

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JASON BREINER and WENDY RAMIREZ-  
MENDOZA, individually and as  
parents and next friends of  
JAMES BREINER, a minor,

Petitioners,

vs.

Case No. 17-1315N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

HERNANDO HMA, LLC, d/b/a  
BAYFRONT HEALTH SPRING HILL,

Intervenor.

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SUMMARY FINAL ORDER OF DISMISSAL

This matter came before the undersigned on Respondent Florida Birth-Related Neurological Injury Compensation Association's (NICA) Motion for Summary Final Order, filed May 4, 2018. Neither Petitioners nor Intervenor filed a response.

STATEMENT OF THE CASE

On February 23, 2017, Petitioners filed a Petition for Benefits 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 Natalie Leibensperger, D.O., as the physician providing obstetric services for the birth of James Breiner (James) on February 25, 2012, at Bayfront Health Spring Hill (Bayfront), in Spring Hill, Florida.<sup>1/</sup>

DOAH served NICA with a copy of the Petition on March 3, 2017. Dr. Leibensperger and Bayfront were served with a copy of the Petition on or before March 8, 2017. On March 9, 2017, Hernando HMA, LLC, d/b/a Bayfront Health Spring Hill filed a Petition for Limited Intervention. Said petition was granted on March 16, 2017.

On June 30, 2017, NICA filed its Response to Petition for Benefits, suggesting that the subject claim was not compensable and requesting a final hearing to address said issue. On July 3, 2017, the undersigned issued an Order directing the parties to confer and advise the undersigned, on or before July 18, 2017, as to the need for a hearing. Thereafter, Petitioners requested an extension of time to respond, and the extension was granted. On August 21, 2017, Petitioners filed a response to the prior Order indicating that a hearing would be needed to determine the issue of compensability.

On October 10, 2017, Petitioners' counsel filed a motion for leave to withdraw as counsel, and an Order granting the same and placing the case in abeyance was issued on October 24, 2017. On

December 15, 2017, at Petitioners' request, the matter was continued in abeyance. The matter remained in abeyance, without opposition to allow Petitioners the opportunity to obtain new counsel.

Following a telephonic status conference on February 23, 2018, the undersigned issued an Order whereby the matter was no longer in abeyance and ordering the parties to provide hearing dates on or before March 2, 2018. Ultimately, the matter was scheduled for final hearing on June 6, 2018.

On May 4, 2018, NICA filed its Motion for Summary Final Order, requesting that a summary final order be entered finding that the claim is not compensable because James did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes, and dismissing the Petition. Petitioners did not timely respond to said motion. On May 18, 2018, the undersigned issued an Order to Show Cause. Said order directed Petitioners to show cause, in writing, on or before May 30, 2018, why NICA's Motion for Summary Final Order should not be granted. Petitioners did not respond to the Order to Show Cause. As noted above, Intervenor did not file a response to NICA's motion.

#### FINDINGS OF FACT

1. James was born on February 25, 2012, at Bayfront in Spring Hill, Florida.

2. NICA retained Donald Willis, M.D., who is board-certified in obstetrics, gynecology, and maternal-fetal medicine, to review the medical records of Wendy Ramirez-Mendoza and James, and opine as to whether there was an injury to his brain or spinal cord that occurred in the course of labor, delivery, or resuscitation in the immediate post-delivery period due to oxygen deprivation or mechanical injury.

3. In Dr. Willis's final report, dated June 12, 2017, he concluded the following:

In summary, the baby was delivered at term and was not depressed at birth. Apgar scores were 8/8. The baby was transferred to the newborn nursery with the mother. Episodes of cyanosis occurred in the nursery, followed intermittent twitching. Head Ultrasound was normal. CT and MRI did not suggest hypoxic brain injury. EEG was normal.

There was no apparent obstetrical event that resulted in oxygen deprivation or mechanical injury to the brain or spinal cord.

4. Attached to NICA's Motion for Summary Final Order is the affidavit of Dr. Willis, dated May 2, 2018. In his affidavit Dr. Willis affirms his prior reports and opines within a reasonable degree of medical probability that there was no obstetrical event that resulted in oxygen deprivation or mechanical injury to James's brain or spinal cord.

5. NICA also retained Laufey Y. Sigurdardottir, M.D., who is board-certified in pediatrics, psychiatry, and neurology, to

review the pertinent medical records, conduct an Independent Medical Examination (IME), and opine as to whether he suffers from a permanent and substantial mental and physical impairment as a result of a birth-related neurological injury.

Dr. Sigurdardottir reviewed the available medical records, obtained a historical account from Petitioners, and conducted an IME of James on April 19, 2017.

6. Dr. Siguradottir's affidavit, dated May 1, 2018, attached to NICA's Motion for Summary Final Order, provides, in part, as follows:

Summary: James is a 5 yr old boy with motor and speech delay from birth. There is no documented fetal depression at birth, and FHR tracings from the onset of induction of labor fails to show heart rate decelerations. Respiratory distress after birth and ensuing hypotonia and feeding difficulties point to patient's difficulties to have apparent from birth but timing of insult is not found to correlate with active labor or delivery. His current status suggests moderate to severe neurological deficits that are likely to be lifelong. It is of note that limited records were available for my review after patient's transfer to ACH. If there are forwarded to NICA I would be able to review them and make appropriate adjustments to this IME.

James is found to have a permanent and substantial physical impairment at this time. He is found to have a permanent and substantial language/cognitive impairment at this time.

In review of available documents, although having respiratory distress shortly after birth, there is no clear acute hypoxic event

during labor and/or delivery, and fetal hearth [sic] rate strips were benign. MRI performed in the neonatal period, EEG performed in the neonatal period did not support an acute encephalopathy (per report). No laboratory evidence of multisystem hypoxic changes were noted in post natal period.

The prognosis for full motor and mental recovery is poor but his life expectancy is full.

Due to absence of evidence of hypoxic event during active labor, absence of secondary findings supportive of a hypoxic encephalopathy (MRI, laboratory or EEG), I do not feel James should be included in the NICA program.

7. Dr. Sigurdardottir's opinions contained in her affidavit are within a reasonable degree of medical probability.

8. A review of the file reveals that no contrary evidence was presented to refute the findings and opinions of Dr. Willis and Dr. Sigurdardottir. Their unrefuted opinions are credited.

#### CONCLUSIONS OF LAW

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

10. 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.

11. 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.

12. NICA has determined that Petitioners do not have a claim that is compensable under the Plan and has filed an unopposed Motion for Summary Final Order, requesting that an order be entered finding that the claim is not compensable.

13. In ruling on the motion, the administrative law judge must make the following threshold 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).

§ 766.309(1), Fla. Stat.

14. 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.

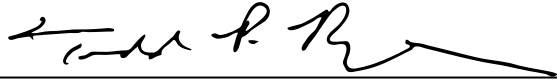
15. The evidence establishes that James sustained an injury that rendered him permanently and substantially mentally and physically impaired. The unrefuted evidence, however, establishes that there was not an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period. Thus, James did not sustain a birth-related neurological injury as defined in section 766.302(2) and, therefore, is not eligible for benefits under the Plan.

#### CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition is dismissed with prejudice.



DONE AND ORDERED this 31st day of May, 2018, in Tallahassee,  
Leon County, Florida.



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TODD P. RESAVAGE  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of May, 2018.

ENDNOTE

<sup>1/</sup> According to the Petition, at the time of the birth, Bayfront  
Health Spring Hill was known as Spring Hill Regional Hospital.

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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).