

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

QUANISHIA MALLORY AND YAH YAH  
POLITE, AS PARENTS AND NATURAL  
GUARDIANS OF YAHSIR POLITE, A MINOR,

Petitioners,

Case No. 20-4269N

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

MEMORIAL HEALTH SYSTEMS, INC., D/B/A  
ADVENTHEALTH DAYTONA BEACH, TED  
ROBERTSON, M.D., MEGAN BAGWELL,  
M.D., AND VOLUSIA OB/GYN, P.A.,

Intervenors.

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SUMMARY FINAL ORDER OF DISMISSAL

This cause came before the undersigned on the unopposed Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (“NICA”), on December 2, 2020.

STATEMENT OF THE CASE

Whether Yahsir Polite (“Yahsir”) suffered a “birth-related neurological injury,” as defined by section 766.302(2), Florida Statutes (2018),<sup>1</sup> for which

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<sup>1</sup> All references to the Florida Statutes are to the 2018 versions, unless otherwise specified. None of the cited statutory provisions have materially changed since 2018.

compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan (“Plan”).

PRELIMINARY STATEMENT

On September 18, 2020, Petitioners Quanishia Mallory and Yah Yah Polite, as parents and natural guardians of Yahsir, a minor, filed a Petition for Determination of NICA Compensability with the Florida Division of Administrative Hearings (“DOAH”). Petitioners seek a determination as to whether Yahsir suffered a compensable “birth-related neurological injury” and, if so, to award all NICA benefits available under the law.

The Petition named Ted Robertson, M.D., and Megan Bagwell, M.D., as the obstetricians who delivered Yahsir on April 8, 2019, and AdventHealth Daytona Beach (“Hospital”), as the hospital where Yahsir was born. DOAH sent copies of the Petition via Certified U.S. Mail to NICA, Dr. Robertson, Dr. Bagwell, and the Hospital on October 1, 2020.

On September 29, 2020, Memorial Health Systems, Inc., d/b/a AdventHealth Daytona Beach moved to intervene and the undersigned granted that motion on the same day. On October 1, 2020, Dr. Robertson, Dr. Bagwell, and Volusia OB/GYN, P.A., moved to intervene and the undersigned granted that motion on the same day.

On November 13, 2020, NICA filed its Response to Petition for Benefits, asserting that the claim was not compensable because Yahsir did not suffer a birth-related neurological injury. NICA supported the Response with reports of its medical experts, Donald C. Willis, M.D., and Michael Duchowny, M.D.

On December 2, 2020, NICA filed its unopposed Motion for Summary Final Order (“Motion”). Petitioners and Intervenors do not oppose the Motion.

On December 3, 2020, the undersigned issued an Order to Show Cause to allow Respondent an opportunity to resolve apparent inconsistencies in its expert reports. On December 16, 2020, Respondent responded to the Order and attached a revised report from Dr. Duchowny. On December 17, 2020, Respondent filed correspondence from Dr. Willis confirming the accuracy of his prior report. In its Response, Respondent noted that neither Petitioners nor Intervenors opposed its Motion.

The available evidence in the cause is comprised of the expert reports of Dr. Willis and Dr. Duchowny.

#### FINDINGS OF FACT

1. Petitioners are the parents and natural guardians of Yahsir.
2. On April 8, 2019, Ms. Mallory gave birth to Yahsir, a single gestation of 39 weeks, at the Hospital. Yahsir was delivered by cesarean section and weighed 3,786 grams at birth.
3. Ted Robertson, M.D., and Megan Bagwell, M.D., provided obstetrical services and delivered Yahsir.
4. The undisputed evidence in the record consists of signed reports of two physicians—Donald Willis, M.D., an obstetrician, and Michael Duchowny, M.D., a pediatric neurologist who conducted a remote evaluation of Yahsir.
5. Dr. Willis reviewed the medical records and summarized his opinions about Yahsir's delivery in a report, dated October 9, 2020.
6. According to Dr. Willis, Ms. Mallory suffered from elevated blood pressure at 34 weeks gestational age and was diagnosed with preeclampsia after a brief hospital evaluation. As a result of the preeclampsia, she was admitted to the Hospital on April 7, 2020, for induction of labor at 39 weeks. Yahsir was delivered the next morning by cesarean section due to a non-reassuring fetal heart rate pattern and suspected placental abruption.

