

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACQUELINE MAYER AND JONATHAN
ZAIFERT, ON BEHALF OF AND AS PARENTS
AND NATURAL GUARDIANS OF LAUREN
ZAIFERT, A MINOR,

Petitioners,

vs.

Case No. 20-4270N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent.

_____ /

FINAL ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569, 120.57(1), and 766.304, Florida Statutes,¹ on July 16, 2021, by Zoom Conference from Tallahassee, Florida.

APPEARANCES

For Petitioners: Jacqueline Mayer, pro se
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¹ All statutory references are to Florida Statutes (2021), unless otherwise noted.

STATEMENT OF THE ISSUE

The issue in this matter is whether Lauren Zaifert suffered a "birth-related neurological injury," as defined by section 766.302(2), for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On August 17, 2020, Petitioners, Jacqueline Mayer and Jonathan Zaifert, as parents and natural guardians of Lauren Zaifert ("Lauren"), a minor, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. (the "Petition") with the Division of Administrative Hearings ("DOAH") for the determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan").

Lauren was born on May 24, 2016, at Tampa General Hospital ("Tampa General"). Thanh-Xuan Le, ARNP, CNM, was the primary healthcare professional who provided obstetrical services at Lauren's birth.

DOAH served a copy of the Petition on Respondent, Florida Birth-Related Neurological Injury Compensation Association ("NICA"), on October 1, 2020. DOAH also served Ms. Le with a copy of the Petition, as well as Tampa General, on that same date.

On December 22, 2020, NICA filed its response to the Petition, taking the position that Lauren did not suffer a "birth-related neurological injury" within the meaning of section 766.302(2). Accordingly, NICA asserted that Petitioners' claim is not compensable under the Plan.

NICA requested DOAH schedule an evidentiary hearing to determine compensability. NICA also requested that DOAH bifurcate the

administrative proceeding to address the issue of compensability before determining the amount of an award to which Petitioners might be entitled under section 766.31. In light of NICA's request, the undersigned bifurcates this proceeding. Accordingly, this Final Order only addresses compensability. *See* § 766.309(4), Fla. Stat.

The final hearing on the issue of compensability was held on July 16, 2020. At the hearing, Joint Exhibits 1 through 10 were admitted into evidence. Petitioners' Exhibits 1 through 3 were admitted into evidence. NICA offered Exhibits 1 through 4, which were also admitted. Petitioner Jacqueline Mayer provided a sworn statement on behalf of Petitioners. Further, by agreement of the parties, the undersigned admitted the deposition testimony of Ms. Mayer (NICA's Exhibit 3) and Luis E. Bello-Espinosa, M.D. (NICA's Exhibit 4).

A Transcript of the final hearing was filed with DOAH on July 30, 2021. At the close of the hearing, the parties were advised of a ten-day deadline after receipt of the hearing transcript to file post-hearing submittals. Following the hearing, both parties submitted separate, but unopposed, requests to extend the filing timeframe, which were granted.² All parties filed Proposed Final Orders, which were duly considered in preparing this Final Order.

FINDINGS OF FACT

1. Lauren was born to Petitioner Jacqueline Mayer on May 24, 2016. Lauren was delivered at Tampa General, in Tampa, Florida.

² By requesting a deadline for filing post-hearing submissions beyond ten days after the Transcript was filed, the 30-day time period for filing the Final Order was waived. *See* Fla. Admin. Code R. 28-106.216.

2. Petitioners Ms. Mayer and Jonathan Zaifert are Lauren's mother and father.

3. Thanh-Xuan Le, ARNP, CNM, a certified nurse midwife, delivered Lauren at Tampa General. Ms. Le was a "participating physician" in the Plan at the time she rendered obstetrical services on May 24, 2016. *See* §§ 766.302(7) and 766.314(4), Fla. Stat. Dawn Palaszewski, M.D., assisted Ms. Le at Lauren's birth. Dr. Palaszewski was also a "participating physician" under section 766.302(7).

4. Lauren was born full term weighing 2,980 grams (six pounds, nine ounces) at delivery.

5. The parties do not dispute that Lauren suffered an injury at her birth, from which she continues to experience both mental and physical impairments. The parties do dispute the degree of Lauren's injuries, as well as the specific cause of her injuries.

6. The statutory language that controls the determination in this matter is found in section 766.302(2), which states:

"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 ... 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. (emphasis added).

7. Petitioners contend that Lauren's injuries were due to oxygen deprivation during her labor and delivery. Petitioners further assert that Lauren's injuries are "substantial." Therefore, Lauren's claim should be considered compensable under the Plan.

8. Conversely, NICA disputes that Lauren's injuries are "substantial." NICA also maintains that the evidence does not establish that Lauren's injury was caused by oxygen deprivation. Consequently, NICA argues that

Lauren did not suffer a "birth-related neurological injury," as defined in section 766.302(2), and Petitioners' claim should be denied.

