

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRANDI L. JENNINGS AND EVAN M.
MABE, ON BEHALF OF AND AS PARENTS
AND NATURAL GUARDIANS OF KILLIAN
MABE, A MINOR CHILD,

Petitioners,

vs.

Case No. 19-5428N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

ST. JOSEPH'S HOSPITAL, INC. D/B/A
ST. JOSEPH'S WOMEN'S HOSPITAL,

Intervenor.

_____ /

ORDER GRANTING MOTION FOR PARTIAL SUMMARY FINAL ORDER

This cause came for consideration on a Motion for Partial Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association ("NICA"), on May 5, 2020. Having reviewed the record in this matter, the undersigned rules as follows:

MATERIAL FACTS AND PROCEDURAL BACKGROUND:

1. Based on the parties' representations, written submissions, and supporting documentation, the undisputed evidence in the record establishes the following:

a. Killian Mabe ("Killian") was born on October 18, 2018, at Intervenor, St. Joseph's Women's Hospital ("St. Joseph's"), in Tampa, Florida.

b. Kathryn Hegland Leenhouts, M.D., provided obstetrical services at Killian's birth at St. Joseph's.

c. Dr. Leenhouts was not a "participating physician" under the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan") at the time she provided obstetrical services at Killian's birth. *See* § 766.302(7), Fla. Stat.

2. On September 27, 2019, Petitioners, Brandi L. Jennings and Evan M. Mabe, on behalf of and as parents and natural guardians of Killian, filed an Involuntary Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. (the "Petition") with the Division of Administrative Hearings ("DOAH") for a determination of compensability under the NICA Plan.

3. Upon receiving the Petition, NICA retained Donald Willis, M.D., a board certified obstetrician/gynecologist specializing in maternal-fetal medicine, as well as Luis E. Bello-Espinosa, M.D., a pediatric neurologist, to review Killian's medical records and condition. NICA sought to determine whether Killian suffered a "birth-related neurological injury" as defined in section 766.302(2), Florida Statutes. Specifically, NICA requested its medical consultants opine whether Killian 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 Killian permanently and substantially mentally and physically impaired.

4. Dr. Willis reviewed Killian's medical records and noted that:

A non-reassuring FHR pattern (fetal distress) developed during labor with delivery of a depressed baby. Apgar scores were 1/1/3. Seizure activity developed shortly after birth. The newborn hospital course was complicated by multi-system organ failure. MRI on DOL 7 was consistent with [hypoxic ischemic encephalopathy].

5. Dr. Willis opined, within a reasonable degree of medical probability:

[I]t is my 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. The Oxygen deprivation resulted in brain injury.

Dr. Willis concluded, however, that “I am unable to comment about the severity of the brain injury.”

6. Dr. Bella-Espinosa, on the other hand, did comment on the extent of Killian’s brain injury. Dr. Bella-Espinosa reviewed Killian’s medical records, as well as conducted an independent medical examination of Killian.

Dr. Bella-Espinosa noted that:

Killian is a fifteen-month old boy with a history of 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 7th of life which were all indicative of acute hypoxic-ischemic injury. On their examination, it is evident Killian has substantial neurological sequelae. At 15-month of age, he is microcephalic, has mild axial hypotonia, and moderate hypertonia in both arms and legs, which is indicative of mild spastic quadriparetic cerebral palsy. He continues receiving therapies.

7. Dr. Bella-Espinosa opined, within a reasonable degree of medical probability:

Killian is found to have substantial physical and mental impairment at this time.

In reviewing all the available documents, the evolution of his symptoms, the acute brain MRI changes, his acute neonatal seizures, it is evident that Killian had an acute hypoxic event perinatally. The injury is felt to be acquired due to oxygen deprivation of the brain. The injuries are felt to be birth-related.

The prognosis of full recovery is poor. Estimated life expectancy is expected to be normal, however, there is potential of developing epileptic seizures in the future.

Considering the clinical presentation, I do feel that there is enough evidence to recommend Killian is included in the NICA program.

8. A review of the record in the case reveals no contrary evidence opposing the findings and opinions of Dr. Willis and Dr. Bella-Espinosa.

9. Based on the statements from Dr. Willis and Dr. Bella-Espinosa, NICA determined that Petitioner's claim is compensable under the Plan. NICA subsequently filed the Motion for Partial Summary Final Order asserting that Killian suffered a "birth-related neurological injury" as defined by section 766.302(2).

ANALYSIS AND RULING:

10. An administrative law judge has exclusive jurisdiction over the subject matter of this proceeding. § 766.304, Fla. Stat.

11. The Florida Legislature established the NICA 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.

12. 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.

13. 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.

14. Section 766.309(1)(a) states that the administrative law judge must make the following determination based upon the available evidence:

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

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 post-delivery 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. No evidence has been presented contesting the findings and conclusions of Dr. Willis and Dr. Bella-Espinosa. Dr. Bella-Espinosa specifically opined that, “Killian is found to have substantial physical and mental impairment at this time Considering the clinical presentation, I do feel that there is enough evidence to recommend Killian is included in the NICA program.” Dr. Bella-Espinosa’s opinion is credible and persuasive.

17. The undisputed evidence in the record establishes that, as a matter of law, Killian suffered a “birth-related neurological injury” as defined in section 766.302(2). Accordingly, NICA’s Motion for Partial Summary Final Order is GRANTED.

CASE POSTURE:

18. In addition to section 766.309(1)(a), before compensation is awardable under the NICA Plan, the administrative law judge must determine the following pursuant to section 766.309(1)(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.

19. The issue in section 766.309(1)(b) remains in dispute, as well as its ramifications on Petitioners' rights and remedies with respect to Killian's birth-related neurological injury. Petitioners also raise the issue of the Intervenor's compliance with the notice requirement set forth in section 766.316.

DONE AND ORDERED this 4th day of June, 2020, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
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Filed with the Clerk of the
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this 4th day of June, 2020.

COPIES FURNISHED:
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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).