

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WHITNIE PADRON, AS PARENT AND
NATURAL GUARDIAN OF LANDEN PADRON,
A MINOR,

Petitioner,

vs.

Case No. 18-6737N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

RACHEL A. LAMBERT, M.D.; AND
MORTON PLANT HOSPITAL ASSOCIATION,
INC., D/B/A MORTON PLANT HOSPITAL,

Intervenors.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause comes for consideration on three motions: 1) Respondent's Renewed Motion for Partial Summary Final Order, filed on August 24, 2020; 2) Intervenor, Morton Plant Hospital Association's, Motion for Summary Final Order, filed on July 28, 2020; and 3) Intervenor, Rachel A. Lambert's, Motion for Partial Summary Final Order, filed on September 4, 2020. All three motions request entry of a final order determining that Petitioner's claim is compensable under the provisions of chapter 766.301, Florida Statutes, et seq.

STATEMENT OF THE CASE

On December 13, 2018, Petitioner, Whitnie Padron, as parent and natural guardian of Landen Padron ("Landen"), a minor, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. with the Division of Administrative Hearings ("DOAH") for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan"). Petitioner subsequently filed a Notice of Election of Remedies Declining NICA Benefits on October 21, 2019, followed by an Amended Petition Under Protest, as well as a Notice of Election of Remedies Declining NICA Benefits, both filed on November 6, 2019. (Petitioner's four separate pleadings are collectively referred to as the "Petition.")

The Petition identified Rachel A. Lambert, D.O., as the physician who provided obstetrical services at Landen's birth on January 22, 2018, at Morton Plant Hospital ("Plant Hospital") in Clearwater, Florida.

DOAH served Dr. Lambert with copies of the initial Petition on December 28, 2018, and served Plant Hospital that same date. DOAH also served the Florida Birth-Related Neurological Injury Compensation Association ("NICA") with a copy of the initial Petition on December 28, 2018.¹

Dr. Lambert moved to intervene in this matter on January 14, 2019, which was granted. Plant Hospital also moved to intervene on January 14, 2019, which was also granted.

On September 26, 2019, NICA filed a Notice of Compensability taking the position that Petitioner's claim is compensable under the Plan.

¹ Petitioner served copies of the three subsequent pleadings included as the Petition on the other parties when they were filed with DOAH.

On November 7, 2019, NICA filed a Motion for Summary Final Order requesting the Administrative Law Judge enter a summary final order finding that Petitioner's claim is compensable under the NICA statute because Landen suffered a "birth-related neurological injury" as defined in section 766.302(2), and Dr. Lambert was a "participating physician" pursuant to section 766.302(7).²

Plant Hospital, on July 28, 2020, moved for a Motion for Summary Final Order on the limited issue of whether Plant Hospital met the notice requirement under section 766.316.

Dr. Lambert, on September 4, 2020, also filed a Motion for Partial Summary Final Order asserting that she was not required to provide notice under section 766.316 based on the circumstances of Landen's birth.

FINDINGS OF FACT

1. Landen was born on January 22, 2018, at Plant Hospital located in Clearwater, Florida.

2. Rachel A. Lambert, D.O., was the delivering physician for Landen's birth at Plant Hospital. At that time, Dr. Lambert qualified as a "participating physician" in the Plan as that term is defined in section 766.302(7).

3. Petitioner was admitted to Plant Hospital on January 21, 2018, to deliver Landen. Upon her arrival, Petitioner reported that her membranes had spontaneously ruptured (her "water broke"), and she was experiencing contractions.

² Respondent supplemented its motion with the Renewed Motion for Partial Summary Final Order, filed on August 24, 2020. Both Respondent's motions are considered in determining this Order and are collectively referred to as the "Motion."

