

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

RYAN BUNCH AND REGINA OLES ON  
BEHALF OF AND AS PARENTS AND  
NATURAL GUARDIANS OF JETTY BUNCH, A  
MINOR,

Petitioners,

Case No. 20-2843N

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

TEDRA GILMORE, M.D., AND HALIFAX  
HOSPITAL MEDICAL CENTER D/B/A HALIFAX  
HEALTH MEDICAL CENTER,

Intervenors.

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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 September 23, 2021.

STATEMENT OF THE CASE

On June 18, 2020, Petitioners, Ryan Bunch and Regina Oles, on behalf of and as parents and natural guardians of Jetty Bunch (Jetty), 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 Tedra Gilmore, M.D., as the physician who provided obstetric services at the birth of Jetty on June 19, 2015, at Halifax Medical Center, located in Volusia County, Florida.

DOAH served Dr. Gilmore, Halifax Medical Center, and NICA with a copy of the Petition on June 25, 2020.

Between July 22, 2020, and July 12, 2021, the undersigned granted six extensions of time for NICA to respond to the Petition, because of difficulties in securing medical records. On August 11, 2021, NICA filed a Response to Petition for Benefits, asserting that Jetty 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 August 13, 2021, 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 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 August 27, 2021, NICA filed a Response to Order Dated August 13, 2021, which noted the position of NICA and Intervenors was that this matter could be resolved by Motion for Summary Final Order, and the position of Petitioners was that they disputed NICA’s determination and requested a hearing. The undersigned thereafter noticed this matter for a final hearing for October 29, 2021.

On September 23, 2021, 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 October 1, 2021, ordering Petitioners to show cause, on or before October 14, 2021, 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. Petitioners have not responded to NICA's Motion or the undersigned's Order to Show Cause.

#### FINDINGS OF FACT

1. Jetty was born on June 19, 2015, at Halifax Health Medical Center, d/b/a Halifax Medical Center, located in Volusia County, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Jetty. In a medical report dated August 6, 2021, Dr. Willis summarized his findings and opined, in pertinent part, as follows:

In summary, spontaneous labor occurred at term and ended with a spontaneous vaginal delivery. Apgar scores were 5/9. Bag and mask ventilation was given for about 4-minutes due to respiratory distress at birth. Oxygen was weaned with spontaneous respirations. The baby was considered stable and remained in the room with the mother. Twenty minutes after birth the baby was noted to be floppy and cyanotic. Laboratory evaluation identified severe hypoglycemia and DIC. MRI showed brain hemorrhage with follow up MRI showing evolving brain injury related to the previously identified hemorrhage. Genetic evaluation was negative.

The baby suffered brain injury as indicated by MRI. Although the baby was initially depressed at birth, stabilization occurred shortly after birth with the baby remaining in the room with the mother and not requiring nursery care. This would suggest the baby did not have significant oxygen deprivation at birth. The brain injury likely occurred at some time around delivery, but it does not appear the brain injury was caused by oxygen deprivation or trauma during labor and delivery. I do not have any opinions about issues related to the hypoglycemia or DIC as a cause for the brain injury.

3. NICA retained Michael S. Duchowny, M.D. (Dr. Duchowny), a medical expert specializing in pediatric neurology, to examine Jetty and to review his medical records. Dr. Duchowny examined Jetty on June 7, 2021. In a medical report dated August 8, 2021, Dr. Duchowny summarized his examination of Jetty and opined, in pertinent part, as follows:

In summary, Jetty's examination reveals substantial cognitive and motor deficits consistent with global developmental delay. Jetty is non-fluent, non-ambulatory with spastic quadriparesis and primitive reflex responses. He has asymmetrically greater right-sided involvement, a non-fixed right elbow contracture, and shortening of his right leg. He lacks consistent visual fixation and following, and a history suggestive of bilateral optic atrophy. There is a longstanding pharmacoresistant epilepsy. Jetty's neurodevelopmental delays have been present since infancy and he has shown little developmental progress.

A review of Jetty's medical records reveals that he was born at Halifax Medical Center and was the product of a 40 week gestation with a birth weight of 3742 grams. The pregnancy was complicated by maternal maintenance buprenorphine for management of substance abuse. Rupture of membranes occurred 4 hours prior to delivery and revealed thickly meconium-stained fluid.

Apgar scores were 5 and 9 at 1 and 5 minutes; cord blood gases were therefore not ordered. Jetty was placed with his mother in the newborn nursery but suddenly became cyanotic and ashen, received supplemental blow-by oxygen, and was transferred to the NICU. An Accucheck was unrecordable and serum glucose determination was recorded as 1. Arterial blood gases revealed respiratory acidosis with a pH of 7.24 and base excess of -1.8.

Laboratory examination revealed a leukocytosis (WBC=36.3) with elevated mononuclear cells and bandemia. Jetty was subsequently transferred to

Shands Jacksonville where he evidenced an elevated CRP, a PDA, acute adrenal insufficiency, hematuria, acute renal failure and DIC with thrombocytopenia and abnormal clotting parameters. MR imaging performed on July 7<sup>th</sup> revealed multifocal diffusion-weighted abnormalities, ventriculomegaly and periventricular signal abnormality; the report also noted intracranial hemorrhage. Subsequent MR imaging on July 20<sup>th</sup> revealed the development of multi-cystic white matter lesions, PVL and further ventricular enlargement.

The clinical and imaging findings and brain injury are most likely caused by the fetal inflammatory response syndrome, and did not result from either mechanical injury or oxygen deprivation in the course of labor or delivery. The hemorrhage reported on brain imaging did not contribute to the brain injury. I am therefore not recommending that Jetty be considered for inclusion in 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 Jetty. Dr. Willis's opinion is credited. There have been no expert opinions filed that are contrary to Dr. Duchowny's opinion that Jetty should not be considered for inclusion in the NICA Plan. Dr. Duchowny's opinion is credited.

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

#### 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 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 Petitioners have not refuted or attempted to refute, established that Jetty did not suffer a birth-related neurological injury. Therefore, Jetty 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 Ryan Bunch and Regina Oles, on behalf of and as parents and natural guardians of Jetty Bunch, is dismissed with prejudice. The final hearing scheduled for October 29, 2021, is cancelled.

DONE AND ORDERED this 21st day of October, 2021, in Tallahassee, Leon County, Florida.



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ROBERT J. TELFER III  
Administrative Law Judge  
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Filed with the Clerk of the  
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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).