

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

ANNA AND JOSHUA COMEAU,  
INDIVIDUALLY AND AS PARENTS AND  
NATURAL GUARDIANS OF ADALINE  
COMEAU, MINOR CHILD,

Petitioners,

Case No. 20-3387N

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

GALENCARE, INC. D/B/A BRANDON  
REGIONAL HOSPITAL; MARIAN A.  
SAMPSON, M.D., AND WOMEN'S CARE  
FLORIDA, LLC.,

Intervenors.

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SUMMARY FINAL ORDER OF DISMISSAL

This cause came before the undersigned on Respondent Florida Birth-Related Neurological Injury Compensation Association's ("NICA") unopposed Motion for Summary Final Order, filed on December 1, 2020.

STATEMENT OF THE CASE

Whether Adaline Comeau ("Adaline") suffered a "birth-related neurological injury," as defined by section 766.302(2), Florida Statutes,<sup>1</sup> for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan ("Plan").

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<sup>1</sup> All references to the Florida Statutes are to the 2018 versions, unless otherwise specified.

## PRELIMINARY STATEMENT

On July 6, 2020, Anna and Joshua Comeau, Individually and as Parents and Natural Guardians of Adaline, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. with the Florida Division of Administrative Hearings (“DOAH”). Petitioners argued that Adaline was eligible for NICA benefits because she suffered a compensable birth-related neurological injury.

The Petition named Marian A. Sampson, M.D., as the obstetrician who delivered Adaline on November 22, 2018, and Brandon Regional Hospital (“Hospital”) as the Hospital where she was born. DOAH sent copies of the Petition via Certified U.S. Mail to NICA, Dr. Sampson, and the Hospital on August 3, 2020.

On August 18, 2020, the Hospital moved to intervene in this proceeding. Petitioners filed a response that agreed with the Hospital’s intervention on the issues of notice and whether it was participating in the Plan, but opposed intervention as to compensability. Petitioners argued that the Hospital was not an indispensable party because NICA could adequately represent its interests in this proceeding. On August 19, 2020, the undersigned granted the Hospital’s motion based on binding case law. On August 21, 2020, Dr. Sampson moved to intervene and the undersigned granted her motion.

On September 3, 2020, the Hospital requested an opportunity to conduct discovery, but the undersigned denied that request without prejudice to refile it once NICA had an opportunity to respond to the Petition and determine its position as to compensability, which may obviate the need for a final hearing in this matter.

On October 20, 2020, NICA filed a Notice of Non-Compensability and Request for Evidentiary Hearing on Compensability, arguing that its experts reviewed the medical records, conducted an examination of Adaline, and opined that the claim was not compensable. At a teleconference held on October 22, 2020, Petitioners indicated that they agreed with NICA's determination as to compensability; Intervenors requested an opportunity to conduct limited discovery to confirm their position on that issue. In an Order dated October 28, 2020, the undersigned authorized Intervenors to obtain a complete set of Adaline's medical records, depose Petitioners about Adaline's condition, and have their own experts conduct an independent medical examination ("IME") of Adaline. The undersigned required the parties to file a Joint Status Report on or before January 26, 2021.

On December 1, 2020, NICA filed a Motion for Partial Summary Final Order arguing that the claim was not compensable because, although there was an oxygen deprivation event during labor, delivery, and the immediate post-delivery period, it neither caused Adaline to suffer brain injury nor rendered her permanently and substantially physically and mentally impaired. NICA supported its motion with affidavits and reports of two medical experts. Petitioners did not contest NICA's motion. In an Order dated December 2, 2020, the undersigned gave Intervenors until January 26, 2021, to either respond to NICA's motion or file a Joint Status Report if they intended not to oppose the motion.

Over the next two months, Intervenors deposed Petitioners and requested additional medical records from other medical professionals. However, on January 22, 2021, Intervenors moved to compel Petitioners to answer additional deposition questions as to Adaline's condition and requested more time to obtain further medical records. The undersigned held a teleconference on the motion on January 25, 2021. In an Order dated January 26, 2021, the

undersigned gave Intervenor 30 days to obtain the medical records and conduct an IME, denied the request to re-depose Petitioners, and required Intervenor to file a Status Report on or before February 24, 2021.