Lauren's Birth:

9. Both Ms. Mayer and Mr. Zaifert were present at Lauren's birth.

10. Just after Lauren was delivered, Petitioners heard a nurse sound a code over a radio. Quickly thereafter, five to six medical personnel rushed into the room. Mr. Zaifert recalled that it was "very clear" that something was not right. He immediately thought that "something traumatic" was happening.

11. Lauren was rushed to the newborn intensive care unit ("NICU") shortly after she was born. Upon admission, Lauren's medical records note that she lay "supine in open crib, lethargic, unresponsive to exam."

12. On May 25, 2016 (the day after Lauren was born), Ms. Le noted in Lauren's medical records:

Delivery of infant's head was atraumatic. There was not difficulty delivering the shoulder. The infant did not cry at delivery. ... NICU was called, meconium noted at delivery. [F]emale infant "Lauren" weighing 2980g with Apgars^[3] 4 and 6 and was transferred to NICU for care. ... Mom and baby stable.

13. Lauren was discharged from Tampa General on May 31, 2016, seven days after her delivery. Her discharge summary provides a more detailed description of the circumstances surrounding Lauren's birth, reporting:

The infant was floppy at delivery; the APGAR scores were 5 at one minute and 5 at five minutes, 5 at 10 minutes. ... On exam, infant was noted to be neurologically devastated with no gag, corneal, or suck reflex. Infant was hypotonic. Due to neurologic status and unresponsiveness infant was transferred to the NICU. Birth was not traumatic.

³ An APGAR score is a numerical expression of the condition of the newborn and reflects the sum total of points gained on an assessment of heart rate, respiratory effort, muscle tone, reflex irritability, and color. *Bennett v. St. Vincent's Med. Ctr., Inc.*, 71 So. 3d 828, 834 (Fla. 2011). APGAR stands for appearance, pulse, grimace, activity, and respiration.

14. Her discharge summary also provides an account of Lauren's time in the NICU, stating:

The patient met 5/6 clinical criteria for moderate encephalopathy and due to concern for HIE,⁴ she was started on a 72 hour cooling protocol. ... The infant did have subclinical seizure activity after cooling began Infant's neurological exam improved throughout admission as she had a suck reflex, palmar/plantar reflexes, and improved tone. She still did not have complete moro reflex at the time of discharge.

15. The discharge summary incorporated a "Patient Active Problem List," which included the following entries:

- Term birth of female newborn
- HIE (hypoxic-ischemic encephalopathy), moderate
- Neonatal seizure

16. Lauren's neurologic assessment at her discharge recorded:

Abnormal neurological exam immediately after birth, possible HIE. No birth trauma reported or concerns during the pregnancy.

Infant met 5 of 6 clinical criteria for moderate encephalopathy.

On the other hand, Lauren's neurological exam also reported that her condition improved throughout her hospital stay, and by the time of her discharge, her neurological status was noted to be alert and active, with a strong suck, intact plantar/palmar grasps bilaterally, and normal tone.

17. An MRI performed on May 31, 2016, reported, "CEREBRAL ISCHEMIA, 7-day-old female with abnormal neurologic examination."⁵ The record then noted, "There is normal brain development, formation, and gray-white matter differentiation."

⁴ Hypoxic-ischemic encephalopathy.

⁵ Ischemia is a term for inadequate blood supply.

18. On June 6, 2016, Ms. Mayer returned with Lauren to the hospital complaining of Lauren's "poor oral intake." An MRI obtained on June 6, 2016, reported:

While there does appear to be some mildly decreased signal within the cerebellum on the ADC images, there is no signal abnormality seen on any additional sequences suggesting that this is likely artifactual. There is no mass, hemorrhage, or acute infarct. There is normal brain development, formation, and gray-white matter differentiation.

The impression from the MRI was "normal."

19. Lauren was discharged from her second stay at Tampa General on June 9, 2016.

Lauren's Medical Condition:

20. To support their position that Lauren suffered a qualifying "birth-related neurological injury," Petitioners rely on a number of entries in Lauren's medical records. Of primary significance to Petitioners are records that indicate that Lauren suffered hypoxic-ischemic encephalopathy, with seizures, at birth. As summarized by Ms. Mayer, Petitioners assert that Lauren experienced hypoxia (lack of oxygen in the blood) when she was born, which resulted in seizures that lasted until Lauren was approximately seven months old.

21. Petitioners also point to medical records that describe Lauren's physical injuries as consistent with hypotonic cerebral palsy. Generally, cerebral palsy is a motor disability caused by damage to the brain before, during, or shortly after birth. "Hypotonic" cerebral palsy is characterized by low muscle tone. Ms. Mayer represented that Lauren was formally diagnosed with cerebral palsy in December 2020.

