

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LORENA ARELLANO BENITEZ AND  
JORGE POSADA-SANCHEZ, on behalf  
of and as parents and natural  
guardians of DAISY POSADA, a  
minor,

Petitioners,

vs.

Case No. 17-6494N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

FLORIDA HEALTH SCIENCES CENTER,  
INC., d/b/a TAMPA GENERAL  
HOSPITAL, AND UNIVERSITY OF  
SOUTH FLORIDA BOARD OF TRUSTEES,

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 April 9, 2018.

STATEMENT OF THE CASE

On November 27, 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 the determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition named Judette Louis, M.D., as the physician who provided obstetric services at the birth of Daisy Posada on December 1, 2014, at Tampa General Hospital in Tampa, Florida.

DOAH served Tampa General Hospital with a copy of the Petition on December 8, 2017. NICA was served with a copy of the Petition on December 15, 2017. DOAH sent a copy of the Petition to Dr. Louis via certified mail on December 6, 2017.

On December 21, 2017, Florida Health Sciences Center, Inc., d/b/a Tampa General Hospital's Petition for Leave to Intervene was granted. On January 10, 2018, University of South Florida Board of Trustee's Motion to Intervene was granted.

On February 12, 2018, NICA filed its Response to Petition for Benefits, suggesting that the subject claim was not compensable and requesting that a hearing be scheduled to address such issue. On April 2, 2018, the undersigned issued an Order directing the parties to confer and advise whether a final hearing would be required. On April 9, 2018, Respondent filed a status report wherein it was represented that a telephonic conference had been conducted by counsel for all parties. Said filing further represented that none of the parties were requesting a final hearing and that neither Petitioners nor

Intervenors take a position on NICA's anticipated Motion for Summary Final Order. On the same date, Respondent filed a Motion for Summary Final Order, requesting that a summary final order be entered finding that the claim was not compensable because Daisy Posada did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. Neither Petitioners nor Intervenors filed a response.

#### FINDINGS OF FACT

1. Daisy Posada was born on December 1, 2014, at Tampa General Hospital in Tampa, Florida.

2. Donald Willis, M.D., an obstetrician specializing in maternal-fetal medicine, was requested by NICA to review the medical records of Daisy Posada and to opine whether an injury occurred in the course of labor, delivery or resuscitation in the immediate post-delivery period at Tampa General due to oxygen deprivation or mechanical injury. In a report dated December 29, 2017, Dr. Willis described his findings in pertinent part as follows:

In summary, delivery was complicated by a significant shoulder dystocia, requiring multiple maneuvers to complete the delivery. The newborn was depressed with Apgar of 0/0. Full resuscitation was required. The newborn hospital course was complicated by multi-system organ failures. The initial ABG, which was done after resuscitation, had a pH of only 6.92. EEG was abnormal, but MRI was reported as normal.

\* \* \*

There was an obstetrical event (shoulder dystocia) that resulted in loss of oxygen to the baby's brain during delivery and continuing into the immediate post delivery period. The oxygen deprivation resulted in at least some degree of brain injury initially, based on the abnormal EEG. However, the brain MRI was normal. There was no mechanical trauma or injury to the spinal cord.

3. Attached to Respondent's Motion for Summary Final Order is the affidavit of Dr. Willis, dated April 2, 2018. In his affidavit, Dr. Willis affirms the findings in his above-quoted report and maintains that his opinions are within a reasonable degree of medical probability.

4. NICA also retained Michael S. Duchowny, M.D., a pediatric neurologist, to review Daisy Posada's medical records and to conduct an Independent Medical Evaluation of her and to opine as to whether she suffers from a permanent and substantial mental and physical impairment as a result of a birth-related neurological injury. Dr. Duchowny reviewed the medical records, obtained historical information from Ms. Arellano Benitez, and performed an evaluation on January 31, 2018.

5. In a report authored after the neurological evaluation, Dr. Duchowny summarized his findings, in pertinent part, as follows:

In SUMMMARY, Daisy's neurological examination today reveals no specific findings apart from

very slight decreased supination of the left hand. She does not otherwise display left upper extremity weakness and has full range of motion. The examination reveals no functional compromise of the left upper extremity, and the remainder of the neurological examination is unremarkable.

\* \* \*

Despite a complicated perinatal course, Daisy has developed well-therapeutic hyperthermia may have contributed to her favorable outcome responsible [sic]. As there is no evidence of a substantial mental or motor impairment, I do not believe that Daisy should be considered for inclusion within the NICA program.

6. Respondent's Motion for Summary Final Order also relies upon the attached affidavit from Dr. Duchowny, dated March 27, 2018. In his affidavit, he affirms the findings contained in his report and opines, based upon his education, training and experience, within a reasonable degree of medical probability, that Daisy Posada has not suffered a substantial mental or physical impairment.

7. A review of the file reveals that no contrary evidence was presented to dispute the findings and opinions of Dr. Willis and Dr. Duchowny. Their opinions are credited.

#### CONCLUSIONS OF LAW

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

9. 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.

10. 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.

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

12. In ruling on the motion, 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).

§ 766.309(1), Fla. Stat.

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

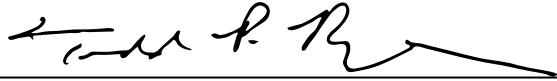
"Birth-related neurological injury" means injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring 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.

14. The evidence establishes that there was an obstetrical event that resulted in loss of oxygen to Daisy Posada's brain during labor, delivery, or the immediate post-delivery period. The evidence further establishes, however, that Daisy Posada did not sustain a permanent and substantial mental impairment. Thus, Daisy Posada did not sustain a birth-related neurological injury as defined in section 766.302(2), Florida Statutes, and, therefore, 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 is dismissed with prejudice.

DONE AND ORDERED this 24th day of April, 2018, in  
Tallahassee, Leon County, Florida.



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TODD P. RESAVAGE  
Administrative Law Judge  
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Filed with the Clerk of the  
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this 24th day of April, 2018.

COPIES FURNISHED:  
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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).