

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

MELISSA PREVATTE AND DEREK
NORSWORTHY, INDIVIDUALLY AND AS
PARENTS AND NATURAL GUARDIANS OF,
GRACEN NORSWORTHY, MINOR CHILD,

Petitioners,

vs.

Case No. 20-3385N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

GALENCARE, INC., D/B/A BRANDON
REGIONAL HOSPITAL; AND MAYA
KAMATH, M.D., AND WOMEN'S CARE
FLORIDA, L.L.C.,

Intervenors.

SUMMARY FINAL ORDER OF DISMISSAL

This cause came for consideration on the Unopposed Motion for Final Summary Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association ("NICA"), on March 8, 2021.

STATEMENT OF THE CASE

On July 14, 2020, Melissa Prevatte and Derek Norsworthy, individually and as Parents and natural guardians of Gracen Norsworthy ("Gracen"), a minor child, filed a Petition for Benefits Filed Pursuant to Florida Statute Section 766.301 et seq (the "Petition"), with the Division of Administrative

Hearings ("DOAH") for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan").

The Petition identified Maya Kamath, M.D., as the physician who provided obstetrical services at Gracen's birth on June 26, 2019, at Galencare, Inc., d/b/a Brandon Regional Hospital ("Brandon Hospital"), in Brandon, Florida.

DOAH served Dr. Kamath with a copy of the Petition on August 3, 2020, and served Brandon Hospital that same date. DOAH also served NICA with a copy of the Petition on August 3, 2020.

Brandon Hospital moved to intervene in this matter on August 11, 2020, which was granted. Dr. Kamath and Women's Care Florida, L.L.C., also moved to intervene on August 21, 2020, which was also granted.

On October 13, 2020, NICA filed its response to the Petition, taking the position that Petitioners' claim is not compensable under the Plan. NICA requested DOAH schedule an evidentiary hearing to determine compensability.

On March 8, 2021, NICA filed an Unopposed Motion for Final Summary Order requesting the Administrative Law Judge ("ALJ") to enter a summary final order finding the claim not compensable under the NICA statute because Gracen did not suffer a "birth-related neurological injury" as defined in section 766.302(2), Florida Statutes.

FINDINGS OF FACT

1. Gracen was born on June 26, 2019, at Brandon Hospital located in Brandon, Florida.

2. According to the Petition, Maya Kamath, M.D., provided obstetrical services at Gracen's birth.¹

3. Upon receiving the Petition, NICA retained Donald Willis, M.D., a board-certified obstetrician/gynecologist specializing in maternal-fetal medicine, as well as Luis E. Bello-Espinosa, M.D., a pediatric neurologist, to review Gracen's medical records and condition. NICA sought to determine whether Gracen suffered a "birth-related neurological injury" as defined in section 766.302(2). Specifically, NICA requested its medical consultants opine whether Gracen experienced an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury which occurred in the course of labor, delivery, or resuscitation in the immediate post-delivery period. And, if so, whether this injury rendered Gracen permanently and substantially mentally and physically impaired.

4. Dr. Willis reviewed Gracen's medical records and noted that:

The mother was admitted for induction of labor at 39 weeks gestational age.

* * *

Cesarean section was done for a non-reassuring FHR pattern. A true knot was noted in the umbilical cord at birth.

* * *

The delivery operative note describes the baby as pink and vigorous at birth. Neonatal team noted poor respiratory effort once placed in the warmer. ... Despite resuscitative measures, the baby remained floppy with delayed perfusion.

* * *

¹ No evidence was presented establishing that Dr. Kamath was a "participating physician" under the NICA statute at the time Gracen was born. *See* §§ 766.302(7) and 766.314(4), Fla. Stat. However, this finding is not pertinent to this Final Order as Gracen did not suffer a compensable injury under the Plan.

The baby was taken to the NICU. ... Chest X-ray suggested transient tachypnea of the newborn (TTN). Hypoxic ischemic encephalopathy (HIE) was suspected and the baby was transferred to [Tampa General Hospital] for possible cooling protocol.

* * *

EEG showed depressed cerebral activity while on cooling protocol, but no seizure activity was noted. Neurologic exam at time of newborn hospital discharge was considered normal.

