

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DANIELLE FAIVUS and SCOTT  
FAIVUS, as parents and natural  
guardians of the person, RYDER  
FAIVUS, on behalf of DANIELLE  
FAIVUS and SCOTT FAIVUS  
individually and on behalf of  
RYDER FAIVUS, a minor, and  
REBECCA G. DOANE, et al.,

Petitioners,

vs.

Case No. 16-3998N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

WELLINGTON REGIONAL MEDICAL  
CENTER; MELISSA E. CARLSON,  
M.D.; AND OB/GYN SPECIALISTS OF  
THE PALM BEACHES, P.A.,

Intervenors.

\_\_\_\_\_ /

PARTIAL SUMMARY FINAL ORDER

This cause came on for consideration upon Respondent's  
Motion for Summary Final Order filed on January 24, 2017, by  
Respondent, Florida Birth-Related Neurological Injury  
Compensation Association (NICA).

STATEMENT OF THE CASE

On July 8, 2016, Petitioners, Danielle Faivus and Scott Faivus, as parents of Ryder Faivus (Ryder), a minor, filed a Petition Under Protest for Determination as to the Applicability of Florida Birth-Related Neurological Injury Compensation Plan (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 Melissa E. Carson, M.D., as the physician who provided obstetric services at the birth of Ryder on July 22, 2014, at Wellington Regional Medical Center in Wellington, Florida.

DOAH served NICA with a copy of the Petition on July 20, 2016. DOAH served Melissa E. Carlson, M.D., with a copy of the Petition on July 21, 2016. On July 25, 2016, DOAH received a return receipt from the United States Postal Service showing that Wellington Regional Medical Center had been served with a copy of the Petition.

On August 8, 2016, Wellington Regional Medical Center and Dr. Melissa E. Carlson, M.D., and OB/GYN Specialists of the Palm Beaches, P.A., filed Petitions to Intervene, which were granted by Order dated August 16, 2016.

On January 24, 2017, NICA filed a Motion for Summary Final Order. The Motion for Summary Final Order addresses the issue of

compensability. On January 31, 2017, Petitioners filed a Response to NICA's Motion for Summary Final Order stating that Petitioners have no objection to a finding that the claim is compensable but continue to assert that there was improper notice. Intervenors did not file a response to NICA's Motion.

FINDINGS OF FACT

1. Ryder Faivus was born on July 22, 2014, at Wellington Regional Medical Center in Wellington, Florida. Ryder weighed in excess of 2,500 grams at birth. Ryder was delivered by Melissa E. Carlson, M.D., who was a NICA participating physician at the time of his birth.

2. Donald Willis, M.D. (Dr. Willis), an obstetrician specializing in maternal-fetal medicine, was requested by NICA to review the medical records for Ryder and her mother. In a medical report dated December 2, 2016, Dr. Willis summarized his findings as follows:

In summary, labor was complicated by a non-reassuring FHR pattern. The newborn was depressed and had seizure activity shortly after birth. The initial MRI showed areas of restricted diffusion, which progressed to cystic encephalomalacia by 3-weeks of age.

There was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery and continuing into the immediate post delivery period. The oxygen deprivation resulted in brain injury. I am unable to comment about the extent of the brain injury.

3. Dr. Willis reaffirmed his opinion in an affidavit dated January 23, 2017.

4. NICA retained Laufey Y. Sigurdardottir, M.D. (Dr. Sigurdardottir), as its expert in pediatric neurology who evaluated the medical records and examined Ryder on November 16, 2016. Based on her examination, Dr. Sigurdardottir made the following findings:

In summary, Ryder is a 2-year 4-month-old male with hypoxic ischemic encephalopathy at birth, although a clear inciting event during the delivery cannot be identified apart from known nuchal cord wrapping around his neck. He did, however, have well established postnatal encephalopathy with refractory neonatal seizures, and MRI changes that evolved in a manner consistent with an acute hypoxic ischemic injury. The patient has very severe sequelae and is now at the age of 2 year-4 months on an infantile level, with no independent daily living skills. He is G-tube fed and is on medication for seizures. He is in all therapy services at this time.

Result as to Question 1: Ryder is found to have a substantial physical and mental impairment at this time.

Result as to Question 2: In review of available documents, evolution of his symptoms, MRI changes, refractory neonatal seizures that an acute hypoxic event occurred perinatally. The injury is felt to be acquired due to oxygen deprivation of the brain. The injury is felt to be birth related.

Result as to question 3: The prognosis for full recovery is very poor. Estimated life expectancy is at this time guarded due to the potential for ongoing seizures, as well as

feeding difficulties, failure to thrive and airway issues.

In light of this challenging presentation, I do feel that enough evidence is present to recommend Ryder being included in the NICA program. If needed, I will be happy to answer additional questions.

5. Dr. Sigurdardottir reaffirmed her opinion in an affidavit dated January 19, 2017.

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

#### CONCLUSIONS OF LAW

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

8. 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.

9. 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.

10. In determining the issue of compensability, the administrative law judge must make the following determination based upon the available evidence:

(a) Whether the injury claimed is a birth-related neurological injury. If the claimant has demonstrated, to the satisfaction of the administrative law judge, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.303(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 evidence, which is not refuted, established that Ryder sustained a birth-related neurological injury and is eligible for benefits under the Plan.

#### CONCLUSION

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

ORDERED:

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

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

3. Jurisdiction is reserved to determine whether the notice requirements of section 766.316 were satisfied. A hearing on the issue of notice is currently scheduled on April 5, 2017.

DONE AND ORDERED this 6th day of February, 2017, in Tallahassee, Leon County, Florida.



---

BARBARA J. STAROS  
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 6th day of February, 2017.

COPIES FURNISHED:  
(via certified mail)

Kenney Shipley, Executive Director  
Florida Birth Related Neurological  
Injury Compensation Association  
2360 Christopher Place, Suite 1  
Tallahassee, Florida 32308  
(eServed)  
(Certified Mail No. 7016 0910 0001 7981 0316)

Nancy La Vista, Esquire  
Clark Fountain La Vista Prather Keen & Littky-Rubin  
1919 North Flagler Drive, 2nd Floor  
West Palm Beach, Florida 33407  
(eServed)  
(Certified Mail No. 7016 0910 0001 7981 0323)



Richard T. Woulfe, Esquire  
Billing, Cochran, Lyles, Mauro & Ramsey, P.A.  
SunTrust Center, Sixth Floor  
515 East Las Olas Boulevard  
Fort Lauderdale, Florida 33301  
(eServed)  
(Certified Mail No. 7016 0910 0001 7981 0330)

Jeffery L. Blostein, Esquire  
The Law Office of Jay Cohen, P.A.  
Suite 1500  
100 Southeast Third Avenue  
Fort Lauderdale, Florida 33394  
(eServed)  
(Certified Mail No. 7016 0910 0001 7981 0347)

David W. Black, Esquire  
Frank, Weinberg & Black, P.L.  
7805 Southwest 6th Court  
Plantation, Florida 33324  
(eServed)  
(Certified Mail No. 7016 0910 0001 7981 4186)

Amie Rice, Investigation Manager  
Consumer Services Unit  
Department of Health  
4052 Bald Cypress Way, Bin C-75  
Tallahassee, Florida 32399-3275  
(Certified Mail No. 7016 0910 0001 7981 4193)

Justin Senior, Secretary  
Health Quality Assurance  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 1  
Tallahassee, Florida 32308  
(eServed)  
(Certified Mail No. 7016 0910 0001 7981 4209)

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).