

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOGAN FLOUNDERS AND BRITTANY GAETA,
INDIVIDUALLY AND AS NATURAL PARENTS
OF ASHTYN FLOUNDERS, A MINOR,

Petitioners,

vs.

Case No. 19-5147N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

ORLANDO HEALTH, INC. D/B/A HEALTH
CENTRAL HOSPITAL, AND ROSEANNE M.
HENRY, M.D.,

Intervenors.

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PARTIAL SUMMARY FINAL ORDER

This matter came before the undersigned on Respondent's Motion for Summary Final Order (Respondent's Motion), filed June 12, 2020; Petitioners' Interim Response to and Request for Extension of Time Regarding Respondent's Motion for Summary for Order, filed June 18, 2020; Petitioners' Emergency Second Interim Response to Motion for Summary Final Order and Request for Further Extension of Time to Respond to Motion for Summary Final Order, filed July 24, 2020; Intervenor's Motion for Expedited Ruling on NICA's Motion for Summary Final Order on Compensability (Intervenor's Motion), filed October 14, 2020; Respondent's Notice of Joinder in Intervenor's Motion for Expedited Ruling on NICA's Motion for Summary Final Order on Compensability, filed October 15, 2020;

and Petitioner's Response to Intervenor's Motion for Expedited Ruling on NICA's Motion For Summary Final Order on Compensability (Petitioners' Response), filed October 15, 2020.

STATEMENT OF THE CASE

On September 10, 2019, Petitioners, Logan Flounders and Brittany Gaeta, individually and as the natural parents of Ashtyn Flounders (Ashtyn), 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 a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (NICA or the Plan). The Petition named Rosanne M. Henry, M.D., as the physician who provided obstetric services for the birth of Ashtyn at Health Central Hospital in Ocoee, Florida, on July 23, 2017.

On October 4, 2019, DOAH mailed a copy of the Petition to Respondent, Dr. Henry, and Health Central Hospital via certified mail. Respondent was served with the same on October 7, 2019. On October 14, 2019, Orlando Health, Inc., d/b/a Health Central Hospital and Roseanne M. Henry, M.D., filed a petition to intervene, which was granted on October 18, 2019.

After four unopposed motions for extension of time were granted for Respondent to respond to the Petition, on May 27, 2020, Respondent filed a Notice of Compensability and Request for Evidentiary Hearing on Compensability (Notice of Compensability), wherein Respondent averred that it had determined that Petitioners' claim is a "birth-related neurological injury," as defined by section 766.302(2), Florida Statutes. Respondent further maintained that the claim was compensable and requested the matter be scheduled for final hearing on the issue of compensability. On June 8, 2020, Petitioners' Response to Respondent's Notice of Compensability and Request for Evidentiary Hearing (Respondent's Notice of

Compensability) was filed, wherein Petitioners contested that the claim was compensable and requested a hearing on the issue of compensability.

Respondent's Motion was filed on June 12, 2020. Thereafter, due to COVID-19 pandemic related concerns, Petitioner was granted several extensions of time to respond to Respondent's Motion. On August 24, 2020, the undersigned issued an Order on Pending Motions, granting Petitioners an extension of time of September 30, 2020, to conduct reasonable discovery to respond to Respondent's Motion. Thereafter, on September 9, 2020, the matter was scheduled for a final hearing to begin on November 12, 2020.

On October 14, 2020, Intervenor's Motion was filed and Respondent joined that motion on October 15, 2020. On October 15, 2020, Petitioners Response was filed which provides in substantive part as follows:

1. After investigating this claim and conducting extensive discovery, Petitioners do not contest there is a NICA compensable injury, though there are issues of disputed fact in the depositions conducted.
2. However, Petitioners continue to contest that proper notice was given to Petitioners as required under Chapter 766.316.
3. From Petitioners' perspective, this matter may proceed to a Final Hearing on the issue of notice on the stipulated record, which may be agreed upon by the Parties.