22. Lauren has received regular physical and occupational therapy over the last four years. Pertinent entries from Lauren's therapeutic records offer the following information:

a. In December 2017, Lauren underwent an occupational therapy evaluation. Ms. Mayer reported to the therapist that Lauren had been walking for about two months. However, Lauren was falling frequently and was having difficulty with motor skills, as well as displayed poor spatial awareness. A physical examination found that Lauren had "slightly decreased" muscle tone throughout and poor balance. On the other hand, her range of motion and strength were noted to be within normal or functional limits. Lauren was recommended for weekly occupational therapy.

b. Physical therapy records from July 2019 state that Lauren had a "[f]lat foot pattern with intermittent toe/heel pattern." When running Lauren "exhibited decreased proximal stability resulting in excessive hip IR during swing phase bilaterally, excessive horizontal plane movement, and poor eccentric control." Following a physical assessment, the therapist recorded activity limitations including "global strength, static and dynamic balance, gait and running pattern, sitting posture, jumping, stair navigation." Lauren's records also register that Lauren sat up at seven months, crawled at 12 months, and walked at 17 months. The physical therapist noted Lauren's rehabilitation potential was "good."

c. Occupational therapy records from August 2019 report that, "Lauren presents with significant delays in self-care skills affecting her daily independence." The occupational therapist detailed that "Lauren requires assistance to doff all clothing except shoes, and only moves arms or legs slightly to assist with donning of clothing." In addition, Lauren ate "a variety of foods, except only broccoli for vegetables; Drinks through a straw, however not from an open cup. ... Attempts utensil use, however, will pick up food and push onto end of fork. Will bring loaded spoon to mouth, however, frequently spills." On the other hand, Lauren was able to independently blow bubbles and open a marker. Lauren also "completed a 9 piece puzzle with picture clues with ease."

d. Developmental Behavioral Clinic notes from August 12, 2019, record a diagnosis of chronic hypoxic-ischemic brain injury. However, the examining physician remarked; "Counseled parent that findings were not clearly consistent with cerebral palsy, but establishing that diagnosis is outside my scope of practice."

e. Physical therapy records from January 2020 report that Lauren "exhibits a 6 month delay in stationary tasks and a 18 month delay and locomotion tasks ... secondary to decreased strength, stability, and gross motor skills including stair navigation and jumping." For participation restrictions, the physical therapist documented "global strength for stair negotiation and play on playground, static and dynamic balance for safe navigation of community, gait and running pattern for play with peers, sitting posture for joint integrity, jumping for play with peers, stair negotiation for exploration of environment, tricycle for play with peers." Once again, her rehabilitation potential was noted as "good."

f. Following a January 17, 2020, occupational therapy visit, the therapist recorded that Lauren "has difficulty using a utensil during feeding. She is able to drink from an open cup." The therapist further reported that Ms. Mayer had concerns with Lauren's "distractibility," and that Lauren "struggles with maintaining attention to therapist-directed tasks." Lauren's rehabilitation potential was still characterized as "good."

g. During a February 18, 2021, occupational therapy visit, the therapist recorded that Lauren:

Presents with signs and symptoms of high complexity and performance deficits in fine motor coordination, strength, dexterity, attention, perception, problem solving, safety awareness, interpersonal interactions, habits, behaviors, and coping strategies which impact activity participation and functional performance indicating skilled occupational therapy treatment is indicated to address these deficits.

During the examination, Lauren produced a writing sample "with large print and poor spacing." Further, while she needed "maximum assistance to attain a correct scissor grip," Lauren was able to "cut a sheet of paper in half without assistance but with fair coordination." She also scored within her age limit in fine motor and visual skills testing.

h. During a February 2021 physical therapy visit, the therapist commented that, "Lauren exhibits global strength deficits, impaired static and dynamic balance, atypical gait and running pattern, delayed gross motor skills, and poor jumping and coordination skills. These impairments may be related to Lauren's diagnosis of hypotonic cerebral palsy." Lauren's rehabilitation potential was again listed as "good."

