

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMBER EVANS AND FLEMING GARLAND,
Individually and as Parents of
JORDAN S. GARLAND, a minor,

Petitioners,

vs.

Case No. 14-4019N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

SOUTHERN BAPTIST HOSPITAL OF
FLORIDA, INC.,

Intervenor.

_____ /

FINAL ORDER

Pursuant to an Order dated June 7, 2016, the parties were granted leave to submit a stipulated factual record and written argument in lieu of a contested hearing in this case. The Stipulated Record was filed on July 1, 2016. The parties were granted until July 27, 2016, in which to file proposed final orders or written arguments. A Joint Motion for Extension of Time was granted and the parties timely filed their proposed final orders on August 22, 2016.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether Jordan S. Garland suffered an injury for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On July 23, 2014, Amber Evans and Fleming Garland, individually and as parents of Jordan S. Garland (Jordan), a minor, filed a Petition for Determination of Compensability Pursuant to Florida Statute Section 766.301 et seq. (Petition), with DOAH. The Petition alleged that Jordan suffered oxygen deprivation or mechanical injury occurring during labor, delivery or the immediate post-delivery period, and sought a determination as to compensability under the Florida Birth-Related Neurological Injury Compensation Association (NICA) statutes.

The Petition asserted Martin A. Garcia, M.D., as the physician providing obstetric services at Jordan's birth, and

asserted Jordan was born at Baptist Medical Center in Jacksonville, Florida, on September 22, 2009.

DOAH served NICA with a copy of the Petition on August 27, 2014, and served Baptist Medical Center and Martin A. Garcia, M.D., with a copy of the Petition on August 28, 2014.

Southern Baptist Hospital of Florida, Inc., d/b/a Baptist Medical Center filed a Petition to Intervene, which was granted. As of the date of this Final Order, Martin A. Garcia, M.D., has not petitioned to intervene into this proceeding.

On June 30, 2015, NICA filed a response to the Petition, giving notice that the alleged injury did not "meet the definition of a 'birth-related neurological injury' as defined in section 766.3021(2), Florida Statutes.'" NICA requested that a hearing be scheduled to resolve whether the claim was compensable.

A final hearing was scheduled for June 9, 2016. On May 13, 2016, the parties filed a Pre-hearing Stipulation in which they agreed to certain facts as set forth in section E of the Pre-hearing Stipulation. These facts have been incorporated into this Final Order.

On June 6, 2016, the parties filed a Joint Motion to Submit Stipulated Record in Lieu of a Contested Hearing, which was granted. A Notice of Filing Stipulated Record was filed on June 24, 2016. On June 27, 2016, Intervenor filed a Notice of Filing Additional Exhibit as Evidence for Consideration in Case,

despite having taken no position for or in opposition to the issue of compensability in the Pre-hearing Stipulation.

Petitioners and Respondent timely filed their Proposed Final Orders on August 22, 2016, which have been carefully considered in the preparation of this Final Order. On the same date, Petitioners also filed a Motion to Strike or Limit the Testimony of Defense Expert Dr. Donald Willis and a Motion to Limit the Testimony of Defense Expert Dr. Raymond Fernandez. Respondent filed a Response in Opposition to Petitioners' Motions to Strike and/or Limit Testimony of Experts. These motions are addressed by separate order.

FINDINGS OF FACT

1. Amber Evans and Fleming Garland are the natural parents of Jordan Garland.

2. Jordan was born on September 22, 2009, at Baptist Medical Center, which is a licensed hospital located in Jacksonville, Florida.

3. Jordan weighed in excess of 2,500 grams at birth.

4. Amber Evans was an obstetrical patient of Dr. Martin Garcia, who at all times material to this proceeding, was a participating physician in the NICA program.^{1/}

5. On September 21, 2009, Amber Evans contacted Dr. Garcia's office because she was going into labor. She was told to come into the office where Dr. Garcia checked her and instructed her to

go to the hospital to be admitted. She was admitted to Baptist Medical Center at approximately 3:30 p.m., and was sent to labor and delivery.