On October 19, 2020, a telephonic motion hearing and status conference was conducted with all parties in attendance. During the hearing, Petitioners stipulated that Ashtyn had sustained a birth-related neurological injury, as that term is defined in section 766.302(2). The parties stipulated that Respondent's Motion was ripe for a decision on that issue and further stipulated to permitting Respondent to file the deposition of Luis E. Bello-Espinosa, M.D., in support of Respondent's

Motion. A hearing to address whether the notice requirements of section 766.316 have been satisfied is scheduled for November 12, 2020.

FINDINGS OF FACT

1. Ashtyn was born a live infant on July 23, 2017, at Health Central Hospital in Ocoee, Florida.

2. At the time of birth, Ashtyn weighed over 2,500 grams.

3. It is undisputed that Health Central Hospital is a “hospital,” as defined by section 766.302(6).

4. Obstetrical services were delivered by Roseanne M. Henry, M.D., in the course of the subject labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, Health Central Hospital.

5. At the time of Ashtyn’s birth, Dr. Henry was a “participating physician” as that term is defined in section 766.302(7).

6. As set forth in greater detail below, the unrefuted evidence establishes that Ashtyn 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 of Ashtyn and Brittany Gaeta and opine as to whether Ashtyn sustained an injury to his brain or spinal cord caused by oxygen deprivation or mechanical injury that occurred during the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.

8. On March 18, 2020, Dr. Willis authored a report that included his findings and opinions. The report provides, in pertinent part, as follows:

The fetal heart rate (FHR) tracing during labor was not available for review, but hospital records describe a category II tracing prior to delivery. Delivery was at term by spontaneous vaginal delivery and noted to be atraumatic. A nuchal chord X 1 and cord around the body

were described. Amniotic fluid was meconium stained. Birth weight was 3,275 grams.

Apgar scores were 1/6/8. Umbilical cord pH was 7.3. Bag and mask ventilation was given for two-minutes, followed by CPAP. Respiratory distress requiring supplemental oxygen continued in the nursery with grunting, flaring and retractions. Chest X-Ray showed RUL airspace disease. Antibiotics were given for 3 hours and discontinued with negative blood cultures.

Apnea episode with oxygen desaturation to 20% requiring bag and mask ventilation. Seizure activity occurred shortly after birth, associated with apnea episode. The baby was transferred on the day of birth to Winnie Palmer Hospital (WPH) for evaluation and management. Intubation was attempted, but failed and transfer was on HFNC oxygen.

The baby was intubated, with some difficulty on admission to WPH. Laryngeal constriction or abnormality was suspected for difficult intubation. Mechanical ventilation was required for three days. Seizure activity was present at time of admission to WPH. MRI on the day after birth showed cerebral edema, consistent with hypoxic insult and a small subdural hemorrhage. EEG on DOL 1 was positive for seizure activity. Neurology consultation on DOL 2 stated “seizures in light of moderately severe hypoxic ischemic encephalopathy” (HIE).

At three-months of age the baby was noted to have global muscle weakness and diagnosed with Cerebral Palsy.

In summary, labor was complicated by a category II FHR pattern. Spontaneous vaginal birth was atraumatic with a depressed newborn. Apgar scores were 1/6/8. Respiratory depression was present at birth and continued with nursery admission. Apnea with oxygen desaturations to 20% occurred shortly after birth and were accompanied by seizure activity. MRI was consistent with HIE.

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. The oxygen deprivation resulted in brain injury. I am unable to comment about the severity of the injury.

9. In his affidavit dated June 11, 2020, Dr. Willis affirmed that the statements and opinions contained in his report were all within a reasonable degree of medical probability and true and correct based upon his review of the medical records.

10. Respondent also retained Luis E. Bello-Espinosa, M.D., a pediatric neurologist, to review the pertinent medical records and evaluate Ashtyn and opine as to whether he suffers from an injury which rendered him permanently and substantially mentally and physically impaired; and whether such injury is consistent with an injury caused by oxygen deprivation or mechanical injury occurring during the course of labor, delivery, or the immediate post-delivery period in a hospital. Dr. Bello-Espinosa is board certified in pediatric neurology, epilepsy, and neurophysiology.