7. Yahsir was depressed at birth with APGAR scores of two at one minute, five at five minutes, and eight at ten minutes. Yahsir's heart rate was less than 60 bpm at birth. Positive pressure ventilation was initiated without the need for chest compression and bag and mask ventilation continued for three minutes. Oxygen was weaned and Yahsir was transferred to the NICU.

8. Yahsir arrived in the NICU with an oxygen saturation of 95 percent on room air and no further respiratory distress occurred before his discharge. The medical records noted that Yahsir was "without clinical encephalopathy." No seizure activity occurred during his stay in the Hospital.

9. At Yahsir's pediatric follow up appointment at four days old, he was noted as having a bilateral upper extremity tremor. Neurological evaluation was scheduled and, at five months old, Yahsir was diagnosed with spastic cerebral palsy. An MRI conducted at seven months was normal.

10. Based on the medical records, Dr. Willis opined that Yahsir's neurologic issues do not appear to be birth related. Although the labor was complicated by a non-reassuring fetal heart rate pattern, Yahsir was initially depressed at birth with low APGAR scores, and was later diagnosed with cerebral palsy, Dr. Willis noted that Yahsir suffered no multi-system organ failures or seizure activity at the Hospital and had a normal MRI finding at seven months old.

11. Dr. Duchowny reviewed the medical records, conducted a virtual neurological evaluation by Zoom on October 30, 2020, and summarized his opinions in a report, dated November 6, 2020, as to whether Yahsir suffers from permanent and substantial mental and physical impairment caused by an oxygen deprivation event.

12. Yahsir was 18 months old at the time of the evaluation. He was previously diagnosed with cerebral palsy and leg tightness has been his major issue. He began physical therapy at four months old and began walking independently at eight months old. He can run, climb stairs, and has no motor regression. He can use both hands cooperatively and has no

required medical treatment for spasticity. His previous MRI findings were normal.

13. Yahsir's communication is delayed. He did not say any words until about 12 to 13 months old and only seems to repeat what he hears, but he understands spoken language without difficulty. Yahsir's speech sounds are unclear, but his hearing and vision are good. He has no significant feeding issues and has gained weight steadily. Yahsir has significant sleep issues and he is prone to temper tantrums, but his overall health is otherwise stable. He attends daycare five days per week.

14. Dr. Duchowny found Yahsir to be an alert, well-developed, and well-nourished infant. Although Yahsir showed mild speech delay, Dr. Duchowny believed that would improve with speech therapy. Based on the medical records and evaluation, Dr. Duchowny did not believe that Yahsir has a substantial mental or physical impairment.

#### CONCLUSIONS OF LAW

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

16. 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.

17. 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.

18. 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. § 766.305(7), Fla. Stat. But, if NICA disputes the claim, as it does here, the dispute must be resolved by an administrative law judge (“ALJ”) in accordance with chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

19. 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 post delivery 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 post delivery 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.

20. 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 post delivery 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).

21. 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.”).

22. 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.*

23. Based on the Findings of Fact above, the undisputed evidence establishes that Yahsir did not sustain a brain injury caused by oxygen deprivation during labor, delivery, and the immediate post-delivery period and, even if he had, the brain injury did not render him permanently and substantially mentally and physically impaired. Thus, Yahsir did not suffer a “birth-related neurological injury.” § 766.302(2), Fla. Stat.

24. Accordingly, based on the Findings of Fact above and the undisputed evidence, Yahsir 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 under the Plan, NICA's Motion for Summary Final Order is granted, and the Petition is dismissed with prejudice.

DONE AND ORDERED this 29th day of December, 2020, in Tallahassee, Leon County, Florida.



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ANDREW D. MANKO  
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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).