23. Lauren has also undergone several neuropsychological evaluations since her birth. Pertinent entries record the following:

a. In December 2020 and January 2021, Lauren's overall cognitive functioning was evaluated. Progress Notes from December 16, 2020, list findings "consistent with hypotonic cerebral palsy." In addition, the neuropsychologist found that, "Lauren's milestone development was delayed in gross motor, fine motor and speech/language skills." Lauren was noted to have been previously diagnosed with Specific Developmental Disorder of motor function, Phonological Disorder, and Fluency Disorder. The neuropsychologist, based on her own evaluation, also diagnosed Lauren with an Unspecified Mood Disorder. On the other hand, the neuropsychologist ruled out a diagnosis of Attention-Deficit/Hyperactive Disorder. The neuropsychologist also commented that Lauren had remained seizure free for four years and, as such, her current cognitive difficulties were not associated with seizures, and no clinically significant cognitive deficit was discovered. The neuropsychologist concluded:

[R]esults from the tests revealed an average performance on tests assessing verbal comprehension, working memory and processing speed skills. Lauren's performance revealed mild

deficits within visual spatial skills and fluid reasoning. However, her scores within tasks assessing visual motor integration and visual perception fell within normal limits.

b. On February 3, 2021, Lauren was seen at Johns Hopkins All Children's Hospital regarding Petitioners' concerns with the delay in Lauren's gross motor development. A neurological examination recorded that Lauren was cooperative and followed commands well. Her speech was clear and language was normal. Lauren was able to draw people and objects and name their parts. The medical provider ultimately agreed that Lauren suffered from "mild hypotonic cerebral palsy." The physician commented:

We do feel that in time, [Lauren] can continue to develop strength. She may continue to be somewhat uncoordinated or hypotonic, though we do feel she will develop all skills as time continues.

24. Beginning in 2017, Lauren has also regularly received weekly speech therapy. Lauren's speech therapy records note concerns regarding speech language development, stuttering, intelligibility, and oral motor planning/sequencing.

25. By October 10, 2019, her speech had improved. A Speech Language Pathology Progress Report documents that Lauren displayed age appropriate skills in "receptive language, play, [and] expressive language." Further, a speech therapy assessment from September 2020 reported:

Lauren is able to use sentences that are age appropriate in length and complexity. She is able to ask and answer questions appropriately, and vocabulary is age appropriate, as well. Results of informal assessment indicate receptive and expressive language skills to be within normal limits. ... Lauren was observed to have a moderate fluency disorder, which may be developmental in nature.

Her speech language pathologist concluded:

Overall, Lauren presents with language skills which are within normal limits. Articulation skills are currently mildly delayed. Fluency skills are currently moderately impacted.

The pathologist also reported that Lauren's prognosis was "[g]ood for continued growth in speech/language and reading skills given recommendations are followed."

Lauren's Current Condition:

26. Ms. Mayer described Lauren's current mental and physical impairments, which both she and Mr. Zaifert consider to be "substantial." Ms. Mayer represented that Lauren's physical injuries include gross motor delay. She further stated that Lauren is "always clumsy" and experiences problems with coordination, fine motor skills, and grasping. Ms. Mayer relayed that Lauren has difficulty jumping and swimming. In addition, Lauren's "awkward gait" causes her to trip and fall several times a day. Ms. Mayer stated that Lauren has issues with daily living activities, such as caring for and dressing herself. Lauren will likely not play sports.

27. Ms. Mayer further expressed that Lauren's mental injuries include a neurological language disorder, which causes speech issues. Ms. Mayer conveyed that the speech evaluation at Johns Hopkins resulted in a diagnosis of apraxia, which is a motor speech disorder that makes speaking difficult. Ms. Mayer claimed that Lauren suffers from a mood disorder, which makes daily living very difficult.

28. Ms. Mayer advised that, despite her injuries, Lauren's speech and motor skills have improved with therapy. Currently, Lauren is able to jump, run, and swim without assistance. Lauren also enjoys playing on the stairs and the slide on the playground. Lauren also demonstrates imaginative play and can entertain herself.

29. However, while Lauren's condition has improved since her birth, Ms. Mayer declared that Lauren will never be fully normal. Lauren will continue to need occupational, physical, and speech therapy for the foreseeable future.

30. Finally, Ms. Mayer relayed that Lauren currently attends preschool. However, Ms. Mayer expressed that due to her developmental delays, Lauren has below average scores, and younger children were far ahead of her. Consequently, Lauren will likely start kindergarten a year behind. Ms. Mayer further stated that Lauren was evaluated by Hillsborough County Public Schools for language and literacy concerns. Lauren was found to have difficulty with participation and displayed poor effort and focus. Lauren also engages in impulsive behavior, which impedes her ability to problem solve and follow instructions. At the present time, Lauren is on an independent educational plan with the Hillsborough County school district.

NICA's Position:

31. NICA does not dispute Petitioners' claim that Lauren suffered an injury during her birth that has left her permanently impaired. However, NICA contends that Lauren's medical condition is not "substantial" enough to meet the statutory definition of "birth-related neurological injury" in section 766.302(2).

32. 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 Lauren's medical records and condition. NICA sought to determine whether Lauren suffered a "birth-related neurological injury," as defined in section 766.302(2). Specifically, NICA requested its medical consultants opine whether Lauren 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 Lauren permanently and substantially mentally and physically impaired.