11. In his affidavit dated June 8, 2020, Dr. Bello-Espinosa opined, to a reasonable degree of medical probability, as follows:

Ashtyn is a 2-year 10-month-old boy with a history of moderate to severe hypoxic-ischemic encephalopathy of birth. He was documented in the NICU to have acute electroclinical and electrographic seizures, as well as MRI of the brain obtained on day 4th of life which were all indicative of an acute hypoxic-ischemic injury. On his examination is evident Ashtyn has severe neurological sequela. At 2-year 10-months of age, he has severe behavioral dysfunction with poor adaptive emotional regulatory skills, he has severe communication skills, severe dysphagia for which required G-tube, has mild hypertonia in both arms and legs, intermittent fishing, and has an uncoordinated gait, all of which are signs indicative of combined (extrapyramidal and ataxic) cerebral palsy, for which he is receiving occupational, physical and speech therapies.

Ashtyn is found to have substantial mental impairment at this time.

Ashtyn is found to have substantial physical impairment at this time.

In reviewing all the available documents, including the evolution of his acute neonatal seizures, the acute prolonged video-EEG, the neonatal brain MRI finding, and his examination today it is evident that Ashtyn had an acute hypoxic-ischemic event perinatally. The injury is felt to be acquired due to oxygen deprivation of the brain. The injuries are felt to be birth-related.

12. Dr. Bello-Espinosa was deposed on August 28, 2020. Dr. Bello-Espinosa credibly testified that Ashtyn sustained an injury to his brain caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period, which rendered him permanently and substantially mentally and physically impaired.

13. The undisputed opinions of Dr. Willis and Dr. Bello-Espinosa are credited. Based on their opinions, the undersigned finds that Ashtyn 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 Ashtyn permanently and substantially mentally and physically impaired.

CONCLUSIONS OF LAW

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

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. The evidence establishes that Ashtyn was born a live infant weighing at least 2,500 grams. The unrefuted evidence further establishes that there was an injury to Ashtyn'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 him permanently and substantially mentally and physically impaired.

21. The undisputed evidence further establishes that obstetrical services were delivered by Dr. Henry, who was a participating physician at the time of birth, in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, Health Central Hospital.

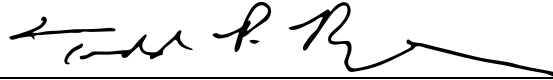
22. Accordingly, it is concluded that Ashtyn has sustained a compensable birth-related neurological injury.

CONCLUSION

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

1. Respondent's Motion for Summary Final Order addressing compensability is 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 30th day of October, 2020, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of October, 2020.

COPIES FURNISHED:
(via certified mail)

Kenney Shipley, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
Suite 1
2360 Christopher Place
Tallahassee, Florida 32308
(eServed)
(Certified No. 7019 2280 0000 5623 6724)

Jonathan T. Gilbert, Esquire
Colling, Gilbert, Wright & Carter, LLC
Suite 830
801 North Orange Avenue
Orlando, Florida 32801
(eServed)
(Certified No. 7019 2280 0000 5623 6731)

David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest 6th Court
Plantation, Florida 33324
(eServed)
(Certified No. 7019 2280 0000 5623 6748)

Michael R. D'Lugo, Esquire
Wicker, Smith, O'Hara, McCoy, Ford, P.A.
Post Office Box 2753
Orlando, Florida 32802
(eServed)
(Certified No. 7019 2280 0000 5623 6755)

Ronald S. Gilbert, Esquire
Colling Gilbert Wright & Carter, LLC
Suite 830
801 North Orange Avenue
Orlando, Florida 32801
(eServed)
(Certified No. 7019 1640 0000 2306 2838)

Joseph P. Menello, Esquire
Wicker, Smith, O'Hara, McCoy and Ford, P.A.
Suite 1000
390 North Orange Avenue
Orlando, Florida 32801
(eServed)
(Certified No. 7019 2280 0001 7689 4866)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified No. 7019 2280 0001 7689 4880)

Shevaun L. Harris, Acting Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(Certified No. 7019 2280 0001 7689 4897)

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).