

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LINDSEY MCNEIL and BENJAMIN  
GALBRAITH, individually and  
parents of NOELLE GALBRAITH,

Petitioners,

vs.

Case No. 18-5254N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

ADVENTIST HEALTH  
SYSTEMS/SUNBELT, INC., d/b/a  
ADVENTHEALTH ORLANDO,

Intervenor.

\_\_\_\_\_ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came for consideration on an Unopposed Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association ("NICA"), on October 11, 2019.

STATEMENT OF THE CASE

On September 28, 2018, Petitioners, Lindsey McNeil and Benjamin Galbraith, individually and as parents of Noelle Galbraith ("Noelle"), 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 the determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan ("Plan").

The Petition identified Kyle Crofoot, M.D., as the physician who provided obstetrical services at the birth of Noelle on February 9, 2017, at Adventist Health Systems/Sunbelt, Inc., d/b/a AdventHealth Orlando ("AdventHealth")<sup>1/</sup> in Orlando, Florida.

DOAH served Dr. Crofoot with a copy of the Petition on October 16, 2018, and served AdventHealth that same date. NICA was also served with a copy of the Petition on October 16, 2018.

On December 19, 2018, NICA filed its response to the Petition, taking the position that Petitioners' claim is not compensable under the Plan. NICA requested that DOAH schedule a hearing to determine compensability.

AdventHealth moved to intervene in this matter on February 4, 2019, which was granted.

On October 11, 2019, NICA filed an Unopposed Motion for Summary Final Order, requesting the Administrative Law Judge enter a summary final order finding that the claim is not compensable under the NICA statute because Noelle did not suffer a "birth-related neurological injury" as defined in section 766.302(2), Florida Statutes. In its motion, NICA represents

that Petitioners do not oppose the motion. Petitioners have not otherwise responded to NICA's motion.

FINDINGS OF FACT

1. Noelle was born on February 9, 2017, at AdventHealth located in Orlando, Florida.

2. Upon receiving the Petition, NICA retained Donald Willis, M.D., a board certified obstetrician/gynecologist specializing in maternal-fetal medicine, as well as Laufey Y. Sigurdardottir, M.D., a pediatric neurologist, to review Noelle's medical condition. NICA sought to determine whether Noelle suffered a "birth-related neurological injury" as defined in section 766.302(2). Specifically, NICA requested its medical experts render an opinion whether Noelle experienced 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; and, if so, whether this injury rendered Noelle permanently and substantially mentally and physically impaired.

3. Dr. Willis reviewed Noelle's medical records and observed:

A cephalohematoma was noted on admission to the nursery, but the baby was not felt to be in acute distress. Neurologic exam was normal.

\* \* \*

The child was seen in the ED at about 13-months of age for head trauma related to a fall. MRI showed diffuse periventricular white matter volume loss. Evaluation at about 18-months of age described decrease movement of left arm and leg. A diagnosis of cerebral palsy with hemiplegia and partial epilepsy was made.

4. Dr. Willis then opined:

In summary, vaginal delivery was complicated by a shoulder dystocia, lasting one-minute. The baby was not depressed with Apgar scores of 7/9. No resuscitation was required. The baby was transferred to the nursery at about 16 hours after birth with decreasing blood sugars and desaturations occurred in the nursery. This would be after resuscitation in the immediate post-delivery period.

\* \* \*

This child suffered a brain injury as documented by the MRI findings. However, the brain injury does not appear to be birth related.

\* \* \*

There was no apparent obstetrical event that resulted in oxygen deprivation or mechanical trauma to the brain or spinal cord during labor, delivery or the immediate post-delivery period.

5. Dr. Sigurdardottir also reviewed Noelle's medical records, as well as conducted an independent medical exam of Noelle on November 28, 2018. Dr. Sigurdardottir opined, within a reasonable degree of medical probability:

Noelle Galbraith has substantial delays in motor and mild delays in mental abilities.

\* \* \*

Noelle has serious delays in motor milestones and carries diagnosis of hemiplegic cerebral palsy. She had delays in gross motor development.

6. Despite these findings, Dr. Sigurdardottir concluded that:

In review of available documents, there is evidence of impairment consistent with a neurologic injury to the brain or spinal cord acquired due to oxygen deprivation or mechanical injury, but timing of injury to the labor, birth or immediate post natal period is not able to be determined.

\* \* \*

I believe Noelle does not fulfill criteria of a substantial mental and physical impairment at this time. I do feel that Noelle should not be included in the NICA program.

7. A review of the file reveals no contrary evidence to dispute the findings and opinions of Dr. Willis and Dr. Sigurdardottir. Their opinions are credible and persuasive.

8. Based on the opinions and conclusions of Dr. Willis and Dr. Sigurdardottir, NICA determined that Petitioner's claim was not compensable. NICA subsequently filed the Unopposed Motion for Summary Final Order asserting that Noelle has not suffered a "birth-related neurological injury" as defined by section 766.302(2). Petitioners do not oppose NICA's motion.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 766.301 through 766.316. The undersigned, as an Administrative Law Judge, has "exclusive jurisdiction to determine whether a claim filed under [NICA] is compensable." §§ 766.301(1)(d), 766.304, and 766.311(1), Fla. Stat.

10. The Florida Legislature established the Plan "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. To seek compensation under the Plan, 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, then 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. 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.

13. In this matter, however, NICA determined that Petitioners' claim is not compensable under the Plan. Therefore, NICA filed the Unopposed Motion for Summary Final Order, requesting an order be entered finding that the claim is not compensable.

14. In reviewing the compensability of a claim, section 766.309(1) directs the Administrative Law Judge to 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. 766.302(2).

15. 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. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

16. "The [NICA] 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).

17. In reviewing the injury in this matter, the undisputed evidence establishes that Noelle did not sustain a "birth-related neurological injury" as defined in section 766.302(2). Dr. Willis determined that Noelle's brain injury did not appear to be birth related. Consequently, he concluded that, "There was no apparent obstetrical event that resulted in oxygen deprivation or mechanical trauma to the brain or spinal cord during labor, delivery or the immediate post-delivery period." Similarly, Dr. Sigurdardottir opined that Noelle only had "mild delays in mental abilities." Further, she could not connect Noelle's injury to the labor, birth, or immediate post-natal period.

18. Accordingly, based on the available evidence in the record, the undersigned determines that Noelle has not suffered a "birth-related neurological injury" and is not eligible for NICA benefits.



DISPOSITION

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 13th day of November, 2019, in Tallahassee, Leon County, Florida.



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J. BRUCE CULPEPPER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 13th day of November, 2019.

ENDNOTE

<sup>1/</sup> AdventHealth Orlando was previously called Florida Hospital Orlando, which is the name Petitioners used in their Petition to identify the hospital at which Noelle was born.

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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).