

**STATE OF FLORIDA**  
**DIVISION OF ADMINISTRATIVE HEARINGS**

GEORGE BULL AND HOLLI BULL, ON  
BEHALF OF AND AS PARENTS AND  
NATURAL GUARDIANS OF JAXSON BULL, A  
MINOR,

Petitioners,

vs.

Case No. 20-3597N

FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION,

Respondent.

\_\_\_\_\_ /

SUMMARY FINAL ORDER OF DISMISSAL

This came before the undersigned on Respondent's Amended Motion for Summary Final Order, filed January 25, 2021. Petitioners did not file a response to the motion within the allowable response period.

In its Motion, the Florida Birth-Related Neurological Injury Compensation Association (NICA) asserts that in order for a claim to be compensable under the Florida Birth-Related Neurological Injury Compensation Plan (the Plan), the statutory prerequisites of section 766.309, Florida Statutes, must be met, including:

(1) The administrative law judge shall 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.

\* \* \*

*(2) If the administrative law judge determines that the injury alleged is not a birth-related neurological injury or that obstetrical services were not delivered by a participating physician at the birth, she or he shall enter an order . . . (emphasis added).*

The term “birth-related neurological injury” is defined in section 766.302(2) as:

(2) “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. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality. (emphasis added).

#### FINDINGS OF FACT

1. On July 27, 2020, Petitioners filed a Petition for Determination as to Applicability of Florida Birth-Related Neurological Injury Compensation Plan, pursuant to sections 766.301-766.316, otherwise known as the Plan.

2. The baby was born on April 23, 2019, at Tallahassee Memorial Healthcare (Hospital). The circumstances of the labor, delivery, and birth of the minor child are reflected in the medical records the Hospital submitted with the Petition.

3. In the instant case, NICA has retained Donald C. Willis, M.D., as its medical expert specializing in maternal-fetal medicine, who opined that “[t]here was an obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery and continuing into the immediate post delivery period. The oxygen deprivation resulted in brain injury.” Dr. Willis’s report was filed with NICA’s Response to the Petition on December 18, 2020. Dr. Willis also commented that he “is not able to comment about the severity of the injury.”

4. Additionally, NICA retained Michael S. Duchowny, M.D., as its medical expert specializing in Pediatric Neurology. Dr. Duchowny’s Affidavit was attached to the motion. Upon examination of the pertinent medical records and performance of an independent medical examination, Dr. Duchowny opined:

In summary, Jaxson's examination reveals findings consistent with multiple developmental disabilities. He is hyperactive and impulsive with behavioral issues, and evidences delayed language and social development. I could not confirm the history of exotropia. In contrast there were no findings indicative of structural brain injury. Jaxson's social and communication issues strongly suggest an underlying diagnosis of autism spectrum disorder.

A review of Jaxson's medical records confirms his birth at Tallahassee Memorial Hospital at 38 weeks' gestation. He weighed 2.499 kg. and had Apgar scores of 0,0 and 0 at 1, 5 and 10 minutes of life. Cord blood gases were not drawn. Jaxson was resuscitated at birth and admitted to the NICU where he was placed in a therapeutic hypothermia protocol. An MRI scan obtained on May 1st (DOL# 8) revealed multifocal intracerebral hemorrhages with the largest in the right temporal lobe; a right temporal extra-axial hemorrhage was also noted.

By history obtained today, a repeat head CT scan at age 5 months was normal.

Jaxson's multiple developmental delays were likely acquired prior to birth and were not caused by mechanical injury or oxygen deprivation during labor or delivery. In all likelihood, the hemorrhages noted on brain images were acquired at delivery but likely were resorbed into the bloodstream without resulting in brain injury. I therefore am not recommending that Jaxson be considered for inclusion in the NICA program.

5. The medical reports and affidavits of Dr. Willis and Dr. Duchowny are the only evidence of record relating to the issue of whether the subject claim is compensable as defined by the statute. The Petition, along with the unrebutted medical reports of Dr. Willis and Dr. Duchowny, establishes that there are no genuine issues of material fact regarding the compensability of this claim.

#### CONCLUSIONS OF LAW

6. The Division of Administrative Hearings (DOAH) has jurisdiction over the parties to and the subject matter of these proceedings. §§ 766.301-766.316, Fla. Stat.

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

8. 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. Section 766.305(4) provides that NICA, which administers the Plan, has 45 days from the date that a complete claim is served 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.

9. If NICA determines that the alleged injury is a birth-related neurological injury that is compensable under the Plan, it may award compensation to the claimant, provided that the award is approved by the assigned administrative law judge. § 766.305(7), Fla. Stat. However, if NICA disputes the claim, as it does in this case, the dispute must be resolved by the assigned administrative law judge in accordance with chapter 120, Florida Statutes. §§ 766.304, 766.30, and 766.31, Fla. Stat.

10. The first inquiry is whether the infant has sustained a birth-related neurological injury as defined by section 766.302(2), which provides:

“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. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

11. If the administrative law judge determines that the infant meets the statutory threshold for weight and has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and that as a result of the injury, the infant was rendered permanently and substantially mentally and physically impaired, then section 766.309(1) provides that there is a rebuttable presumption that the injury is a birth-related neurological injury.

12. In this case, the evidence does not support a finding that the injury is a birth-related neurological injury. This issue is dispositive with respect to compensability. Based upon this evidence, Jaxson Bull did not sustain a birth-related neurological injury as defined in section 766.302(2), and is not eligible for benefits under the Plan.

CONCLUSION

Based upon the Findings of Fact and Conclusions of Law provided above, Petitioners' claim is not compensable under the Plan, and the Petition is dismissed with prejudice.

DONE AND ORDERED this 11th day of February, 2021, in Tallahassee, Leon County, Florida.



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W. DAVID WATKINS  
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 11th of February, 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. 7020 2450 0002 1970 5015)

Shevaun L. Harris, Acting Secretary  
Health Quality Assurance  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 1  
Tallahassee, Florida 32308  
(Certified No. 7020 2450 0002 1970 5022)

Tana D. Storey, Esquire  
Rutledge Ecenia, P.A.  
Suite 202  
119 South Monroe Street  
Tallahassee, Florida 32301  
(Certified No. 7020 2450 0002 1970 5039)

E. Rose Kasweck, Esquire  
FASIG | BROOKS  
Suite 200  
3522 Thomasville Road  
Tallahassee, Florida 32309  
(Certified No. 7020 2450 0002 1970 5046)

Kenney Shipley, Executive Director  
Florida Birth-Related Neurological  
Injury Compensation Association  
Suite 1  
2360 Christopher Place  
Tallahassee, Florida 32308  
(Certified No. 7020 2450 0002 1970 5053)

Tallahassee Memorial Hospital  
Attention: Risk Management  
1300 Miccosukee Road  
Tallahassee, Florida 32308  
(Certified No. 7020 2450 0002 1970 5060)

Andrea Friall, M.D.  
Suite 202  
1401 Centerville Road  
Tallahassee, Florida 32308  
Certified No. 7020 2450 0002 1970 5077)

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).