

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AMANDA BRAGG, individually and  
as parent of BENTLEY BRAGG, a  
minor,

Petitioner,

vs.

Case No. 15-2498N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

ORLANDO HEALTH, INC., d/b/a  
WINNIE PALMER HOSPITAL FOR WOMEN  
AND BABIES AND GREGORY A.  
ZITTEL, M.D.,

Intervenors.

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SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon a Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on December 10, 2015.

STATEMENT OF THE CASE

On April 27, 2015, Petitioner, Amanda Bragg, individually and as parent of Bentley Bragg (Bentley), a minor, filed a Petition for Determination of Compensability 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 Gregory Allan Zittel, M.D., as the physician who provided obstetrical services at the birth of Bentley on May 9, 2013, at Winnie Palmer Hospital located in Orlando, Florida.

DOAH served NICA with a copy of the Petition on May 9, 2015. DOAH served Gregory Allan Zittel, M.D., with a copy of the Petition on May 7, 2015. The docket reflects that a copy of the Petition was mailed to Winnie Palmer Hospital on May 5, 2015.

On May 27, 2015, Orlando Health, Inc., d/b/a Winnie Palmer Hospital for Women & Babies and Gregory A. Zittel, M.D., filed a Petition for Leave to Intervene, which was granted by Order dated June 9, 2015.

On December 10, 2015, NICA filed a Motion for Summary Final Order, asserting that Bentley did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. In its Motion for Summary Final Order, NICA represents that Intervenors do not oppose the Motion. During a telephone hearing on December 15, 2015, Petitioner was afforded additional time to respond to NICA's Motion for Summary Final Order. As of the date of this Summary Final Order of Dismissal, which is after the additional time granted, no

response has been filed to the Motion for Summary Final Order by Petitioner.

FINDINGS OF FACT

1. Bentley Bragg was born on May 9, 2013, at Winnie Palmer Hospital located in Orlando, Florida. Bentley weighed 4,233 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Bentley. In a medical report dated July 23, 2015, Dr. Willis opined as follows:

Delivery was complicated by a shoulder dystocia, resulting in about a one minute delay in delivery. The baby was eventually delivered after extension of an episiotomy and rotation of the posterior arm. Birth weight was 4,233 grams (9 lbs 5 oz's). This would be large-for-gestational age (LGA).

Apgar scores were 3/8. Bag and mask ventilation was given for about 80 seconds. The baby had no movement of the left arm. Left brachial plexus injury was diagnosed. Newborn exam and hospital course were otherwise benign. The baby had significant bruising and was evaluated by Hematology and monitored for bilirubin levels.

There were not EEG's or imaging studies of the brain.

In summary, delivery of the LGA baby was complicated by a shoulder dystocia which resulted in a brachial plexus injury. Hospital and medical records did not suggest oxygen deprivation or brain injury. MRI of the cervical spine after hospital discharge was reported as a "normal cervical spine."

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

3. NICA retained Laufey Y. Sigurdardottir, M.D.

(Dr. Sigurdardottir), a pediatric neurologist, to examine Bentley and to review his medical records. Dr. Sigurdardottir examined Bentley on September 2, 2015. In a medical report regarding her independent medical examination of Bentley, Dr. Sigurdardottir opined as follows:

Overall assessment, here we have a 2-year 4-month-old male with a severe upper brachial plexus injury, which has required muscle and tendon transfer surgery because of an increasing deformity of shoulder and shoulder contraction. He does have fairly sustained functional abilities, although not complete. Bentley also has an expressive language delay that is not felt to relate to his physical brachial plexus injury which definitely is birth related. Mild depression at birth with an Apgar score of 3 did show prompt recovery and a cord pH that was within normal limits.

Result as to question 1: The child is found to have a permanent physical impairment, but no obvious mental impairment. His mild expressive language delay does not substantiate a profound mental impairment.

\* \* \*

Due to the fact that Bentley's disability only relates to physical impairment and no clear mental impairment related to birth-related neurologic injury can be found, I am not recommending Bentley to be included into the Neurologic Injury Compensation

Association (NICA) program and would be happy to answer additional questions.

4. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinion of Dr. Willis that there was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery or the immediate post-delivery period. Dr. Willis' opinion is credited. There have been no expert opinions filed that are contrary to Dr. Sigurdardottir's opinion that Bentley is not found to have a substantial mental impairment. Dr. Sigurdardottir's opinion is credited.

5. Moreover, in response to an interrogatory served to Petitioner by NICA, Petitioner acknowledged that she does not contend that Bentley suffers from a permanent and substantial mental impairment.

#### CONCLUSIONS OF LAW

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

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

8. The injured infant, her or his personal representative, parents, dependents, and next of kin may seek compensation under the Plan by filing a claim for compensation with DOAH. §§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat. NICA, which administers the Plan, has "45 days from the date of service of a complete claim . . . in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." § 766.305(4), Fla. Stat.

9. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the administrative law judge to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned administrative law judge in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

10. In discharging this responsibility, the administrative law judge must make the following determination based upon the available evidence:

(a) Whether the injury claimed is a birth-related neurological injury. If the claimant has demonstrated, to the satisfaction of the administrative law judge, that the infant has sustained a brain or spinal cord injury

caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.303(2).

(b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital.

§ 766.309(1), Fla. Stat. An award may be sustained only if the administrative law judge concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth."

§ 766.31(1), Fla. Stat.

11. The term "birth-related neurological injury" is defined in section 766.302(2) as follows:

"Birth-related neurological injury" means injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired.

12. "The statute is written in the conjunctive and can only be interpreted to require permanent and substantial impairment that has both physical and mental elements." Fla. Birth-Related Neurological Injury Comp. Ass'n. v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349, 1356 (Fla. 1997).

13. The evidence, which is not refuted, established that Bentley did not sustain 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 a hospital which rendered him permanently and substantially mentally and physically impaired. Therefore, Bentley is not eligible for benefits under the Plan.

#### CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Amanda Bragg, individually and as parent of Bentley Bragg, is dismissed with prejudice.



DONE AND ORDERED this 19th day of January, 2016, in  
Tallahassee, Leon County, Florida.



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BARBARA J. STAROS  
Administrative Law Judge  
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Filed with the Clerk of the  
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this 19th day of January, 2016.

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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).