

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

YANARA AVILA-CANA AND JULIO CESAR  
HASSAN HERRERA, ON BEHALF OF AND AS  
PARENTS AND NATURAL GUARDIANS OF  
SCARLETT HASSAN-AVILA, A MINOR CHILD,

Petitioners,

vs.

Case No. 19-0281N

FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

GOOD SAMARITAN MEDICAL CENTER INC.;  
MARCELA ANDREA LAZO, M.D.; BARBARA  
TELAN, ARNP, CNM; AND PALM BEACH  
OBSTETRICS AND GYNECOLOGY, P.A.,

Intervenors.

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PARTIAL SUMMARY FINAL ORDER OF DISMISSAL

This matter came before the undersigned on Respondent's Motion for Summary Final Order, filed October 22, 2019; Intervenor, Good Samaritan Medical Center's (Good Samaritan) Motion for Summary Final Order, filed October 25, 2019; Intervenors, Marcela Andea Lazo, M.D., Barbara Telan, ARNP, CNM, and Palm Beach Obstetrics and Gynecology, P.A.'s (Palm Beach) Motion for Summary Final Order, filed November 20, 2019; Good Samaritan's Renewed Motion for Summary Final Order, filed May 12, 2020; Respondent's Renewed Motion for Partial Summary Final Order, filed

May 15, 2020; Palm Beach's Notice of Joinder with Good Samaritan's Renewed Motion for Summary Final Order, filed May 13, 2020; and Petitioner's Response in Opposition, filed May 22, 2020.

On July 30, 2020, pursuant to notice, an evidentiary hearing concerning the above-referenced filings was conducted by Zoom Conference, with counsel for all parties in attendance.

#### STATEMENT OF THE CASE

On January 4, 2019, Petitioners filed a "Petition for Benefits Filed Under Protest Pursuant to Florida Statute Section 766.301 et seq." (Petition). On February 7, 2019, the undersigned issued an Order granting Good Samaritan's Motion to Intervene. On the same date, the undersigned issued an Order granting Palm Beach's Motion to Intervene. On June 12, 2019, Respondent filed its Notice of Compensability and Request for Evidentiary Hearing, suggesting that the subject claim is compensable and requesting an evidentiary hearing. On June 13, 2019, the undersigned issued an Order requiring the parties to advise by June 26, 2019, whether a hearing would be required.

On July 31, 2019, Petitioners' original legal counsel filed a motion to withdraw as counsel, and said motion was granted on August 8, 2019. Thereafter, on August 15, 2019, this matter came before the undersigned on a previously-noticed telephonic status conference. Petitioner, Yanara Avila-Cana, participated in the conference pro se and an interpreter was provided for Petitioner. During the telephonic status conference, Petitioner requested a 60-day extension to evaluate Respondent's acceptance of Petitioners' claim as compensable and to seek new legal counsel. Neither Respondent nor Intervenors objected to the requested extension. Accordingly, on September 4, 2019, an Order Granting Extension of Time was issued, granting Petitioners

an extension of time of 60 days to seek new legal counsel and evaluate Respondent's Notice of Compensability. Petitioners were further ordered to submit a written status report, on or before November 4, 2019, advising whether Petitioners intend to accept the NICA benefits or whether a final hearing would be required.

On October 15, 2019, Petitioners, pro se, filed a Notice of Election of Remedies Declining NICA Benefits, and requested that the "instant matter with the Division of Administrative Hearings (DOAH) shall be closed with prejudice." On October 22, 2019, Respondent filed a Motion for Summary Final Order contending the claim is compensable under the Florida Birth-Related Neurological Injury Plan (Plan). On October 25, 2019, Good Samaritan filed a Motion for Summary Final Order, also contending that the claim is compensable under the Plan.

On October 30, 2019, Petitioners' current counsel filed a notice of appearance. On October 31, 2019, Petitioners, now through counsel, filed the following: an Amended Petition Under Protest (Amended Petition); an Objection to Defendant's Motion for Summary Final Order and Motion for a Stay of Deadlines (Petitioners' Objection); and a Notice of Election of Remedies Declining NICA Benefits (Petitioners' Notice). Pursuant to Petitioners' Objection, Petitioners requested 60 days to respond to the pending motions for summary final order and to conduct necessary discovery to respond to the same. Pursuant to Petitioners' Notice, Petitioners represented that they "have willfully and voluntarily elected not to pursue any NICA benefits," and "do not wish to seek any award or any benefits of any kind." Petitioners requested that the instant matter with DOAH be "closed with prejudice."