33. Dr. Willis performed a forensic review of Lauren's medical records and noted the following:

The mother was admitted to the hospital at 39 weeks gestational age in active labor.

* * *

Delivery was by spontaneous vaginal birth and stated to be atraumatic. ... Despite being described as "neurologically devastated" at birth, the arterial cord blood gas was reasonable Cooling protocol was initiated due to suspected hypoxic ischemic encephalopathy (HIE).

NICU admission evaluation noted the baby to be unresponsive, hypotonic and with no gag or suck reflex.

* * *

The initial EEG was consistent with diffuse encephalopathy and seizure activity. Clinical seizure was also noted. MRI on DOL 7 had non-specific abnormal signals in the cerebellum, possibly related to HIE vs artifactual.

* * *

In summary, spontaneous vaginal delivery at term was noted to be atraumatic. The baby had low Apgar scores of 5/5/5, but a reasonable cord blood pH of 7.15, suggesting the newborn depression was not related to oxygen deprivation at birth. The initial EEG was abnormal with diffuse encephalopathy, but MRI was essentially normal.

34. Based on his review of the medical records, Dr. Willis opined that, "There was no obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery, or the immediate post-

delivery period. Although the child was subsequently found to have global developmental delay, this does not appear to be birth related."

35. NICA also introduced (via deposition) the testimony of Dr. Bello-Espinosa. Dr. Bello-Espinosa reached the same conclusion as Dr. Willis that Lauren did not suffer injuries that qualify her for inclusion in the NICA Plan.

36. Dr. Bello-Espinosa reviewed Lauren's medical records, as well as conducted an independent medical examination on December 11, 2020, which included a comprehensive neurological examination. Dr. Bello-Espinosa's examination occurred when Lauren was approximately four and one-half years old and lasted approximately 40 minutes. Following his examination, Dr. Bello-Espinosa prepared a report, in which he recorded:

Lauren was quite alert and interactive. She smiled and tracked. She had great attention. She grabbed objects and toys with both hands without difficulties. She had a dysfluent speech but no drooling. She following directions appropriately for her age.

* * *

On the motor exam: She had mildly decreased tone of her arms and legs, but the axial tone was normal. ... No tremors, or myoclonias were present. Here strength was 5/5. She was able to sit, walk on her own power without difficulties.

* * *

Gait: She walked with a narrow base. The [sic] was no ataxia, or abnormal tiptoe walking. She walked with mild inversion of her left toe. When I asked [her] to run along the hallway, she ran spontaneously, without falling. Her running was mildly asymmetric with asymmetric arm swinging and slight left foot dragging.

37. Summarizing his findings, Dr. Bello-Espinosa wrote:

Lauren comprehensive neurological examination today shows mild dysfluency of speech, but normal receptive language, mild non-specific hypotonia, a mild clumsy gait, but no major neurological sequelae. She does not have evidence of brain dysfunction, no evidence of abnormal upper or lower motor neuron signs, nor extrapyramidal signs, and no signs of cerebellar dysfunction. She does not have remote symptomatic seizures.

38. Dr. Bello-Espinosa concluded, "The prognosis of full recovery is excellent. Lauren has a normal estimated life expectancy." Dr. Bello-Espinosa then opined:

In reviewing all the available documents, there are no impairments consistent with an injury acquired due to oxygen deprivation or mechanical injury occurring during labor, delivery or the immediate post-delivery period.

Considering the clinical presentation, I do feel that there is no evidence to recommend Lauren is included in the NICA program.

39. Regarding the degree of Lauren's injuries, in his deposition, Dr. Bello-Espinosa opined, within a reasonable degree of medical probability, that Lauren "did not have a substantial impairment," either mentally or physically.

40. Expanding on his medical opinion, Dr. Bello-Espinosa commented that the word "substantial" is not a specific term he uses in his clinical practice. Dr. Bello-Espinosa explained:

We would use the term severe or catastrophic[,] so she did not have any of those ... neither severe neurological outcome were present.

41. On the other hand, Dr. Bello-Espinosa acknowledged that Lauren received an early diagnosis of hypoxic-ischemic encephalopathy, which he

defined as "a lack of oxygen to the brain and lack of blood supply to the brain." However, Dr. Bello-Espinosa did not believe that the medical records he reviewed confirmed that Lauren experienced HIE as a result of something related to her labor or delivery. Specifically, Dr. Bello-Espinosa testified that Lauren did not have MRI or EEG findings that indicate HIE. He also noted that Lauren did not have arterial blood gas changes or other systemic changes that would point to HIE.

