STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANGELINA JOHNSON AND JOHN T. JOHNSON, JR., INDIVIDUALLY AND AS THE PARENTS AND NATURAL GUARDIANS OF ADAM JOHNSON, A MINOR,

Petitioners,

vs. Case No. 20-2377N

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,

Respondent,

and

LEE HEALTH SYSTEM N/K/A LEE HEALTH D/B/A HEALTHPARK MEDICAL CENTER,

Intervenor.
_____/

SUMMARY FINAL ORDER OF DISMISSAL

This matter came before the undersigned on Respondent's Motion for Summary Final Order (Respondent's Motion), filed January 13, 2021; Intervenor's Response to Respondent's Motion, filed January 25, 2021; and Petitioner's Notice of Clarification of Petitioner's Position (Petitioners' Notice), filed January 26, 2021.

STATEMENT OF THE CASE

On May 8, 2020, Petitioners, Angelina and John T. Johnson, Jr., as parents and natural guardians of Adam Johnson (Adam), a minor, filed a Petition for Benefits Pursuant to Florida Statute Section 776.301 *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 named Jane A. Daniel, M.D., as the physician who provided obstetric services for the birth of Adam at HealthPark Medical Center, in Fort Myers, Florida, on June 11, 2018.

On May 29, 2020, DOAH mailed a copy of the Petition to Respondent, Dr. Daniel, and HealthPark Medical Center via certified mail. Respondent was served with the same on June 1, 2020.

On June 17, 2020, Lee Memorial Health System n/k/a Lee Health d/b/a HealthPark Medical Center filed a petition for leave to intervene, which was granted on June 19, 2020. After granting three extensions of time to respond to the Petition, on November 16, 2020, Respondent filed its response to the Petition wherein Respondent maintained that the claim was not compensable because Adam did not sustain a "birth-related neurological injury," as defined by section 766.302(2), Florida Statutes. Respondent requested that a bifurcated hearing be scheduled to address the issues of compensability and notice first, and, if required, to address the amount of an award in a second hearing.

On November 20, 2020, the undersigned issued an Order requiring the parties to advise whether a final hearing would be required; and, if so, an estimate of the time required to conduct the hearing and several mutually agreeable dates, on or before February 1, 2021, in which the parties were available. In response, Respondent advised that compensability may be determined by a motion for summary final order.

On November 30, 2020, Petitioners', after consultation with Respondent and Intervenor, filed a Response to Scheduling Order wherein they advised as follows:

> Petitioners contend that a hearing is unnecessary because NICA has determined that the claim is not compensable. Petitioners will not oppose NICA's motion for summary judgment and do not believe additional discovery is required. Petitioners are seeking to pursue their civil remedies in Circuit Court outside of NICA. If compensability need be decided by hearing, Petitioners are challenging the reasonableness of the notice based on *Galen of Fla. v. Braniff*, 696 So. 2d 308 (Fla. 1997) and its progeny. Petitioners are electing their tort remedies.

In the same filing, it was represented that Intervenors desired an additional 60 days to conduct discovery prior to a hearing, if necessary. Thereafter, on December 4, 2020, a final hearing was scheduled and noticed for March 25 through 26, 2021.

On January 13, 2021, Respondent's Motion was filed. Said motion avers that Petitioners' claim is not compensable as Adam did not sustain a birth-related neurological injury. Respondent's Motion was represented as unopposed by Petitioners.

In response to an Order to Show Cause, on January 25, 2021, Intervenors represented that it "has no legal basis to show why Respondent's Motion for Summary Final Order should not be granted." Petitioners' Notice, filed January 26, 2021, clarifies that Petitioners agree with the relief sought by Respondent's Motion (a determination of noncompensability), but do not agree with the reasoning (that the infant did not sustain a birth-related neurological injury). Petitioners maintain that Intervenor did not satisfy the notice requirements of section 766.316, and, therefore, they "should have the option to elect common law remedies, instead of NICA benefits." A telephonic conference was conducted on February 19, 2021, and Petitioners represented

that they did not oppose Respondent's Motion and would not be filing a response in opposition.

FINDINGS OF FACT

1. Adam was born on June 11, 2018, at HealthPark Medical Center, in Fort Myers, Florida.

2. Adam was a single gestation and his weight at birth exceeded 2500 grams.

3. Obstetrical services were delivered by a participating physician, Jane A. Daniel, M.D., in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, HealthPark Medical Center.