On November 20, 2019, Palm Beach filed a motion for summary final order, contending Petitioners' claim is compensable under the Florida Birth-Related Neurological Injury Plan.

On November 21, 2019, a telephonic motion hearing was conducted regarding Petitioners' Notice, with counsel for all parties in attendance. In response to the undersigned's inquiry, Petitioners' counsel represented and confirmed that it was Petitioners' intent that the undersigned construe Petitioners' Notice as a notice of dismissal with prejudice. Accordingly, on November 25, 2019, the undersigned issued a Final Order of Dismissal with prejudice.

Thereafter, this matter came before the undersigned on Petitioners' Motion for Rehearing and/or Motion for Relief Based on Mistake, Inadvertence, Surprise, or Excusable Neglect and/or Exception of Court Order Entered on November 25, 2019 (Petitioners' Motion), filed December 10, 2019. Palm Beach and Good Samaritan filed their respective Notice of Joinder in Petitioners' Motion. Subsequently, the undersigned granted Petitioner's Motion, and the November 25, 2019, Final Order of Dismissal was rescinded and the file at DOAH was reopened.

Upon reopening the matter, on December 19, 2019, a telephonic case management conference was conducted to address the pending motions for summary final order as well as Petitioners' Objection. On the same date, the undersigned's Order Extending Time to Conduct Discovery and Respond to Pending Motions for Summary Final Order was issued. It was ordered that: 1) all discovery, including written responses to written discovery and depositions, shall be completed within 50 days from the date of this Order; and 2) the parties may resubmit any previously filed motions for summary final order, if they so choose, based on the completed discovery. Petitioners

shall have 60 days from the date of this Order to file any response to the pending motions for summary final order.

After multiple extensions of time, on May 21, 2020, the existing discovery Order was again extended for 30 days to complete limited remaining discovery. On June 10, 2020, an Order Requiring Response was issued directing the parties to file a joint response providing several mutually agreeable dates in which to conduct the hearing, an estimate of the time required to conduct the hearing, and the parties' preferred mode for conducting the hearing (in-person, video-teleconference, or Zoom meeting). In response, a Status Report was filed, wherein the parties requested an evidentiary hearing on the issue of compensability as raised in the motions at issue and a separate final hearing on whether the notice requirements of section 766.316, Florida Statutes, were satisfied.

The evidentiary hearing on compensability was conducted on July 30, 2020, with counsel for all parties in attendance.

#### FINDINGS OF FACT

1. Scarlett Hassan-Avila (Scarlett), was born a live infant on January 17, 2017, at Good Samaritan, in West Palm Beach, Florida.
2. At the time of birth, Scarlett weighed over 2500 grams.
3. Good Samaritan is a "hospital," as defined by section 766.302(6).
4. Obstetrical services were delivered by Marcela Andrea Lazo, M.D., and Barbara Telan, ARNP, CNM, in the course of the subject labor, delivery, or resuscitation in the immediate post-delivery period in a teaching hospital, Good Samaritan.
5. At the time of Scarlett's birth, Dr. Lazo and Nurse Telan were "participating physicians" as defined in sections 766.302(7) and 766.314(4)(c).

6. As set forth in greater detail below, the unrefuted evidence establishes that Scarlett sustained a “birth-related neurological injury,” as defined by section 766.302(2).

7. Donald Willis, M.D., a board certified obstetrician specializing in maternal-fetal medicine, was retained by Respondent to review the pertinent medical records and opine as to whether Scarlett sustained an injury to her brain or spinal cord caused by oxygen deprivation or mechanical injury that occurred in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.

8. In an affidavit dated July 20, 2019, Dr. Willis opined to a reasonable degree of medical probability, as follows:

. . . an abnormal FHR patten developed during labor, requiring Cesarean delivery. The newborn was depressed with a cord gas pH of 7.1 and a base excess of -20. Seizure activity occurred shortly after birth. The baby was subsequently diagnosed with cerebral palsy and global development delay.

As such, it is my ultimate opinion that there “was an apparent obstetrical event that resulted in oxygen deprivation to the brain during labor, delivery and continuing into the immediate post-delivery period. It appears the oxygen deprivation resulted in brain injury.

9. Dr. Willis was deposed on February 10, 2020. In support of his ultimate opinion, Dr. Willis testified that: 1) during the delivery process, Scarlett experienced oxygen deprivation for approximately 30 minutes; 2) she experienced respiratory distress at birth, and required bag mask ventilation for more than three minutes; 3) her arterial blood gas (approximately 30 minutes after birth) was abnormal, which was consistent with metabolic acidosis; 4) within the first five hours of birth, seizure activity was noted; 5) an EEG performed on her second day of life was abnormal and consistent

with electrical seizures; and 6) an MRI performed on her sixth day of life showed cerebral ischemia consistent with hypoxic ischemic encephalopathy.