42. Dr. Bello-Espinosa was also cognizant that Lauren's medical records included potential "indicators" of some form of neurological injury. He recognized that Lauren was noted to have hypotonia (low tone) and seizures in the NICU. She also had no gagging or sucking reflex, and her speech was "not as fluent as it should be." He further commented that Lauren's Apgar scores of 5/5/5⁶ were "abnormal." In light of these statements, Dr. Bello-Espinosa conceded that Lauren "may not be 100 percent of what we suspect at development for [her] age." He further commented that Lauren would likely benefit from ongoing occupational, physical, and speech therapy in the future. However, Dr. Bello-Espinosa stated that children who experience HIE at birth are not automatically left with permanent and substantial impairments and can live normal, healthy lives.

43. Dr. Bello-Espinosa was further aware that a neurologist diagnosed Lauren with hypotonic cerebral palsy, which he explained causes a child to have "decreased tone of the arms or the legs, as well as the trunk as a result of the injury to the brain." However, despite recognizing the "possibility" that Lauren's injuries are due to a neurological deficit, Dr. Bello-Espinosa firmly characterized Lauren's hypotonia as "mild," not moderate or severe. Additionally, while he "respected" the neurologist's findings, Dr. Bello-Espinosa expressed that in his personal opinion, Lauren does not suffer from cerebral palsy. Following his independent medical examination, Dr. Bello-

⁶ A score of five out of ten at one minute after birth, five minutes after birth, and ten minutes after birth.

Espinosa reported that Lauren followed directions appropriate for her age, had good attention, and ran without falling. Based on his observation, Dr. Bello-Espinosa determinedly expressed that Lauren "does not have a substantial physical impairment."

44. The evidence adduced at the final hearing reveals no medical opinions disputing the findings and impressions of Dr. Willis and Dr. Bello-Espinosa. Their conclusions are credible and are credited.

45. Based on the competent substantial evidence in the record, the preponderance of the evidence does not establish that Lauren suffered a "birth-related neurological injury," as defined in section 766.302(2). While Lauren's medical records show that she did experience some injury at the time of her birth, the evidence does not support a finding that Lauren has sustained an injury to her brain or spinal cord that has rendered her "permanently and substantially mentally and physically impaired."⁷

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the parties and the 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.

47. In 1988, the Florida Legislature created the Plan as a means to alleviate the high costs of medical malpractice insurance for physicians

⁷ NICA further maintains that the evidence does not support a finding that the impairment from which Lauren suffers was "caused by oxygen deprivation or mechanical injury occurring during the course of labor, delivery or during resuscitation in the postdelivery period." NICA's argument is well made as neither the medical records nor expert testimony introduced at the final hearing expressly link her injuries to a lack of oxygen or mechanical injury during birth. However, because the competent substantial evidence does not establish a "substantial" physical and mental impairment, it is unnecessary to delve into the available evidence to discern the root cause of Lauren's injuries. The ultimate conclusion would remain the same, that Lauren did not suffer a "birth-related neurological injury," as that term is defined in section 766.302(2).

practicing obstetrics. *Bennett v. St. Vincent's Med. Ctr., Inc.*, 71 So. 3d 828, 836 (Fla. 2011); and *Univ. of Miami v. Ruiz*, 164 So. 3d 758, 764 (Fla. 3d DCA 2015). The Plan's purpose is to "provid[e] compensation, irrespective of fault, for birth-related neurological injury claims." § 766.303(1), Fla. Stat. Specifically, the Legislature established the Plan:

for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation.

§ 766.301(2), Fla. Stat., and *Fla. Birth-Related Neuro. Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings*, 686 So. 2d 1349, 1354 (Fla. 1997).

48. When considering whether a claim is compensable under the NICA Plan, section 766.309(1) charges 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.

(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.

49. The term "birth-related neurological injury" is defined in section 766.302(2) to mean:

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.

50. "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 Neuro. Injury Comp. Ass'n*, 686 So. 2d at 1356.

51. The Plan provides limited remedies as a statutory substitute for common law rights and liabilities. Therefore, the NICA statute "should be strictly construed to include only those subjects clearly embraced within its terms." *Bennett*, 71 So. 3d at 836; and *Fla. Birth-Related Neuro. Injury Comp. Ass'n*, 686 So. 2d at 1354.

52. Upon determining that a claim qualifies for compensation, section 766.31(1) directs:

Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for the following items relative to such injury:

53. On the other hand, if a claim does not qualify for an award of compensation, section 766.309(2) instructs:

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 and shall cause a copy of such order to be sent immediately to the parties by registered or certified mail.

54. The burden of proof in this matter falls on Petitioners, as the "claimants," to prove that Lauren is covered by the NICA Plan. § 766.302, Fla. Stat.; and *Balino v. Dep't of Health & Rehab. Servs.*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977)("The general rule is, that as in court proceedings, the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal."). If Petitioners demonstrate the statutory prerequisites for NICA benefits, a rebuttable presumption of compensation arises in their favor. *Bennett*, 71 So. 3d at 845; and *Fla. Health Scis. Ctr., Inc. v. Div. of Admin. Hearings*, 974 So. 2d 1096, 1099 (Fla. 2d DCA 2007).