6. Ms. Evans recalls that between approximately 7:00 and 8:00 p.m., the heart rate monitor alarm periodically sounded, until the nurses repositioned her. Ms. Evans estimates that the monitor alarm went off approximately every 45 minutes, at which time the nurses would reposition her and the alarm would stop. Based upon conversations which took place in the labor and delivery room, Ms. Evans believed that the alarm went off when the baby's heart rate went down.

7. Jordan was born by vaginal delivery at 2:24 a.m. According to Ms. Evans, Dr. Garcia arrived in the delivery room when Jordan's head "was basically already out." When Jordan was delivered, she recalls that he was blue in color, was not breathing, and that Dr. Garcia instructed the nurses to perform resuscitation on Jordan. After he was resuscitated, she heard him cry and was able to hold him before he was taken to the nursery.

8. Fleming Garland, Jordan's father, was present in the delivery room and also recalls the heart monitors going off and Ms. Evans being repositioned. He recalled Dr. Garcia turning Jordan from a face-down position to a face-up position as he was delivering Jordan.

9. Mr. Garland cut the umbilical cord, and Jordan was taken to the warming table where he was resuscitated. Mr. Garland recalls that Jordan was covered in birth film, was a little blue, and that his eyes were closed. He saw three or four people huddled around the warming table while Jordan was being resuscitated. After hearing Jordan cry, he recalled that the delivery room staff brought Jordan to them. Ms. Evans held Jordan first, followed by Mr. Garland. At that time, Mr. Garland described Jordan as being really pink, a little yellowish, with his eyes closed.

10. Mr. Garland then accompanied the nurses who took Jordan to the nursery, where he assisted in giving Jordan his first bath. Mr. Garland returned to the delivery room and after a period of time, the nurses brought Jordan back into the delivery room to his parents, where Ms. Evans attempted to nurse Jordan. Jordan was unable to latch, so he was fed formula. Jordan stayed with his parents in the labor and delivery room for the rest of that night. Mr. Garland recalls that Jordan was periodically taken back to the nursery where he was monitored for jaundice. Otherwise, Jordan stayed in the room with his mother and/or his father. Attempts at breastfeeding remained unsuccessful.

11. Carrie Anderson is a neonatal physician assistant. She was employed at Baptist Medical Center at the time Jordan was born, and was known at that time as Carrie Smith. She was called

to the labor and delivery unit where Jordan was born. She arrived in the labor and delivery room seven minutes after Jordan was born. When she arrived, she was provided information about what had happened up to that point. According to her report, the baby had been in distress with no respirations, with a heart rate less than 100. Bag mask valve had been used "times 90 seconds intermittently" meaning that bag and mask ventilation was used intermittently for a total of 90 seconds. The report reflects that Jordan became pink and stayed pink with spontaneous respirations and a heart rate greater than 100.

12. At the time Ms. Smith arrived, resuscitative efforts were no longer ongoing. Jordan had "mild acrocyanosis moving times four," meaning that he had a bluish color of the palms and soles of his feet and that the extremities were moving. Ms. Smith explained that was indicative of continuation of transition from fetal blood flow to infant blood flow. Jordan's one-minute and five-minute Apgar scores, which were 3 and 7, had been determined before Ms. Smith arrived. Ms. Smith determined the 10-minute Apgar score to be 10. She cleared Jordan to be sent to the nursery unit.

13. When asked about her involvement when she arrived in the room, Ms. Smith reviewed her progress notes and testified as follows:

A. According to my note I walked in -- when it says RN reports, then it's indicative of me saying what's going on. And the RN tells me that the baby came out with no respirations. She bagged the baby for 90 seconds intermittently. And then the baby was pink and stayed pink, spontaneous respirations, heart rate above 100. I approached the baby, and the baby is in the radiant warmer, and, according to my note, pink and not crying, but you can -- I could clearly see the baby was breathing on his own and there was some slight retractions which is your -- just your subcostal retractions of having a little bit difficulty breathing. And then no nasal flaring, which is also a sign of no respiratory distress. The nasal flaring indicates respiratory distress.

* * *

Q. The baby was still having difficulty breathing still when you arrived?

A. According to my note he was having slight retractions. And then according to my physical exam, his bilateral breath sounds were equal and had mild rales throughout, but -- that were clearing with crying, which is showing improvement in the baby.

