

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

KATHLEEN CROWLEY AND TOBY CROWLEY,  
INDIVIDUALLY AND AS PARENTS AND NEXT  
FRIENDS OF KOBY CROWLEY, A MINOR,

Petitioners,

Case No. 20-4358N

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION,

Respondent.

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SUMMARY FINAL ORDER OF DISMISSAL

This matter came before the undersigned on Respondent's Unopposed Motion for Summary Final Order (Respondent's Motion), filed March 1, 2021.

STATEMENT OF THE CASE

On September 21, 2020, Petitioners, Kathleen Crowley and Toby Crowley, individually and as parents and next friends of Koby Crowley (Koby), a minor, filed a Petition for NICA Benefits (Petition) with the Division of Administrative Hearings (DOAH), for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).<sup>1</sup> The Petition named Judette Louis, M.D., as the physician who provided obstetric services for the birth of Koby at Tampa General Hospital, in Tampa, Florida, on January 10, 2020.

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<sup>1</sup> Petitioners filed an Amended Petition for NICA Benefits on October 2, 2020. The amendment addressed a scrivener's error.

On October 7, 2020, DOAH mailed a copy of the Petition to Respondent, Dr. Louis, and Tampa General Hospital via certified mail. Respondent was served with the same on October 8, 2020.

After granting an extension of time to respond to the Petition on December 22, 2020, Respondent filed its Response to Petition for Benefits, wherein Respondent maintained that the claim was not compensable because Koby did not sustain a “birth-related neurological injury,” as defined by section 766.302(2), Florida Statutes. Respondent requested that a bifurcated hearing be scheduled to address the issues of compensability and notice first, and, if required, to address the amount of an award in a second hearing.

On December 28, 2020, the undersigned issued an Order Requiring Response directing the parties to communicate and advise whether a final hearing would be required; and, if so, an estimate of the time required to conduct the hearing and several mutually agreeable dates to conduct the hearing. In response, Florida Birth-Related Neurological Injury Compensation Association (NICA), on January 11, 2021, filed a status report representing that Petitioners were not contesting Respondent’s determination of noncompensability, and that Respondent anticipated filing an unopposed motion for summary final order.

Respondent’s Motion was filed on March 1, 2021. Said motion avers that Petitioners do not oppose the motion or the requested relief.

#### FINDINGS OF FACT

1. Koby was born on January 10, 2020, at Tampa General Hospital, in Tampa, Florida.

2. Koby was a single gestation and his weight at birth exceeded 2,500 grams.

3. Obstetrical services were delivered by a participating physician, Dr. Louis, in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, Tampa General Hospital.

4. As set forth in greater detail below, the unrefuted evidence establishes that Koby did not sustain a “birth-related neurological injury,” as defined by section 766.302(2).

5. Donald Willis, M.D., a board-certified obstetrician specializing in maternal-fetal medicine, was retained by Respondent to review the pertinent medical records of Ms. Crowley and Koby and opine as to whether Koby sustained an injury to his brain or spinal cord caused by oxygen deprivation or mechanical injury that occurred during the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.

6. In his report, dated October 19, 2020, Dr. Willis summarized his findings and opinions as follows:

In summary, pregnancy was complicated by a known fetal congenital birth defect, Omphalocele. Delivery by repeat Cesarean section was done in early labor with rupture of the membranes. The baby was depressed at birth with cord blood pH of 6.74 and base excess of -21. Despite the acidosis at birth, MRI on DOL 7 was normal.

There was some degree of oxygen deprivation at birth, as documented by the cord blood pH of 6.4. However, MRI on DOL 7 was normal, suggesting the oxygen deprivation did not result in identifiable brain injury. Based on available medical records, it does not appear the child suffered a birth related brain injury.

7. In his supporting affidavit, Dr. Willis opines, to a reasonable degree of medical probability, that while Koby suffered some degree of oxygen deprivation at birth, it does not appear the child suffered a birth related brain injury.

8. Respondent also retained Luis E. Bello-Espinosa, a pediatric neurologist, to review the medical records of Ms. Crowley and Koby, and to conduct an Independent Medical Examination (IME) of Koby. The purpose of his review and IME was to determine whether Koby suffered from a permanent and substantial mental and physical impairment as a result of an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury in the course of labor, delivery, or resuscitation in the immediate post-delivery period.

9. Dr. Bello-Espinosa reviewed the pertinent medical records and, on December 11, 2020, conducted the IME. In his report, prepared the same day as the examination, he summarized his findings and opinions as follows:

Koby is an eleven month and three-week-old by ex-35 week premature born via C-section with clear amniotic fluid after PROM. At birth, he was diagnosed with an omphalocele. A diagnosis of moderate hypoxic encephalopathy was made given his initial Apgar score, arterial blood gases, and neurological examination. Therapeutic hypothermia was implemented despite his neonatal age, given his clinical presentation. During his NICU stay, he did not have acute electroclinical or electrographic seizures. An MRI of the brain obtained on day 7<sup>th</sup> of life was normal. Since birth, he has benefited from PT and OT. His comprehensive neurological examination today is normal.

10. Dr. Bello-Espinosa opined that Koby does not suffer from a substantial and permanent mental and physical impairment. Additionally, he opined that Koby did not acquire an injury to the brain or spinal cord during labor, delivery, or the immediate post-delivery period. Accordingly, he did not recommend Koby be considered for inclusion in the Plan. Dr. Bello-Espinosa confirms those opinions in his supporting affidavit.

11. The undisputed and unopposed findings and opinions of Drs. Willis and Bello-Espinosa are credited. The undersigned finds that Koby did not sustain an injury to the brain or spinal cord 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 rendered him permanently and substantially mentally and physical impaired.

#### CONCLUSIONS OF LAW

12. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. §§ 766.301-766.316, Fla. Stat.

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

14. The injured infant, her or his 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. Respondent, which administers the Plan, 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.

15. If Respondent determines that the injury alleged is a claim that is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the administrative law judge (ALJ) to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, compensability is disputed, the dispute must be resolved by the assigned ALJ in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

16. In discharging this responsibility, the ALJ is required to make the following threshold determinations based upon the available evidence:

(a) Whether the injury claimed is a birth-related neurological injury. If the claimant has demonstrated, to the satisfaction of the administrative law judge, 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, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.303(2).

(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.

§ 766.309(1), Fla. Stat.

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

“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.

18. If the ALJ determines that the injury is not a birth-related neurological injury, or that obstetrical services were not delivered by a

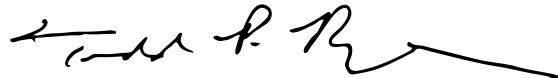
participating physician at birth, he or she is required to enter an order and immediately provide a copy to the parties. § 766.309(2), Fla. Stat.

19. The undisputed and unopposed evidence establishes that there was not an injury to Koby's brain 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 rendered him permanently and substantially mentally and physically impaired. Thus, it is concluded that he did not sustain a compensable birth-related neurological injury, as defined in section 766.302(2), and, therefore, is not eligible for benefits under the Plan.

#### CONCLUSION

Based on the Findings of Fact and the Conclusions of Law, it is ORDERED that Respondent's Motion is granted and the Petition is dismissed with prejudice.

DONE AND ORDERED this 26th day of March, 2021, in Tallahassee, Leon County, Florida.



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TODD P. RESAVAGE  
Administrative Law Judge  
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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).