55. The preponderance of the evidence standard is applicable to this matter. *See* § 120.57(1)(j), Fla. Stat.

56. Turning to the injury in this case, the specific issue addressed in this Final Order is whether Lauren suffered a "substantial" mental and physical impairment.

57. NICA argues that the Plan covers only "catastrophic" injuries, not every injury that might occur during childbirth. For support, NICA refers to the Legislature's expressed intent in section 766.301(2) to restrict coverage to "a limited class of catastrophic injuries." Therefore, the term "substantial" as used to characterize a mental and physical impairment that qualifies as a "birth-related neurological injury" in section 766.302(2) should only refer to "catastrophic" medical conditions, as opposed to injuries that might be described as "mild" or "moderate."

58. Petitioners argue that the term "substantial" in section 766.302(2) should not be strictly circumscribed by the word "catastrophic." Instead, Petitioners urge that, to determine a "substantial mental and physical impairment," NICA should apply a standard similar to that used in the Americans with Disabilities Act ("ADA") found in 42 U.S.C. § 12101, et seq.

59. Under the ADA, to show a "disability," an individual must demonstrate that his or her impairment substantially limits one or more

major life activities. 42 U.S.C. § 12101(1). A "major life activity" may include, but is not limited to, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A); *see also Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F.3d 1220, 1226 (11th Cir. 1999)(to establish a disability, a plaintiff must show that an impairment substantially limits one or more major life activities); and *United States Equal Employment Opportunity Comm'n v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333, 1344 (11th Cir. 2016)(Major life activities include, but are not limited to "sleeping, walking, standing, lifting, ... [and] bending."). Petitioners assert that Lauren's physical and mental health impairments significantly affect several of her major life activities compared to what the average person in the general population can perform. Therefore, Petitioners argue that her injuries are "substantial."

60. In assessing Lauren's injuries, the undersigned notes that neither the term "catastrophic" in section 766.301(2), nor the word "substantial" as used in section 766.302(2), are defined in the NICA statute. Florida case law provides that when a term is not defined within a statute, a fundamental construction tool requires giving a statutory term its plain and ordinary meaning. When necessary, the plain and ordinary meaning may be ascertained by reference to the dictionary definition. *See Greenfield v. Daniels*, 51 So. 3d 421, 426 (Fla. 2010) and *Raymond James Fin. Servs. v. Phillips*, 110 So. 3d 908, 910 (Fla. 2d DCA 2011); *see also Orlando Reg'l*, 997 So. 2d at 431(which relies on a dictionary definition to interpret the terms "resuscitation" and "immediate" in section 766.302(2)); and *Dianderas v. Florida Birth Related Neurological*, 973 So. 2d 523, 527 (Fla. 5th DCA 2007)(which refers to the dictionary to define the terms "clear," "concise," and "explanation" in section 766.316.) *Fla. Birth-Related Neuro. Injury Comp. Ass'n.*, further provides that when interpreting the NICA statute:

consideration must be accorded not only to the literal and usual meaning of the words, but also to their meaning and effect on the objectives and purposes of the statute's enactment. ... Indeed, "[i]t is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided [in construing enactments of the legislature]."

Fla. Birth-Related Neuro. Injury Comp. Ass'n., 686 So. 2d at 1354. The *Fla. Birth-Related Neuro. Injury Comp. Ass'n.* court also noted that the underlying finding by the ALJ that the child's injuries met the definition of a "birth-related neurological injury" was "supported by competent and substantial evidence." *Fla. Birth-Related Neuro. Injury Comp. Ass'n.*, 686 So. 2d at 1356.

61. As additional guidance for interpreting chapter 766, the court in *Adventist Health Sys./Sunbelt, Inc. v. Florida Birth-Related Neurological Injury*, 865 So. 2d 561, 568-69 (Fla. 5th DCA 2004), in affirming an ALJ's decision that a child did not suffer a "substantial mental impairment," stated:

The legislature left the application of the terms they used to the administrative law judges designated by statute to hear these claims and to apply the expertise they develop in carrying out this task to determine from the evidence adduced in each case whether the test for NICA is met.

* * *

In cases such as the one before us, the ALJ, as fact finder, brings his own background, training, experience and expertise to the task of weighing and evaluating very sophisticated evidence. The child's advocate likewise brings his own communication and strategic skills to the fact-finding process; and finally, the evidence in each case will vary in its power to persuade. This will be especially true in cases where the opinions of experts are considered.