Q. Okay. By ten minutes of life would those have resolved?

A. According to my Apgar of 10 out of 10, yes.

14. Jordan's blood cord pH was 7.21.

15. Jordan was discharged from the hospital on September 24, 2009, on his third day of life.

16. Ms. Evans first began to have concerns about Jordan's development when he was three-to-six months old. Jordan was

"wobbly" when trying to sit up and needed support under his head and neck as he had trouble holding his head up.

17. Jordan's parents expressed their concerns to Dr. Silberman, who was Jordan's pediatrician at that time. Dr. Silberman referred them to Early Steps which came to their home once or twice a week and provided physical therapy and occupational therapy to Jordan. Ms. Evans noticed improvements in Jordan from the physical therapy including his ability to balance his neck correctly, his ability to start to crawl and an improvement in eating. The physical therapist provided physical therapy to Jordan until he was three years old.

18. When Jordan was about five months old, Dr. Silberman referred Jordan's parents to Dr. Sheth, a pediatric neurologist at Nemours. Dr. Sheth performed a neurological exam on Jordan on March 1, 2010. It is not entirely clear from the record whether Dr. Silberman or Dr. Sheth ordered an MRI, but one took place.

19. Following the neurological exam and reviewing the MRI report, Dr. Sheth wrote a letter to Dr. Silberman which reads in pertinent part:

IMPRESSION:

Jordan is a 5-month-old male presenting with a history of head [lag] as well as an MRI scan that is suggestive of a possible structural abnormality in the form of nodular heterotopia. On exam, patient does appear to have a mild delay in terms of his head control with a head lag. Jordan has reached other

developmental milestones including cooing, bringing his hands together and moving his arms and legs equally and symmetrically. In other words there are no other features on exam that would point to gross motor delay. The MRI of the brain performed in [sic] 02/25/2010 shows benign extracerebral cerebral fluid collection that does correspond with his head circumference at the 95th percentile. In addition there was a suspected nodule heterotopia reported on the MRI scan; however, this will need to be reviewed with Radiology to further confirm these findings. The benign extracerebral fluid collection is anticipated to resolve over time.

RECOMMENDATIONS:

1. We will review the MRI of the brain at the next Neuroradiology conference to further shed light on the possible structural abnormality in the form of nodular bilateral frontal horn nodular heterotopia. The parents were recommended to call the office 1 week after the conference for the results.
2. If no abnormality is confirmed, the patient will not need to followup in Neurology Clinic; however, if the findings are confirmed then we will contact the patient.
3. The patient's parents were recommended to call the office with any new additional developmental or other concerns for that matter.

20. Dr. Sheth conducted a reevaluation of Jordan about six months following the previous visit. He wrote another letter to Dr. Silberman which reads in pertinent part:

ASSESSMENT:

Jordan Garland has developmental delay associated with thinning of the corpus callosum, although the corpus callosum is

intact, as well as 2 nodular heterotopias that were seen, 1 in each ventricle in the frontal horns. No other heterotopias were seen anywhere else. He has no ash leaf spots to suggest tuberous sclerosis; however, this is clearly in consideration. I discussed the findings of this and told the mother that these did not need surgery by themselves. They sometimes are associated with seizures which she will watch for.

PLAN: Genetics consultation. I have not scheduled a further followup appointment for her; however, should seizures develop, mother knows to return to see us.

21. Dr. Sheth again examined Jordan in 2014. In a letter dated May 27, 2014, to Dr. Robert Colyer, Jordan's current pediatrician, Dr. Sheth stated in pertinent part as follows:

I saw your 4-year-old patient, Jordan Garland, in the Pediatric Neurology Clinic in consultation for evaluation of speech issues that he is not talking.

HISTORY OF PRESENT ILLNESS: Jordan is a 4-year-old boy who I first saw when he was an infant for evaluation delays. Since that time, the most prominent problem he has is speech related issues, particularly related to and associated with difficulty swallowing. He drools a lot as well. He has poor coordination in his mouth and tongue.

