

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

BROOKE BAILEY AND ROBERT HOWE, ON
BEHALF OF AND AS PARENTS AND
NATURAL GUARDIANS OF ELAINA Z. HOWE,
A MINOR,

Petitioners,

vs.

Case No. 20-2379N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

ST. LUKE'S-ST. VINCENT'S HEALTHCARE,
INC. D/B/A VINCENT'S MEDICAL CENTER-
SOUTHSIDE AND NKEMDILIM NWOSA, M.D.,

Intervenors.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon the Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on July 29, 2020.

STATEMENT OF THE CASE

On May 20, 2020, Petitioners Brooke Bailey and Robert Howe, on behalf of and as parents and natural guardians of Elaina Z. Howe (Elaina), 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 Nkemdilim Nwosa, M.D., as the physician who provided obstetric services at the birth of Elaina on July 23, 2018, at St. Vincent's Hospital, located in Duval County, Florida.

DOAH served Nkemdilim Nwosa, M.D., St. Vincent's Hospital, and NICA with a copy of the Petition on May 29, 2020.

On June 24, 2020, NICA filed a Response to Petition for Benefits, asserting that Elaina 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 June 30, 2020, the undersigned entered an Order that required the parties to confer and advise concerning the need for a hearing, if any, and if a hearing was needed, when the parties would be prepared to proceed to a hearing, the issues in dispute, the estimate of time required for hearing, and the choice of venue. On July 9, 2020, the parties filed a Joint Response to June 30 Order, requesting an additional 10-day extension to respond to the June 30, 2020, Order. On July 10, 2020, the undersigned entered an Order granting the requested ten-day extension. On July 17, 2020, NICA filed a Response to Order of June 30, 2020, noting that Petitioners had not yet retained counsel, but that NICA had spoken with Petitioners' potential counsel, and further noting that NICA intended to file a motion for summary final order and requesting that the undersigned not schedule this case for hearing. On July 20, 2020, the undersigned entered another Order, providing the parties an additional 30 days to respond to the June 30, 2020, Order. On July 31, 2020, counsel appeared on behalf of Petitioners.

On July 29, 2020, NICA filed its Motion for Partial Summary Final Order (Motion). Having received no response from Petitioners to the Motion within the seven-day time period for a response set forth in Florida Administrative

Code Rule 28-106.204(4), the undersigned issued an Order to Show Cause on August 7, 2020, ordering Petitioner to show cause, on or before August 19, 2020, in writing, why NICA's Motion should not be granted and a summary final order be entered finding that Petitioner's claim is not compensable. On August 10, 2020, Intervenors filed a Request for Additional Time. And, on August 20, 2020, Petitioners, who at this point were represented by counsel, filed a Motion for Extension of Time to Respond to Respondent's Motion for Summary Final Order, requesting until November 20, 2020, to respond to the Motion. On August 20, 2020, the undersigned entered an Order on Pending Pleadings that, *inter alia*, allowed the parties to respond to the Motion no later than November 20, 2020.

On November 20, 2020, Petitioners filed a Response to Respondent's Motion for Summary Order and Motion for Extension of Time, which requested an additional 60 days for NICA's expert to consider fetal heart tracing, and included, as an exhibit, such fetal heart tracing. On December 8, 2020, the undersigned entered an Order Granting Extension of Time for Petitioner to Respond to Motion for Summary Final Order, ordering that "Petitioner [sic] shall file its complete response to the Motion for Summary Final Order no later than January 19, 2021." On December 21, 2020, NICA filed a Supplemental Affidavit of Donald C. Willis, M.D., which offered an opinion after reviewing the additional fetal heart tracing records submitted by Petitioner.

On February 5, 2021, the undersigned entered a Second Order to Show Cause, noting that Petitioners had not filed a response to the Motion, and that the Motion had been pending for over six months. The Second Order to Show Cause ordered Petitioners to show cause, in writing, why the Motion should not be granted and a summary final order be entered, on or before

February 12, 2021. Petitioners have not responded to NICA's Motion or the undersigned's Second Order to Show Cause.

FINDINGS OF FACT

1. Elaina was born on July 23, 2018, at St. Vincent's Hospital, located in Duval County, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Elaina. In a medical report dated August 13, 2020, Dr. Willis summarized his findings and opined, in pertinent part, as follows:

In summary, pregnancy was essentially uncomplicated. Spontaneous vaginal birth resulted in a healthy newborn with Apgar scores of 8/9. The newborn hospital course was uncomplicated. MRI at about one year of age showed cerebral volume loss, consistent with prior brain injury. The brain injury was apparently not due to birth related oxygen deprivation or trauma.

As such, it is my opinion that there was no apparent obstetrical event that resulted in oxygen deprivation and or mechanical trauma to the brain or spinal cord during labor, delivery or in the immediate post-delivery period.

3. NICA retained Raj D. Sheth, M.D. (Dr. Sheth), a medical expert specializing in pediatric neurology, to examine Elaina and to review her medical records. Dr. Sheth examined Elaina on June 17, 2020. In a medical report dated June 17, 2020, Dr. Sheth summarized his examination of Elaina and opined, in pertinent part, as follows:

1. Elaina Howe does suffer from substantial physical impairment and substantial mental impairment as manifest by delays in gross motor, and fine motor, language and personal social skills.

2. Elaina Howe mental and physical impairments are likely to be permanent although there is likely to be some improvement with time.

3. The mental and physical impairments are not consistent with an injury to the brain or spinal cord acquired due to oxygen deprivation or mechanical injury occurring during labor and delivery or immediate post delivery period.

4. The permanent and substantial impairments from the records provided and this evaluation do not appear to have occurred during labor, delivery or the immediate post-delivery period.

4. NICA filed a Supplemental Affidavit of Dr. Willis on December 21, 2020, in which he offered an opinion on the fetal heart tracing records submitted by Petitioners. Dr. Willis opined as follows:

The FHR tracing during labor was reassuring (no distress), consistent with my previous opinion, dated 6/17/20, that there was no apparent obstetrical event that resulted in oxygen deprivation and or mechanical trauma to the brain or spinal cord during labor, delivery or in the immediate post delivery period.

The Opinions set forth in my Affidavit executed July 21, 2020 remain the same and are not modified by my review of the additional medical records as indicated herein.

5. 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 Elaina. Dr. Willis's opinion is credited. There are no expert opinions filed that are contrary to Dr. Sheth's opinion that Elaina should not be considered for inclusion in the NICA program. Dr. Sheth's opinion is credited.

6. Petitioners have failed to respond to the Motion or the undersigned's Second Order to Show Cause.

CONCLUSIONS OF LAW

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

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. To be compensable under the 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).

14. The evidence, which Petitioners have not refuted or attempted to refute, established that Elaina did not suffer a birth-related neurological injury. Therefore, Elaina 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 Brooke Bailey and Robert Howe, on behalf of and as parents and natural guardians of Elaina Z. Howe, is dismissed with prejudice.

DONE AND ORDERED this 23rd day of February, 2021, in Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
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Filed with the Clerk of the
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this 23rd day of February, 2021.

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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).