4. As part of her admission that day, Petitioner signed a Receipt of NICA Information (the "Receipt") presented to her by Plant Hospital pursuant to section 766.316. The Receipt notified Petitioner that Plant Hospital was furnishing her information prepared by NICA and stated that "certain limited compensation is available in the event certain types of qualifying neurological injuries may occur during labor, delivery or resuscitation."

5. Dr. Lambert first examined Petitioner at 5:07 p.m. on January 22, 2018. Dr. Lambert had never seen Petitioner prior to this examination. The nurse midwife tending to Petitioner contacted Dr. Lambert because she was the backup for the on-call obstetrician who was involved in another surgery. At that time, Petitioner had been in active labor since at least 11:30 a.m., and delivery was imminent.

6. Dr. Lambert immediately began working to deliver Landen. At 5:20 p.m., Dr. Lambert attempted a vacuum delivery (the first of several attempts). Dr. Lambert ultimately delivered Landen, via cesarean section, at 7:12 p.m.

7. Prior to Landen's birth, Dr. Lambert did not provide Petitioner notice of her participation in the NICA Plan or information regarding the Plan's limited no-fault alternative for birth-related neurological injuries.

8. Landen weighed over 2,500 grams at birth. However, during the course of labor, delivery, or resuscitation in the immediate postdelivery period, Landen suffered an injury. Petitioner subsequently filed the Petition with DOAH to determine whether Landen's injury qualified as a "birth-related neurological injury" as defined in section 766.302(2).

9. Upon receipt of the Petition, NICA retained Donald Willis, M.D., a board-certified obstetrician/gynecologist specializing in maternal-fetal medicine, as well as Michael S. Duchowny, M.D., a pediatric neurologist, to review Landen's medical records and condition. NICA sought to determine whether Landen suffered a "birth-related neurological injury" as defined in section 766.302(2). Specifically, NICA requested its medical consultants opine

whether Landen experienced an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury which occurred in the course of labor, delivery, or resuscitation in the immediate post-delivery period. And, if so, whether this injury rendered Landen permanently and substantially mentally and physically impaired.

10. Dr. Willis reviewed Landen's medical records and noted:

Delivery of the fetus at the time of Cesarean section was difficult due to the presenting part impacted in the maternal pelvis.

* * *

The baby was depressed at birth The baby was described as pale and without respiratory effort or tone at birth.

* * *

Seizure activity developed shortly after birthTransfer to St. Joseph's Women's Hospital was arranged for body cooling due to suspected hypoxic ischemic encephalopathy (HIE).

* * *

The newborn hospital course was complicated by multi-system organ failures, including respiratory distress, seizures, subgaleal hematoma, oliguria, DIC and thrombocytopenia.

* * *

In summary, extraction of the baby at the time of Caesarean section was difficult and resulted in a depressed newborn. Apgar scores were 2/2/2. Resuscitation included intubation, chest compressions and multiple doses of Epinephrine Seizures developed shortly after birth. The newborn hospital course was complicated by multi-system organ failures. Head Ultrasound shows cerebral edema. MRI was consistent with cerebral infarcts.

11. Based on these records, Dr. Willis opined that:

[T]here was an apparent obstetrical event that resulted in oxygen deprivation to the baby during delivery and continuing into the immediate post-delivery period. This oxygen deprivation resulted in brain injury.

Dr. Willis, however, was "unable to comment on the severity of the brain injury."

12. Dr. Duchowny, on the other hand, did offer an opinion as to the extent of Landon's injury. Dr. Duchowny reviewed Landon's medical records, as well as conducted an independent medical examination ("IME") of Landon on September 9, 2019. Dr. Duchowny observed, within a reasonable degree of medical probability:

Landon is now 19 months old and has delay development. He does not communicate verbally and has recurrent seizures. Landon's parents were told by his Neonatologist that "Landon would never walk or talk."³

* * *

Landon has no words in his lexicon. He instead points or gestures and "looks at stuff" but cannot encode his thoughts verbally.