Reviewing his MRI scans I see modular heterotopias plus hypoplastic corpus callosum and wider opened sylvian fissures than normal. Clearly, one wonders if while the sylvian fissures are not as wide open as you would expect with open opercular syndrome, if there are features of this. His findings are consistent with delays that are related to cerebral malformation and the delays manifest both in expressive language and in swallowing.

Because of this, I recommend the following specific plan:

1. Genetic consultation. Mom had blood drawn when he was 1-year-old, but the sample was apparently lost and she was very frustrated and did not see Genetics at that time. Clearly this is important now. He is the only child for this family. They are considering a 2nd child and it would heavily depend on the ratios of likelihood to have another child similarly affected.

2. I have recommended speech and language evaluation. This is to identify issues that could be consistent with the open opercular syndrome as well as suggest management strategies for this. He does not have any nutritional problems as a result of these problems.

22. In his deposition taken on May 23, 2016, Dr. Sheth was asked about his May 27, 2014, letter to Dr. Colyer. Dr. Sheth testified in relevant part as follows:

Q. All right. Now again, referring to this letter to Dr. Colyer in 2014, you indicated in here that, "His findings are consistent with delays that are related to cerebral malformation and that the delays manifest both in expressive language and in swallowing." Did I read that correctly?

A. Yes.

Q. Okay. And can you please explain what that means:

A. Well, the -- so the findings of diffuse low white matter volume and the heterotopias, to an extent, would all be indicating, you know, that they manifest in many ways, but expressive language and swallowing were one of the ways in which I thought it might be manifesting in this situation.

* * *

Q. And so what you are saying there is that the pattern of brain malformation and, in particular, correct me if I'm wrong, the nodular heterotopias are consistent with the pattern or impairment that you see in this child?

A. That is correct.

23. Jordan is now seven years old. According to his mother, he still suffers from developmental delay. He only says a few words. He has shown improvement in physical abilities in that he is able to walk and run. He can jump in that he can now successfully get both feet off of the ground. He wore orthotics on his feet until a few months ago. He is still a little unbalanced although his walking and running have noticeably improved over the past year. Jordan enjoys playing outside. He loves to throw a ball and enjoys playing basketball using a child's basketball set. He loves playing with remote-control cars. He still has training wheels on his bicycle and still uses his feet to push the bike along. Jordan enjoys using an iPad, playing with Legos, and taking selfies.

24. Jordan is in kindergarten in a special education program. He is improving with writing skills and starting to pick up math. He can identify letters, colors, and shapes. He is able to follow instructions.

25. Jordan receives physical, occupational, and speech therapy at school. He also sees a speech pathologist once a week at Nemours. At the time of her deposition in March 2016, Ms. Evans was waiting for a referral for Jordan to receive some additional physical therapy at Nemours.

26. Jordan still has significant problems with his speech, although he has shown improvement with vowel sounds. According to his mother, Jordan has never had a seizure.

27. NICA retained Dr. Donald Willis, an obstetrician specializing in maternal fetal medicine, who reviewed the medical records related to Jordan's birth and subsequent development to determine whether Jordan sustained an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury in the course of labor, delivery, or resuscitation in the immediate post-delivery period. In two separate reports dated November 7, 2014, and February 2, 2016, Dr. Willis stated in pertinent part:

(November 7, 2014 Report)

Delivery was by vaginal birth. There is no record of forceps or vacuum extractor use. Amniotic fluid was clear. Birth weight was 3,414 grams.

The newborn was depressed initially at birth. Apgar scores were 3/7/10. Cord blood gas had a normal pH of 7.21 with a base excess of only -3. Bag and mask ventilation was required at birth and continued for [90 seconds].^[2] The baby was noted to be responsive and clinically stable after the initial bag mask resuscitation.

Evaluation in the nursery indicated the initial respiratory distress at birth had resolved. The baby had problems with hypoglycemia and failed the newborn hearing test. The baby was approved for discharge home on 09/24/2009, which would be DOL 3.

Subsequent problems after hospital discharge include recurrent otitis media, abnormal peripheral auditory function and developmental delay.