* * *

In summary, labor was induced at term. A non-reassuring FHR pattern during labor required Caesarean delivery. ... Cooling protocol was initiated for suspected HIE. No seizure activity was noted, either clinically or by EEG. Head ultrasound was normal. MRI on DOL 7 was normal. There was some degree of oxygen deprivation at birth ... However, MRI on DOL 7 did not identify any brain injury.

5. Dr. Willis concluded that, "Fortunately, the oxygen deprivation did not result in any identifiable brain injury."

6. Dr. Bella-Espinosa agreed with Dr. Willis that Gracen did not suffer injuries that qualify for inclusion in the NICA Plan. Dr. Bella-Espinosa reviewed Gracen's medical records, as well as conducted an independent medical examination of Gracen on October 9, 2020, when Gracen was 15 months old. Following the examination, Dr. Bella-Espinosa reported that:

Gracen was quite alert and interactive. He had great attention. ... The tone of arms and legs was normal. ... [H]e was able to walk on his own power without difficulties. ... He reached for objects without any tremors or dysmetria.

Thereafter, Dr. Bella-Espinosa concluded that Gracen's prognosis is "excellent," and that his "estimated life expectancy is normal." Dr. Bella-Espinosa then opined:

In reviewing all the available documents, there is no evidence of permanent and substantial mental and physical impairments of the brain or spinal cord that may have been due to oxygen deprivation or mechanical injury that may have occurred during labor, delivery or the immediate post-delivery period. ... Considering the clinical presentation, I do feel that there is no evidence to recommend Gracen is included in the NICA program.

7. A review of the documents in the record reveals no contrary evidence to dispute the findings and opinions of Dr. Willis and Dr. Bella-Espinosa. Their opinions are credible and persuasive.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 766.301 through 766.316. The undersigned, as an Administrative Law Judge ("ALJ"), has "exclusive jurisdiction to determine whether a claim filed under [NICA] is compensable." §§ 766.301(1)(d), 766.304, and 766.311(1), Fla. Stat.

9. The Florida Legislature established the Plan "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims." § 766.303(1), Fla. Stat.

10. To seek compensation under the Plan, a legal representative on behalf of an injured infant files a claim with DOAH. §§ 766.302(3) and 766.305(1), Fla. Stat. NICA, which administers the Plan, then 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.

11. 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 ALJ to whom the claim has been assigned. § 766.305(7), Fla. Stat.

12. In this matter, however, NICA determined that Petitioners' claim is not compensable under the Plan. Therefore, NICA filed the Unopposed Motion for Final Summary Order, requesting a finding that Gracen is not eligible for NICA Plan benefits.

13. In reviewing the compensability of a claim, section 766.309(1) directs the ALJ to 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; and

(c) How much compensation, if any, is awardable pursuant to s. 766.31.

14. The term "birth-related neurological injury" is defined in section 766.302(2) as:

injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation ... 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.

15. "The [NICA] Statute is written in the conjunctive and can only be interpreted to require permanent and substantial impairment that has both physical and mental elements." *Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings*, 686 So. 2d 1349, 1356 (Fla. 1997).

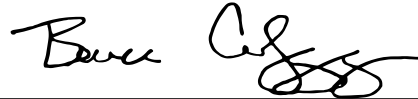
16. In reviewing the injury in this matter, the preponderance of the evidence does not establish that Gracen sustained a "birth-related neurological injury" as defined in section 766.302(2). Dr. Willis specifically noted that, while there "was some degree of oxygen deprivation at birth," Gracen's "MRI on DOL 7 did not identify any brain injury." Similarly, Dr. Bella-Espinosa found that "there is no evidence of permanent and substantial mental and physical impairments of the brain or spinal cord that may have been due to oxygen deprivation or mechanical injury that may have occurred during labor, delivery or the immediate post-delivery period."

17. Accordingly, based on all the available evidence in the record, the undersigned determines that Gracen has not suffered a "birth-related neurological injury" and is not eligible for NICA benefits.

DISPOSITION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition is dismissed, with prejudice.

DONE AND ORDERED this 15th day of March, 2021, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
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Filed with the Clerk of the
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this 15th day of March, 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).