

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COURTNEY PHILLIPS, INDIVIDUALLY AND
AS PARENT AND NEXT FRIEND OF JACE
KELLEY, A MINOR,

Petitioner,

vs.

Case No. 20-1345N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This came before the undersigned on Respondent's Motion for Summary Final Order, filed May 1, 2020. In its Motion, the Florida Birth-Related Neurological Injury Compensation Association (NICA) asserts that in order for a claim to be compensable under the Florida Birth-Related Neurological Injury Compensation Plan (the Plan), the statutory prerequisites of section 766.309, Florida Statutes, must be met, including:

(1) The administrative law judge shall make the following determinations based upon all available evidence:

(a) *Whether the injury claimed is a birth-related neurological injury . . .*

(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.

* * *

(2) *If the administrative law judge determines that the injury alleged is not a birth-related neurological injury or that obstetrical services were not delivered by a participating physician at the birth, she or he shall enter an order (emphasis added).*

The term “birth-related neurological injury” is defined in section 766.302(2) as:

(2) “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. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality. (emphasis added).

Petitioner filed a response to the motion on May 7, 2020, stating:

1. The Petitioner has reviewed NICA’s Motion for Summary Final Order and the attached affidavit of Donald C. Willis, M.D., asserting that the instant claim is not compensable under the Florida Birth-Related Neurological Injury Compensation Plan.
2. The Petitioner does not object to Dr. Willis’ affidavit, and will not be filing any affidavit in opposition to it.

FINDINGS OF FACT

1. On March 5, 2020, Petitioner filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq., for benefits pursuant to sections 766.301-766.316, otherwise known as the Plan.

2. The baby was born on February 26, 2016, at Ascension Sacred Heart Hospital Emerald Coast (Hospital). At birth the infant weighed 3325 grams. The circumstances of the labor, delivery, and birth of the minor child are reflected in the medical records the Hospital submitted with the Petition.

3. In the instant case, NICA has retained Donald C. Willis, M.D., as its medical expert specializing in maternal-fetal medicine pediatric neurology. Upon examination of the pertinent medical records, Dr. Willis opined:

There was no apparent obstetrical event that resulted in oxygen deprivation and or mechanical trauma to the baby's brain or spinal cord during labor, delivery or the immediate post-delivery period.

4. Dr. Willis's medical report dated March 23, 2020, reflects his ultimate opinion that:

Seizure activity was noted on the second hospital day and MRI was consistent with acute cerebral infarcts. The brain injury appears to have occurred after the immediate post-delivery period and not birth related.

5. The medical report of Dr. Willis is the only evidence of record relating to the issue of whether the subject claim is compensable as defined by the statute. As noted, Petitioner stated that she does not object to Dr. Willis's report, and will not be filing any affidavit in opposition to it. The Petition, along with the unrebutted medical report of Dr. Willis, establishes that there are no genuine issues of material fact regarding the compensability of this claim.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings (DOAH) has jurisdiction over the parties to and the subject matter of these proceedings. §§ 766.301-766.316, Fla. Stat.

7. The Plan was established by the Legislature “for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims” related to births occurring on or after January 1, 1989. § 766.303(1), Fla. Stat.

8. An injured infant, his or her 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. Section 766.305(4) provides that NICA, which administers the Plan, has 45 days from the date that a complete claim is served 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.

9. If NICA determines that the alleged injury is a birth-related neurological injury that is compensable under the Plan, it may award compensation to the claimant, provided that the award is approved by the assigned administrative law judge. § 766.305(7), Fla. Stat. However, if NICA disputes the claim, as it does in this case, the dispute must be resolved by the assigned administrative law judge in accordance with chapter 120, Florida Statutes. §§ 766.304, 766.30, and 766.31, Fla. Stat.

10. The first inquiry is whether the infant has sustained a birth-related neurological injury as defined by section 766.302(2), which provides:

“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. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

11. If the administrative law judge determines that the infant meets the statutory threshold for weight and has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and that as a result of the injury the infant was rendered permanently and substantially mentally and physically impaired, then section 766.309(1) provides that there is a rebuttable presumption that the injury is a birth-related neurological injury.

12. In this case, the evidence does not support a finding that the injury is a birth-related neurological injury. This issue is dispositive with respect to compensability. Based upon this evidence, Jace Kelley did not sustain a birth-related neurological injury as defined in section 766.302(2), and is not eligible for benefits under the Plan.

CONCLUSION

Based upon the Findings of Fact and Conclusions of Law provided above, Petitioner's claim is not compensable under the Plan, and the Petition is dismissed with prejudice.

DONE AND ORDERED this 26th day of May, 2020, in Tallahassee, Leon
County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 26th 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).