

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ASHLEY BRAGG AND KEVIN NGUYEN, ON  
BEHALF OF AND AS PARENTS AND  
NATURAL GUARDIANS OF LUKAS NGUYEN,  
A MINOR,

Petitioners,

vs.

Case No. 19-6339N

FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION,

Respondent.

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SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon the Unopposed Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on May 7, 2020.

STATEMENT OF THE CASE

On November 21, 2019, Petitioners, Ashley Bragg and Kevin Nguyen, on behalf of and as parents and natural friends of Lukas Nguyen (Lukas), a minor, filed a Petition for Benefits 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 (Plan).

The Petition identified Charles Shane Medlock, M.D., as the physician who provided obstetric services at the birth of Lukas on December 23, 2017, at Sacred Heart Hospital, located in Escambia County, Florida.

DOAH served Charles Shane Medlock, M.D., and Sacred Heart Hospital with copies of the Petition on December 3, 2019. DOAH served NICA with a copy of the Petition on December 3, 2019.

On March 12, 2020, NICA filed a Response to Petition for Benefits, asserting that Lukas did not sustain a “birth-related neurological injury” as that term is defined in section 766.302(2), Florida Statutes, and requested that a hearing be scheduled to determine compensability. On March 27, 2020, the parties filed a Joint Status Report requesting additional time to respond to a March 13, 2020, Order from the undersigned that required the parties to confer and advise concerning the need for a hearing, if any, and if a hearing is needed, when the parties will be prepared to proceed to a hearing, the issues in dispute, the estimate of time required for hearing, and the choice of venue. On March 20, 2020, the undersigned entered an Order Granting Extension of Time that provided the parties a 60-day extension to respond to the March 13, 2020, Order.

On May 7, 2020, NICA filed an Unopposed Motion for Summary Final Order, which noted, *inter alia*, that Petitioners do not oppose the Unopposed Motion for Summary Final Order and do not intend to rebut the opinions of NICA’s experts.

#### FINDINGS OF FACT

1. Lukas was born on December 23, 2017, at Sacred Heart Hospital, located in Escambia County, Florida.

2. Donald Willis, M.D. (Dr. Willis) was requested by NICA to review the medical records for Lukas. In a medical report dated January 14, 2020, Dr. Willis summarized his findings and opined in pertinent part as follows:

In summary, labor was induced at 37 weeks due to a prior fetal demise. The newborn was depressed at

birth with Apgar scores of 1/6/7. Bag and mask ventilation was required for 2-minutes. The initial blood gas after birth had a base excess of -16. The baby was anemic at birth. Evaluation identified adrenal hemorrhage as the etiology for the anemia. MRI on DOL 9 showed a small subarachnoid hemorrhage.

The mother was being treated with Lovenox, an injectable anticoagulant. Lovenox does not cross the placenta and would not be factor in the fetal adrenal or subarachnoid hemorrhage. The adrenal and subarachnoid hemorrhage were more likely related to birth related hypoxia.

There was an apparent obstetrical event that resulted in oxygen deprivation to the brain. Based on the cord blood gas pH >7.1, it is unlikely any significant oxygen deprivation occurred prior to birth. However, some degree of oxygen deprivation likely occurred in the immediate post-delivery period, based on the base excess of -16 on the initial blood gas in the nursery and both adrenal and subarachnoid hemorrhages identified by ultrasound. I am unable to comment on the severity of the brain injury.

3. NICA retained Raj D. Sheth, M.D. (Dr. Sheth), a medical expert specializing in maternal-fetal medicine and pediatric neurology, to examine Lukas and to review his medical records. Dr. Sheth examined Lukas on February 18, 2020. In a medical report dated March 8, 2020, Dr. Sheth summarized his examination of Lukas and opined in pertinent part as follows:

In SUMMARY, Lucas's [sic.] neurological examination reveals evidence of behavioral problems, and stereotypic behaviors with expressive language delay concerning for autism spectrum disorder, and generalized axial hypotonia and mild appendicular hypertonia evidenced only in gait, with apparent preserved visual acuity, and a history of epilepsy that started at age 6 months

and generalized tonic clonic seizures with a history of 4 fever related seizures.

Much of Lucas's [sic.] neonatal course was detailed in the history of present illness. He was born at 37 weeks gestation. Delivery was vaginal with an epidural. The NICU team was called emergently to labor and delivery patient appeared depressed and unresponsive pale. Positive pressure ventilation for about 2 minutes was undertaken. Spontaneous breaths were established at this time. Heart rate improved within 30 seconds of positive pressure ventilation. By 40 minutes of age the patient was active normal tone had a good gag good suck responsive pupils and normal Moro. Serial neuro exams for the next 24 hours of life were normal. He was not felt to meet criteria for brain cooling. MRI revealed a slight extra-parenchymal hemorrhage in the subarachnoid space without significant intra-parenchymal involvement. While he has seizures they did not develop till he was approximately six months old and he was not noted to have neonatal seizures. His head appears to be growing appropriately with regards to head size. He has not had a genetic evaluation or developmental pediatrics evaluation. As such Lucas [sic.] would not appear to meet NICA specified criteria for compensation under the NICA program.

4. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinion of Dr. Willis that it is unlikely that any significant oxygen deprivation occurred prior to the birth of Lukas. Dr. Willis's opinion is credited. There are no expert opinions filed that are contrary to Dr. Sheth's opinion that Lukas should not be considered for inclusion in the NICA program. Dr. Sheth's opinion is credited.

5. The Unopposed Motion for Summary Final Order states that "Respondent has conferred with Petitioners' attorney and is authorized to represent that Petitioner is in agreement and not opposed to this motion."

## CONCLUSIONS OF LAW

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

7. The Legislature established the 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.

8. 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, 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.

9. 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. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned administrative law judge in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

10. In discharging this responsibility, the administrative law judge must make the following determination 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. An award may be sustained only if the administrative law judge concludes that the “infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth.” § 766.31(1), Fla. Stat.

11. Section 766.302(2) defines the term “birth-related neurological injury” 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.

12. To be compensable under the NICA Plan, there must have been an obstetrical event which resulted in loss of oxygen to the baby’s brain during labor, delivery, or resuscitation in the immediate post-delivery period resulting in a permanent and substantial mental impairment and a permanent and substantial physical impairment, inasmuch as both are

required to establish compensability. *Fla. Birth-Related Neurological Injury Comp. Ass'n v. Div. of Admin. Hearings*, 686 So. 2d 1349 (Fla. 1997).

13. The evidence, which is not refuted, established that Lukas did not suffer a birth-related neurological injury. Therefore, Lukas is not eligible for benefits under the Plan.

CONCLUSION

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

The Petition filed by Ashley Bragg and Kevin Nguyen, on behalf of and as parents and natural guardians of Lukas Nguyen, is dismissed with prejudice.

DONE AND ORDERED this 20th day of May, 2020, in Tallahassee, Leon  
County, Florida.



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ROBERT J. TELFER III  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of May, 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).