* * *

In SUMMARY, Landon's neurological examination reveals prominent expressive language delay, lateral lower extremity hyperreflexia indicative of a left hemiparesis and pathological right-hand preference. Although Landon's receptive language skills are appropriate for age, he is at risk for significant cognitive impairment.

Dr. Duchowny ultimately opined that based on the IME, which revealed "likely future substantial mental ... impairment, and the medical record

³ Dr. Duchowny's examination report identified Landon as "Landon."

review, I am recommending that Landon be considered for inclusion within the NICA program."

13. At a subsequent deposition, Dr. Duchowny expounded on his IME report. He commented that Landen's injury "suggests that his deficits will be permanent." Dr. Duchowny further expressed that Landen's brain injury causes a condition that "clearly destabilizes his gait and makes it difficult for him to walk or run." Finally, Dr. Duchowny asserted that, within a reasonable degree of medical probability, "I think [Landen] has both substantial mental and physical impairments," and that those impairments are "permanent."

14. Based on the opinions of Dr. Willis and Dr. Duchowny, NICA determined that Petitioner's claim is compensable under section 766.302(2).

15. A review of the documents in the record reveals no contrary evidence to dispute the findings and opinions of Dr. Willis and Dr. Duchowny. Their opinions are credible and persuasive.

16. Based on "all available evidence" in the record, Landen suffered a brain injury during labor, delivery, or resuscitation in the immediate postdelivery period that meets the requirements for compensation under section 766.309(1). Further, both Dr. Lambert and Plant Hospital satisfied the NICA notice requirements set forth in section 766.716. Accordingly, Landen is eligible for an award of NICA benefits under the Plan.

CONCLUSIONS OF LAW

17. 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 ("ALJ"), 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.

18. The Florida Legislature created the Plan as a means to alleviate the high costs of medical malpractice insurance for physicians practicing

obstetrics. *Bennett v. St. Vincent's Med. Ctr., Inc.*, 71 So. 3d 828, 836 (Fla. 2011); and *Univ. of Miami v. Ruiz*, 164 So. 3d 758, 764 (Fla. 3d DCA 2015). The Plan's purpose is to "provid[e] compensation, irrespective of fault, for birth-related neurological injury claims." § 766.303(1), Fla. Stat.

19. To seek compensation under the Plan, a legal representative on behalf of an injured infant files a claim with DOAH. §§ 766.302(3) 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.

20. If NICA determines that the injury is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the ALJ to whom the claim has been assigned. § 766.305(7), Fla. Stat.

21. When considering whether a claim is compensable under the Plan, section 766.309(1) charges the ALJ to make the following determinations "based upon all 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).

(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; and

(c) How much compensation, if any, is awardable pursuant to s. 766.31.

(d) Whether, if raised by the claimant or other party, the factual determinations regarding the notice requirements in s. 766.316 are satisfied. The administrative law judge has the exclusive jurisdiction to make these factual determinations.

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

injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation ... 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.

23. 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).

24. If a claim qualifies for compensation, section 766.31(1) lists the expenses and payments the ALJ shall award "[u]pon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth."

25. Regarding notice of the existence and significance of the NICA Plan to obstetrical patients, section 766.316 states:

Each hospital with a participating physician on its staff and each participating physician ... shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided

on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when notice is not practicable.

26. The burden of proof in this matter falls on NICA and Plant Hospital to prove that Petitioner's claim is covered by the Plan. Petitioner initiated this matter. However, she expressed that she is not seeking compensation. Instead, Petitioner argues that Landen does not fall within the scope of the Plan. *See Bennett*, 71 So. 3d at 846; *Fla. Health Scis. Ctr., Inc. v. Div. of Admin. Hearings*, 974 So. 2d 1096, 1099 (Fla. 2d DCA 2007); and *Balino v. Dep't of Health & Rehab. Servs.*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977) ("The general rule is, that as in court proceedings, the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.").