MRI of the brain at 9 months of age showed marked thinning of the corpus callosum, diffuse white matter volume loss with enlarged lateral ventricles and bilateral nodular heterotopia in the frontal horns of the brain.

Genetic evaluation showed normal chromosomes and normal microarray studies. Evaluation at 16 months by Genetics stated the clinical and imaging findings "imply early fetal developmental insult."

In summary: Although there was initial depression at birth, the cord blood pH was normal. The respiratory depression at birth resolved with resuscitation efforts. The newborn hospital course was not complicated by multisystem failures or seizures, which are commonly seen with birth hypoxia. The baby was discharged home on DOL 3, which again would not be expected with a significant hypoxic brain injury at birth. MRI finding of nodular heterotopia is consistent with early fetal brain development abnormalities and not hypoxic injury.

Nodular Heterotopia is a condition in which nerve cells do not migrate properly during the early development of the fetal brain. This abnormality generally occurs from the time of early brain development to about 24-weeks gestational age. This is a congenital brain developmental abnormality and not a hypoxic birth related injury.

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery or the immediate post delivery period.

(February 2, 2016, Report)

I have reviewed the additional medical record concerning the above case, which include Labor and Delivery hospital records for the mother, fetal heart rate monitor tracing during labor, prenatal records, school records, out-patient office visits and billing records.

The fetal heart rate (FHR) monitor tracing during labor was reviewed. Baseline FHR was 140 bpm with normal variability on admission, which would be consistent with no fetal distress at time of hospital admission. Contractions were every 2 to 4 minutes, consistent with labor. Occasional variable FHR decelerations occurred during labor, but FHR variability remained normal. This would suggest some umbilical cord compression, but no fetal distress.

The remainder of the additional medical records confirmed findings already discussed in the letter dated 11/07/2014.

In summary: FHR monitor tracings are consistent with no apparent fetal distress during labor. The additional records would agree with the previous statement that there was no apparent obstetrical event that resulted in loss of oxygen or mechanical injury to the baby's brain during labor, delivery or the immediate post delivery period.

28. Dr. Willis was deposed on May 26, 2016, in which he reaffirmed the opinions expressed in the above referenced

reports. He noted that while Jordan required some bag ventilation, he responded to resuscitation and recovered well, as evidenced by the five-minute Apgar score of seven, which is considered normal. He explained that the one-minute Apgar score is not a good predictor of the ultimate outcome. The five and 10-minute scores are generally more predictive of the ultimate outcome of the child with respect to any oxygen deprivation experienced during labor and delivery. He further explained that 10 is the highest Apgar score, so the fact that Jordan had an Apgar score of 10 is indicative that the baby was very stable at that time.

29. Dr. Willis' opinion that there was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery or the immediate post-delivery period is credited.

30. NICA also retained Dr. Raymond Fernandez, a pediatric neurologist, to evaluate Jordan. Dr. Fernandez reviewed Jordan's medical records and performed an independent medical examination on Jordan on June 17, 2015. In a medical report dated June 23, 2015, Dr. Fernandez stated the following:

IMPRESSION:

Delay in all areas of development, probably due to a developmental brain abnormality characterized as nodular heterotopias seen on brain MRI.

Jordan has substantial mental impairment that will probably be permanent. While in general he is not well-coordinated, his motor impairment is not considered to be substantial, but rather of less severity.

There is no evidence in the medical record to suggest oxygen deprivation or mechanical trauma of brain or spinal cord during labor, delivery, or the immediate post-delivery period of resuscitation, is the cause of Jordan's neurodevelopmental and brain MRI abnormalities.

31. Dr. Fernandez reaffirmed his opinions contained in his June 2015 written report when he was deposed on May 11, 2016. That is, that Jordan has substantial mental impairment that will most likely be permanent. However, while Jordan is not well-coordinated, he is of the opinion that his motor impairment is not considered to be substantial, but rather is less severe. He also believes that Jordan's motor development can improve.

32. Dr. Fernandez also is of the opinion that the cause of Jordan's impairments relates to his early brain malformation characterized as nodular heterotopias, not to any oxygen deprivation or mechanical trauma during labor, delivery or the immediate post-delivery period of resuscitation. This is consistent with the testimony of Jordan's treating pediatric neurologist, Dr. Sheth, and supports the opinion of Dr. Willis.