4. As set forth in greater detail below, the unrefuted evidence establishes that Adam did not sustain a "birth-related neurological injury," as defined by section 766.302(2).

5. Donald Willis, M.D., a board-certified obstetrician specializing in maternal-fetal medicine, was retained by Respondent to review the pertinent medical records of Ms. Johnson and Adam and opine as to whether Adam 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.

6. In his affidavit, dated December 11, 2020, Dr. Willis summarized his opinions as follows:

> In summary, an abnormal FHR pattern developed during labor and resulted in a depressed newborn. Cord blood pH was 6.9 with a base excess of -18.6. Seizures began shortly after birth. The newborn hospital course was complicated by multi-system organ failures, consistent with birth-related oxygen deprivation. MRI on DOL 4 was suggestive of HIE, but findings improved with follow-up MRI.

> 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] a potential for brain injury, but the follow-up normal MRI suggests that no actual brain injury occurred.

7. Respondent also retained Michael S. Duchowny, M.D., a pediatric neurologist, to review the medical records of Ms. Johnson and Adam, and to conduct an Independent Medical Examination (IME) of Adam. The purpose of his review and IME was to determine whether Adam suffered from a permanent and substantial mental and physical impairment as a result of an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury in the course of labor, delivery, or resuscitation in the immediate post-delivery period.

8. Dr. Duchowny reviewed the pertinent medical records and, on October 20, 2020, conducted the IME. In his affidavit, dated December 16, 2020, Dr. Duchowny summarized his opinions as follows:

> In summary, Adam's evaluation reveals findings consistent with a substantial motor but not mental impairment. He evidences a spastic diplegia, but with relative preservation of motor milestones, and age-appropriate receptive and expressive communication. Adam additionally has a severe behavior disorder, and has a sleep disorder and attentional impairment. His seizures are in remission.
>
> Review of the medical records reveals that Adam was the product of a 40 week gestation and was delivered vaginally with Apgar scores of 3, 6, 7 and 6 at one, five and 10 minutes. Terminal meconium was noted at delivery. Adam initially required positive pressure ventilation until his respirations were subsequently managed with nasal CPAP. His cord gas pH was 6.917 with a base excess of – 18.6.

> Adam developed seizures in the NICU and was intubated on the first day of life for apnea. Multiple seizures were documented on video/EEG monitoring. He was oliguric on the first day of life and had elevated liver function studies. An elevated lactic acid level was noted and there was a borderline elevation of DIC parameters.
>
> Adam was enrolled in a body hypothermia protocol on the first day of life. His blood pressure was maintained with dopamine.
>
> A head ultrasound on June 11 at 22:23 (DOL#2) was unremarkable. A brain MR imaging study performed on June 15, (DOL#5) revealed multifocal areas of restricted diffusion. Follow-up brain MR imaging study on July 5th revealed near-complete resolution of the previously observed diffusion abnormalities. A third MR imaging study obtained one month ago confirms the resolution of the DWI findings noted on the first brain MR imaging study.

9. In conclusion, Dr. Duchowny opined that Adam does not have a substantial mental impairment, and, therefore, did not recommend that Adam be considered for inclusion in the Plan.

10. The undisputed findings and opinions of Drs. Willis and Duchowny are credited. The undersigned finds that Adam did not sustain an injury to the brain or spinal cord 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 rendered him permanently and substantially mentally and physical impaired.

CONCLUSIONS OF LAW

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

12. 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.

13. 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.

14. 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, 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.

15. 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.

16. 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.

17. If the ALJ determines that the injury is not a birth-related neurological injury, or that obstetrical services were not delivered by a participating physician at birth, he or she is required to enter an order and immediately provide a copy to the parties. § 766.309(2), Fla. Stat.

18. The undisputed evidence establishes that there was not an injury to Adam's brain 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 rendered him permanently and substantially mentally and physically impaired. Thus, it is concluded that he did not sustain a compensable birth-related neurological injury, as defined in section 766.302(2), and, therefore, is not eligible for benefits under the Plan.

CONCLUSION

Based on the Findings of Fact and the Conclusions of Law, it is ORDERED that Respondent's Motion is granted and the Petition is dismissed with prejudice.

DONE AND ORDERED this 25th day of February, 2021, in Tallahassee, Leon County, Florida.

TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
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this 25th day of February, 2021.

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).