27. The preponderance of the evidence standard is applicable to this matter. *See* § 120.57(1)(j), Fla. Stat.

28. Turning to the injury in this case, the competent substantial evidence establishes that Landen suffered a "birth-related neurological injury" as defined in section 766.302(2). Dr. Willis, following his review of the medical records, concluded that Landen experienced oxygen deprivation during his birth, which resulted in brain injury. Dr. Willis was not able to assess the severity of Landen's brain injury. However, Dr. Duchowny persuasively testified that Landen sustained substantial mental and physical impairments, which are permanent. Dr. Willis's and Dr. Duchowny's opinions are credited. Accordingly, based on the evidence in the record, the

undersigned determines that Landen suffered a "birth-related neurological injury."

29. In addition to determining the extent of the injury, when raised "by the claimant or other party," section 766.309(1)(d) gives the ALJ exclusive jurisdiction to make "factual determinations regarding the notice requirements in s. 766.316," and whether these conditions are satisfied. In furtherance of this statutory charge, the undersigned determines that Plant Hospital, by providing Petitioner the Receipt on January 21, 2018, prior to Landen's birth the next day, complied with the terms of the NICA notice requirements set forth in section 766.316.

30. Furthermore, Dr. Lambert also satisfied section 766.316. Dr. Lambert did not provide Petitioner notice of her participation in the Plan. However, section 766.316 states that, "[n]otice need not be given to a patient ... when notice is not practicable." Based on the facts in the record, notice from Dr. Lambert to Petitioner was not practicable prior to Landen's birth. The imminent timing of Landen's delivery, combined with the fact that Dr. Lambert was the backup on-call physician who first examined Petitioner approximately two hours before Landen's birth, did not afford Dr. Lambert a reasonable opportunity to discuss the NICA Plan with Petitioner. Consequently, Dr. Lambert was not required to personally give Petitioner notice of the rights and limitations under the NICA Plan in accordance with section 766.316.

31. In sum, the evidence in the record establishes that Petitioner's claim meets the statutory requirements for compensability under the Plan. Landen suffered a "birth-related neurological injury" during the course of the labor, delivery, or resuscitation in the immediate postdelivery period as described in section 766.302(2). The evidence further shows that the obstetrical services provided at Landen's birth were delivered by a "participating physician" as defined in section 766.302(7). Finally, the notice requirements of section

766.316 were met. Accordingly, Landen is eligible for an award of NICA benefits under section 766.31.

DISPOSITION

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

1. Petitioner's Petition for compensation under the NICA Plan is APPROVED.

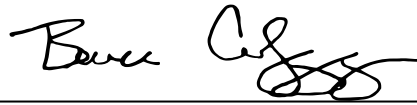
2. NICA shall make immediate payment of all expenses previously incurred, and shall make payment for future expenses as incurred pursuant to section 766.31(1)(a).

3. Whitnie Padron, as the parent and natural guardian of Landen, is entitled to an award pursuant to section 766.31(1)(b)1. The parties are accorded 45 days from the date of this Final Order to resolve, subject to approval by the Administrative Law Judge, the amount and manner in which the award should be paid. If not resolved within such period, the parties will so advise the Administrative Law Judge, and a hearing will be scheduled to resolve such issue.

4. Petitioner is entitled to an award of reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees, pursuant to section 766.31(1)(c). The parties are accorded 45 days from the date of this Order to resolve, subject to approval by the Administrative Law Judge, the amount of such award. If not resolved within such period, the parties will so advise the Administrative Law Judge, and a hearing will be scheduled to resolve such issue.

5. Pursuant to section 766.312, the Division of Administrative Hearings retains jurisdiction over this matter to address the amount of an award pursuant to section 766.31, as well as to resolve any disputes regarding the parties' compliance with the terms of this Final Order.

DONE AND ORDERED this 13th day of October, 2020, in Tallahassee, Leon
County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
Division of Administrative Hearings
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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).