33. Dr. Fernandez's opinion that Jordan is permanently and substantially mentally impaired is credited. Dr. Fernandez's

opinion that Jordan's physical impairment is less than substantial is credited.

34. The greater weight of the evidence establishes through the expert opinion of Dr. Willis that that there was no apparent obstetrical event that resulted in loss of oxygen to Jordan's brain during labor, delivery and continuing into the post-delivery period that resulted in brain injury.

35. The greater weight of the evidence establishes through the expert opinion of Dr. Fernandez that while Jordan has motor impairments, his motor impairment is less severe than substantial and that his motor development can improve.

36. While Petitioners have presented factual evidence regarding Jordan's birth and his mental and physical impairments, they have not established through expert opinion that there was an obstetrical event that resulted in oxygen deprivation or mechanical trauma to the baby's brain during labor, delivery, or the immediate post-delivery period, or that Jordan has a permanent and substantial motor impairment as contemplated by section 766.302. Thus, Jordan is not entitled to benefits under the Plan.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat. (2011).

38. 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. (emphasis added). 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).

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

40. 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.

41. 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.

42. In the instant case, Petitioners filed a claim alleging Jordan did sustain oxygen deprivation or mechanical injury resulting in significant developmental delay and neurology impairment. 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.").

43. The parties have stipulated that Jordan was born a live infant in a hospital licensed in Florida and weighed in excess of 2,500 grams. There is no dispute that the physician who provided obstetric services at Jordan's birth was a participating physician in the NICA program. The parties disagree as to whether Jordan's impairments were caused by oxygen deprivation or mechanical injury during labor, delivery, or the immediate post-delivery period, and

whether his motor deficits are substantial as contemplated by section 766.302(2).

44. Dr. Willis' expert opinion establishes that that there was no apparent obstetrical event that resulted in loss of oxygen to Jordan's brain during labor, delivery and continuing into the post-delivery period that resulted in brain injury.

45. Even if the evidence supporting an ischemic event were present, 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) (the "Birnie" decision).

46. While Petitioners have presented factual evidence regarding Jordan's birth, and that he has physical and mental impairments, it has not been established through expert opinion that Jordan has a substantial physical impairment as contemplated by section 766.302. There have been no expert opinions filed contrary to the credible opinion of NICA's expert pediatric neurologist.

47. Moreover, section 766.302(2) expressly states that the definition of birth-related neurological injury shall not include disability or death caused by a genetic or congenital abnormality. Dr. Fernandez is of the opinion that the cause of Jordan's

impairments relates to his early brain malformation characterized as nodular heterotopias. This is consistent with the opinion of Dr. Willis and with the testimony of Jordan's treating pediatric neurologist. In addition to the reasons set forth above, this does not comport with the definition of birth-related neurological injury as contemplated by section 766.302(2).

48. Accordingly, Jordan is not entitled to benefits under the NICA Plan.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Amber Evans and Fleming Garland, Individually and as parents of Jordan S. Garland, is dismissed with prejudice.

DONE AND ORDERED this 23rd day of September, 2016, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of September, 2016.

ENDNOTES

^{1/} The parties referenced different physicians in their Proposed Final Orders as to who performed obstetrical services at Jordan's birth. Petitioners referenced Dr. Garcia, the physician named in the Petition. NICA referenced Dr. Frank Trogolo, who at the time of Jordan's birth, was in practice with Dr. Garcia. Dr. Trogolo testified that he was not involved in the labor and delivery of Jordan. Dr. Garcia did not testify but was identified as the obstetrician by Jordan's parents. Both parties identified the referenced physician as a participating provider in the NICA program. In any event, there appears to be no dispute that the physician providing obstetric services at Jordan's birth was a participating physician at all times material to this proceeding.

^{2/} Dr. Willis' initial report stated "9 minutes." Dr. Willis corrected this error during his May 26, 2016, deposition, and explained that the reference to "9 minutes" was a typographical error and should read "90 seconds."

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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).