10. In summary, Dr. Willis testified that, in his opinion, Scarlett did suffer oxygen deprivation during labor, delivery, and continuing into the immediate post-delivery period, and that the oxygen deprivation resulted in brain injury. He also opined that the brain injury was not the result of an infection or congenital abnormality.

11. Respondent further retained Michael Duchowny, M.D., who is board certified in pediatrics, neurology (with special competence in child neurology), and clinical neurophysiology, to review the available medical records and conduct an examination of Scarlett to determine whether she suffers from permanent and substantial mental and physical impairment as a result of a birth-related neurological injury. Dr. Duchowny conducted his examination of Scarlett on May 29, 2019, and summarized his opinion in an affidavit dated August 1, 2019. His summary opinions, to a reasonable degree of medical probability, are set forth in full as follows:

In summary, Scarlett's neurological evaluation reveals that she has a substantial mental and motor impairment. She has spastic quadriplegic cerebral palsy, oromotor incoordination, a cortical visual impairment absence of receptive or expressive communication, and an active seizure disorder. Her development level approximates that of a 2-3 month old infant.

Review of the medical records reveals that Scarlett was born by emergent Cesarean section at Good Samaritan Hospital at 39 3/8 weeks' gestation. The delivery was precipitated by loss of fetal heart rate. Her mother experienced severe bleeding that required four red blood cell and platelet transfusions. Scarlett's neonatal head circumference was 36 cm. She was transferred to St. Mary's Hospital shortly after birth.

Scarlett was born floppy and had a high-pitched cry. Apgar scores were 2, 7 and 8 at 1, 5 and 10 minutes of life. Her arterial pH was 7.11 and base excess was -20 thirty-two minutes after delivery. Scarlett did not require mechanical intubation or ventilator assistance.

MR imaging performed on DOL #6 revealed increased signal on diffusion weighted images in the perirolandic cortex bilaterally, basal ganglia and brain stem. Subsequent MR imaging obtained in June, 2017 revealed central and cortical atrophy.

As such, it is my opinion that, based on the IME and medical record review, “Scarlett’s neurological impairments are permanent and substantial and resulted from oxygen deprivation in the course of labor and delivery.”

12. Dr. Duchowny was deposed on February 24, 2020. Dr. Duchowny confirmed his opinions as set forth in his affidavit. He testified that it was his opinion, within a reasonable degree of medical probability, that Scarlett sustained a substantial and permanent mental and physical impairment arising out of oxygen deprivation during the delivery.

13. With respect to the oxygen deprivation, Dr. Duchowny testified that Ms. Yanara Avila-Cana sustained severe hemorrhaging during delivery, which resulted in an insufficient amount of blood getting to Scarlett’s brain.

14. The undisputed opinions of Dr. Willis and Dr. Duchowny are credited. Based on their opinions, the undersigned finds that Scarlett sustained an injury to the brain caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which rendered Scarlett permanently and substantially mentally and physically impaired.



## CONCLUSIONS OF LAW

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

16. 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.

17. 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. Respondent, 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.

18. If Respondent determines that the injury alleged is a claim that 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 (ALJ) to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, compensability is disputed, as alleged in Petitioners’ Petition, the dispute must be resolved by the assigned ALJ in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

19. In discharging this responsibility, the ALJ is required to make the following threshold determinations 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).

(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.

§ 766.309(1), Fla. Stat.

20. 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.

21. The evidence establishes that Scarlett was born a live infant weighing at least 2,500 grams. The unrefuted evidence further establishes that there was an injury to Scarlett’s brain caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital. The undisputed evidence further establishes that said injury has rendered her permanently and substantially mentally and physically impaired.

22. The undisputed evidence further establishes that obstetrical services were delivered by Dr. Lazo and Nurse Telan, who were participating

physicians, in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, Good Samaritan.

23. Accordingly, it is concluded that Scarlett has sustained a compensable birth-related neurological injury.

CONCLUSION


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

1. Respondent and Intervenors' respective motions for partial summary final order addressing compensability are granted, and Petitioners' claim is found and determined to be compensable.

2. Jurisdiction is reserved to determine whether the notice requirements of section 766.316 were satisfied.

3. Jurisdiction is reserved to determine the issue of an award pursuant to section 766.31.

DONE AND ORDERED this 5th day of August, 2020, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
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this 5th day of August, 2020.

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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).