As in *Fla. Birth-Related Neuro. Injury Comp. Ass'n.*, the *Adventist* court "looked to see whether competent substantial evidence supports the ALJ's decision." *Adventist*, 865 So. 2d at 569.

62. The words "catastrophic" and "substantial" have plain and ordinary meanings. "Catastrophic" is defined as "something that is very bad." The term "substantial" is defined as "large in amount or degree." *Macmillan Dictionary*, at <https://www.macmillandictionary.com>. The undersigned concludes that these definitions exclude injuries that are considered "mild" or "moderate."

63. Applying the plain meaning of the applicable statutes, as well as the guidance from the above quoted cases, the competent substantial evidence in the record evinces that the mental and physical impairments from which Lauren currently suffers are not the type of "catastrophic" or "substantial" injuries for which compensation under the NICA plan is available.

64. In attempting to establish the substance of Lauren's mental and physical injuries, Petitioners focus on several key entries in Lauren's medical records, including:

a. Lauren's discharge summary described her as "neurologically devastated" in the moments following her delivery.

b. Lauren was transferred to the NICU within hours of her birth due to her "neurologic status and unresponsiveness."

c. Lauren was diagnosed with HIE, which Dr. Bello-Espinosa explained results from oxygen deprivation to the brain.

d. Lauren experienced seizures until she was seven months old.

e. Lauren was diagnosed with hypotonic cerebral palsy (low muscle tone). Her medical records also include diagnoses of apraxia of speech, phonological disorder, fluency disorder, and an unspecified mood disorder.

f. Lauren has participated in, and will continue to receive, occupational, physical, and speech therapy.

g. Lauren has difficulty with daily living activities, such as dressing and self-care, as well as motor coordination, balance, and strength deficits.

65. In contrast, a greater percentage of Lauren's medical and therapeutic records describe her medical impairments as "mild" or "moderate." Pertinent statements report:

a. Lauren's discharge summary on May 31, 2016, characterized her HIE as "moderate."

b. Lauren met five of six criteria for "moderate" encephalopathy.

c. Lauren's medical condition improved through her initial, seven-day hospital stay, and she was noted to have "normal brain development, formation, and gray-white matter differentiation." An MRI scan from seven days after birth was reported as "normal."

d. Lauren's most recent physical and occupational therapy records characterize her rehabilitation potential as "good."

e. An entry from a neuropsychological evaluation from January 2021 commented that Lauren showed "mild deficits" in visual spatial skills and fluid reasoning."

f. A record from February 3, 2021, from Johns Hopkins reported that Lauren suffered from "mild" hypotonic cerebral palsy. The record included a conclusion that Lauren "will develop all skills as time continues."

g. Lauren's speech pathologist commented that her prognosis was "[g]ood for continued growth in speech/language and reading skills."

66. Moreover, the conclusions of Dr. Willis and Dr. Bello-Espinosa, the only medical opinions offered by the parties, persuasively support the position that Lauren does not meet the statutory definition for NICA compensation. Dr. Willis opined that that there was no obstetrical event that resulted in loss of oxygen or mechanical trauma to Lauren's brain during labor, delivery or the immediate post-delivery period.

67. Dr. Bello-Espinosa determined that Lauren is not substantially mentally or physically impaired. Instead, based on his comprehensive review

of Lauren's medical records, as well as his own medical examination, Dr. Bello-Espinosa specifically described Lauren's current mental and physical impairments as "moderate." Following his examination of Lauren on December 11, 2020, Dr. Bello-Espinosa observed "mildly decreased tone of the arms and legs," as well as "mild disfluency of speech, mild non-specific hypotonia, and a mild clumsy gait."

68. In addition, Dr. Bello-Espinosa found that Lauren's therapy records suggest that Lauren's current deficits are improving, or will improve with time. Dr. Bello-Espinosa personally believed that Lauren's prognosis for full recovery is "excellent."

69. The findings and opinions of Dr. Willis and Dr. Bello-Espinosa are credible and persuasive.

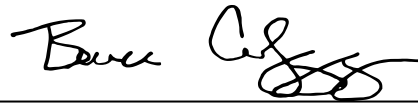
70. Accordingly, based upon all available evidence in the record, the most persuasive evidence and testimony leads to a finding that Lauren did not suffer a "substantial" mental and/or physical injury that would qualify her for benefits under the NICA Plan. Therefore, the undersigned concludes that Lauren did not incur a "birth-related neurological injury," as defined in section 766.302(2). Consequently, Lauren is not eligible for coverage under the NICA Plan.

DISPOSITION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED:

1. Petitioners' Petition for compensation under the NICA Plan is DENIED, with prejudice.

DONE AND ORDERED this 20th day of October, 2021, in Tallahassee, Leon
County, Florida.



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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).