On February 24, 2021, Intervenor filed a Joint Status Report after reviewing the additional medical records and confirmed that they, too, would not contest NICA's motion for summary final order or request a final hearing.

#### FINDINGS OF FACT

1. Petitioners are the parents and legal guardians of Adaline.
2. On November 22, 2018, Ms. Comeau gave birth to Adaline, a single gestation of 39 weeks, at the Hospital. Adaline was delivered by cesarean section and weighed 3,883 grams.
3. Marian A. Sampson, M.D., provided obstetrical services and delivered Adaline.
4. The undisputed record evidence consists of affidavits and reports of two physicians—Donald Willis, M.D., a board-certified obstetrician, and Luis Bello-Espinosa, M.D., a board-certified pediatric neurologist who conducted an IME of Adaline.
5. Dr. Willis reviewed the medical records and summarized his opinions about Adaline's delivery and the attendant complications in a report dated October 12, 2020.
6. Dr. Willis noted that Ms. Comeau's prenatal course was uncomplicated and she was admitted to the Hospital at 39 weeks gestational labor. Although Adaline's fetal heart rate ("FHR") was appropriate upon admission, fetal tachycardia and variable decelerations occurred about one hour prior to delivery. Dr. Sampson applied a vacuum extractor to assist delivery due to the non-reassuring FHR pattern, but ultimately performed a cesarean section due to arrest of descent.

7. At birth, Adaline was depressed, floppy, and cyanotic. The Hospital administered bag and mask ventilation and intubation was required. Adaline's trachea had copious amounts of meconium consistent with meconium aspiration syndrome ("MAS"). Her APGAR scores were three at one minute, five at five minutes, and seven at ten minutes.

8. Adaline was transferred to the NICU with respiratory distress and was intubated for seven days. During that period, continuous EEG showed no seizure activity. A head ultrasound on day one was normal and an MRI on day seven showed no ischemia or hemorrhage.

9. Based on the medical records, Dr. Willis opined to a reasonable degree of medical probability that an obstetrical event resulting in oxygen deprivation to the brain occurred during the birth, but fortunately it did not cause any identifiable brain injury.

10. Dr. Bello-Espinosa reviewed the medical records, conducted an IME on Adaline, and summarized his opinions in a report dated October 9, 2020, as to whether Adaline suffers from permanent and substantial mental and physical impairment caused by an oxygen deprivation event.

11. After being diagnosed with moderate neonatal hypoxic-ischemic encephalopathy, Adaline underwent therapeutic hypothermal treatment at All Children's Hospital for 72 hours. During her course at the NICU, there were no electro-clinical or electrographic seizures, and her MRI was normal.

12. Dr. Bello-Espinosa conducted an IME on October 9, 2020. Adaline's neurological examination was normal except for mild left-sided facial asymmetric smile, which Dr. Bello-Espinosa believed was a congenital condition that was not caused by brain or nerve damage. Adaline exhibited neither indications of any residual encephalopathy or brain dysfunction nor upper or lower motor signs. Her development was normal for her age.

13. Based on the medical records and his IME, Dr. Bello-Espinosa opined to a reasonable degree of medical probability that Adaline does not suffer from permanent and substantial mental and physical impairment.

## CONCLUSIONS OF LAW

14. DOAH has jurisdiction over the parties and exclusive jurisdiction over the subject matter of this case. § 766.304, Fla. Stat.

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

16. 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. NICA, which administers the Plan, has 45 days from the date that a complete claim is served to file a response and to submit relevant written information as to whether the injury is a birth-related neurological injury. § 766.305(4), Fla. Stat.

17. If NICA determines that the infant suffered a compensable birth-related neurological injury, it may award compensation to the claimants, as approved by the assigned administrative law judge (“ALJ”). § 766.305(7), Fla. Stat. But, if NICA disputes the claim, as it does here, the dispute must be resolved by an ALJ in accordance with chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

18. In determining compensability, the ALJ must make the following determinations based upon the 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.

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

(d) Whether, if raised by the claimant or other party, the factual determinations regarding the notice requirements in s. 766.316 are satisfied. The administrative law judge has the exclusive jurisdiction to make these factual determinations.

§ 766.309(1), Fla. Stat.

19. The term “birth-related neurological injury” is defined as follows:

[I]njury 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.

