

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GERALDINE ALCIVAR, as parent and  
natural guardian of ELIAS MANUEL  
CASAS, a minor,

Petitioner,

vs.

Case No. 18-6736N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

ORLANDO HEALTH, INC., d/b/a  
WINNIE PALMER HOSPITAL FOR WOMEN  
AND BABIES; AND JEANNIE  
MCWHORTER, M.D.,

Intervenors.

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SUMMARY FINAL ORDER OF DISMISSAL

This came before the undersigned on Respondent's Motion for Summary Final Order, filed August 29, 2019. In its Motion, the Florida Birth-Related Neurological Injury Compensation Association (NICA) asserts that in order for a claim to be compensable under the Florida Birth-Related Neurological Injury Compensation Plan (the Plan), the statutory prerequisites of section 766.309, Florida Statutes, must be met, including:

(1) The administrative law judge shall make the following determinations based upon all available evidence:

(a) Whether the injury claimed is a birth-related neurological injury . . .

(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.

\* \* \*

(2) If the administrative law judge determines that the injury alleged is not a birth-related neurological injury or that obstetrical services were not delivered by a participating physician at the birth, she or he shall enter an order . . . . (emphasis added).

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

(2) "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. (emphasis added).

Petitioner did not file a response to NICA's motion within the allowable response period. However, due to the dispositive nature of the motion, on September 16, 2019, the undersigned entered an Order to Show Cause, affording Petitioner an additional opportunity to file a written response, should she so choose. Petitioner did not file a response to the Order to Show Cause.

#### FINDINGS OF FACT

1. On December 13, 2018, Petitioner filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. for benefits pursuant to sections 766.301-766.316, Florida Statutes, otherwise known as the Plan.

2. The baby was born on April 1, 2018, at Winnie Palmer Hospital for Women and Babies (Hospital). The circumstances of the labor, delivery, and birth of the minor child are reflected in the medical records the Hospital submitted with the Petition.

3. In the instant case, NICA has retained Donald C. Willis, M.D. as its medical expert specializing in maternal-fetal medicine. Upon examination of the pertinent medical records, Dr. Willis opined:

There was no apparent obstetrical event that resulted in oxygen deprivation or mechanical trauma to the baby's brain or spinal cord

during labor, delivery or the immediate post-delivery period.

4. Dr. Willis's medical report dated February 25, 2019, (which reviews additional medical records), are attached to his Affidavit, with the Affidavit being attached to the motion as Exhibit "1". His Affidavit reflects his ultimate opinion that:

The baby suffered cerebral infarction, which appear to have occurred after the period of stabilization during the immediate post delivery period. Medical records do not suggest the cerebral infarction occurred during labor, delivery or the immediate post delivery period.

As such, it is my ultimate opinion that there was no apparent obstetrical event that resulted in oxygen deprivation or mechanical trauma to the baby's brain or spinal cord during labor, delivery or the immediate post-delivery period.

5. In the instant case, NICA has retained Michael S. Duchowny, M.D. as its medical expert in pediatric neurology. Upon examination of the child and the pertinent medical records, Dr. Duchowny opined:

I reviewed medical records which document Elias's birth at 37 weeks' gestation at Winnie Palmer Hospital. The pregnancy was complicated by pre-eclampsia, asthma, GERD and obesity. The mother had a fever to 101 degrees at time of delivery and was diagnosed with chorioamnionitis. Elias was born vaginally with a birth weight of 5 pounds 10 ounces (2547 grams). Apgar scores were 8 and 9 at 1 and 5 minutes.

Elias was admitted to the NICU and found to have a blood glucose of 35. His NICU stay

was further complicated by apnea and desaturation that raised concerns for seizures; he was started on Keppra, Elias was never intubated or mechanically ventilated and was maintained on room air. An MRI scan of the brain on DOL #2 revealed multiple ischemic infarcts involving the left lateral temporal lobe, left posterior thalamus and left hippocampal formation. There was adjacent extra-axial hemorrhage over the left temporal lobe. The findings were felt to most likely represent areas of venous infarction.

Dr. Duchowny's medical report is attached to his Affidavit, with the Affidavit being attached to the motion as Exhibit "2". His Report reflects his ultimate opinion that:

A consideration of the findings from today's evaluation and record review lead me to recommend that Elias not be considered for compensation within the NICA program. He has normal motor functions and his stroke was likely acquired prenatally. There is no evidence of either mechanical injury or oxygen deprivation in the course of labor, delivery or the immediate post-delivery period.

6. The Affidavits of Dr. Willis and Dr. Duchowny are the only evidence of record relating to the issue of whether the subject claim is compensable as defined by the statute. As noted, Petitioner did not file a response to the motion, nor submit countervailing affidavits. The Petition, along with the Affidavits attached to the motion, establish that there are no genuine issues of material fact regarding the compensability of this claim.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings (DOAH) 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" related to births occurring on or after January 1, 1989. § 766.303(1), Fla. Stat.

9. An injured infant, his or her 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. Section 766.305(4) provides that NICA, which administers the Plan, has 45 days from the date that a complete claim is served 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.

10. If NICA determines that the alleged injury is a birth-related neurological injury that is compensable under the Plan, it may award compensation to the claimant, provided that the award is approved by the assigned administrative law judge.

§ 766.305(7), Fla. Stat. However, if NICA disputes the claim, as it does in this case, the dispute must be resolved by the assigned administrative law judge in accordance with

chapter 120, Florida Statutes. §§ 766.304, 766.30, and 766.31, Fla. Stat.

11. The first inquiry is whether the infant has sustained a birth-related neurological injury as defined by section 766.302(2), which provides:

"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 amultiple 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. (emphasis added).

12. If the administrative law judge determines that the infant meets the statutory threshold for weight and has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and that as a result of the injury the infant was rendered permanently and substantially mentally and physically impaired, then section 766.309(1) provides that there is a rebuttable presumption that the injury is a birth-related neurological injury.

13. In this case, the evidence does not support a finding that the injury is a birth-related neurological injury. This

issue is dispositive with respect to compensability. Based upon this evidence, Elias Manuel Casas did not sustain a birth-related neurological injury as defined in section 766.302(2), and is not eligible for benefits under the Plan.

CONCLUSION

Based upon the Findings of Fact and Conclusions of Law provided above, Petitioner's claim is not compensable under the Plan, and the Petition is dismissed with prejudice.

DONE AND ORDERED this 17th day of October, 2019, in Tallahassee, Leon County, Florida.



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Administrative Law Judge  
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Filed with the Clerk of the  
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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).