§ 766.302(2), Fla. Stat. Thus, a birth-related neurological injury has four components: “(1) an injury to the brain or spinal cord; (2) which is caused by oxygen deprivation or mechanical injury; (3) during labor, delivery, or resuscitation in the immediate postdelivery period; and (4) which renders the infant permanently and substantially impaired.” *Bennett v. St. Vincent’s Med. Ctr., Inc.*, 71 So. 3d 828, 837 (Fla. 2011).

20. Petitioners have the burden to establish by a preponderance of the evidence “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.” § 766.309(1)(a), Fla. Stat.; *see also* § 120.57(1)(j), Fla. Stat. (providing that findings of fact, except in penal and licensure disciplinary proceedings or as

provided by statute, “shall be based upon a preponderance of the evidence”); *Balino v. Dep’t of HRS*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977) (holding generally that “the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal”).

21. If Petitioners meet their burden, section 766.309(1) provides that there is a rebuttable presumption that the injury is a birth-related neurological injury. Conversely, if Petitioners do not meet their burden, the undersigned is required to issue an order dismissing the Petition. *Id.*

22. Based on the Findings of Fact above, the undisputed evidence establishes that, although an oxygen deprivation event occurred during the delivery, it neither caused Adaline to sustain a brain injury nor rendered her permanently and substantially mentally and physically impaired. Thus, she did not suffer a “birth-related neurological injury.” § 766.302(2), Fla. Stat.

23. Accordingly, based on the Findings of Fact above and the undisputed evidence, Adaline is not eligible for benefits under the Plan.

#### CONCLUSION

Based on the Findings of Fact and Conclusions of Law herein, Petitioners’ claim is not compensable, NICA’s unopposed Motion for Summary Final Order is granted, and the Petition is dismissed with prejudice.

DONE AND ORDERED this 8th day of March, 2021, in Tallahassee, Leon County, Florida.



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ANDREW D. MANKO  
Administrative Law Judge  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
www.doah.state.fl.us



Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of March, 2021.

COPIES FURNISHED (via certified mail):

Amie Rice, Investigation Manager  
Consumer Services Unit  
Department of Health  
4052 Bald Cypress Way, Bin C-75  
Tallahassee, Florida 32399-3275  
(Certified No. 7019 1640 0000  
2306 3194)

Armando T. Lauritano, Esquire  
Morgan & Morgan, P.A.  
7th Floor  
201 North Franklin Street  
Tampa, Florida 33602  
(Certified No. 7020 1290 0001  
6309 9836)

Mark R. Messerschmidt, Esquire  
La Cava Jacobson & Goodis, PA  
Suite 1250  
501 East Kennedy Boulevard  
Tampa, Florida 33602  
(Certified No. 7020 1290 0001  
6309 9850)

Louis J. La Cava, Esquire  
La Cava & Jacobson, P.A.  
Suite 1250  
501 East Kennedy Boulevard  
Tampa, Florida 33602  
(Certified No. 7020 1290 0001  
6309 9874)

Marian A. Sampson, MD  
Brandon Regional Hospital  
119 Oakfield Drive  
Brandon, Florida 33511  
(Certified No. 7020 1290 0001  
6309 9898)

Simone Marstiller, Secretary  
Health Quality Assurance  
Agency for Health Care  
Administration  
2727 Mahan Drive, Mail Stop 1  
Tallahassee, Florida 32308  
(Certified No. 7020 1290 0001  
6309 9829)

Kenney Shipley, Executive Director  
Florida Birth-Related Neurological  
Injury Compensation Association  
2360 Christopher Place, Suite 1  
Tallahassee, Florida 32308  
(Certified No. 7020 1290 0001  
6309 9843)

David W. Black, Esquire  
Frank, Weinberg & Black, P.L.  
7805 Southwest 6th Court  
Plantation, Florida 33324  
(Certified No. 7020 1290 0001  
6309 9867)

Carissa Brumby, Esquire  
Beytin, McLaughlin, McLaughlin,  
O'Hara, Bocchino & Bolin, P.A.  
1706 East Eleventh Avenue  
Tampa, Florida 33606  
(Certified No. 7020 1290 0001  
6309 9881)

Brandon Regional Hospital  
Attention: Risk Management  
119 Oakfield Drive  
Brandon, Florida 33511  
(Certified No. 7020 1290 0001  
6309 9904)

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).