

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

MEGHAN GIBSON AND JARROD GIBSON,
INDIVIDUALLY AND AS NATURAL PARENTS
OF OLIVER GIBSON, A MINOR,

Petitioners,

Case No. 20-5232N

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent

and

ORLANDO HEALTH, INC., D/B/A WINNIE
PALMER HOSPITAL, MICHELLE ROTHEN,
M.D., SHAWN LEE, M.D., AND WOMEN'S
CARE FLORIDA, LLC,

Intervenors.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon the Motion for Partial Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on March 16, 2021.

STATEMENT OF THE ISSUES

On November 17, 2020, Petitioners Meghan Gibson and Jarrod Gibson, as parents and natural guardians of Oliver Gibson (Oliver), a minor, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. (Petition) with the Division of Administrative Hearings (DOAH) for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

The Petition identified Michelle Rothen, M.D., and Shawn Lee, M.D., as the physicians who provided obstetric services at the birth of Oliver on July 31, 2016, at Orlando Health, Inc., d/b/a Winnie Palmer Hospital (Winnie Palmer Hospital), located in Orange County, Florida.

DOAH served Michelle Rothen, Shawn Lee, Winnie Palmer Hospital, and NICA with a copy of the Petition on December 11, 2020.

On February 9, 2021, NICA filed a Notice of Non-Compensability and Request for Evidentiary Hearing on Compensability, asserting that Oliver did not sustain a “birth-related neurological injury” as that term is defined in section 766.302(2), Florida Statutes, and requested that a hearing be scheduled to determine compensability. On February 15, 2021, the undersigned entered an Order that required the parties to confer and advise concerning the need for a hearing, if any, and if a hearing is needed, when the parties will be prepared to proceed to a hearing, the issues in dispute, the estimate of time required for hearing, and the choice of venue. On March 5, 2021, NICA filed a Response to Order Dated February 15, 2021. The Response to Order Dated February 15, 2021, noted that NICA “does not anticipate a hearing will be required in this matter[,]” and stated, in part, that “NICA has filed a Motion for Summary Final Order seeking a ruling that the claim is **not** ‘Compensable’” Intervenors Michelle Rothen, Shawn Lee, and Women’s Care Florida, LLC, filed a Response to Order Dated February 15, 2021, which similarly noted that “a hearing will not be required in this matter” and that they will not oppose NICA’s Motion for Summary Final Order. Petitioners did not respond to the February 15, 2021, Order.

On March 16, 2021, NICA filed its Motion for Summary Final Order (Motion). Petitioners have not filed a response to the Motion within the seven-day time period for a response set forth in Florida Administrative Code

Rule 28-106.204(4), and, as noted above, did not respond to the undersigned's February 15, 2021, Order.

FINDINGS OF FACT

1. Oliver was born on July 31, 2016, at Winnie Palmer Hospital, located in Orange County, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Oliver. In a medical report dated December 24, 2020, Dr. Willis summarized his findings and opined, in pertinent part, as follows:

In summary, labor was induced at 37 weeks for preeclampsia. Chorioamnionitis developed during labor and Cesarean delivery was done for a non-reassuring FHR pattern and failed induction. The newborn was depressed with cord blood gas pH < 7.00. However, the baby responded to resuscitation efforts and was on room air by six hours after birth. Neurologic exam was noted to be essentially normal. Head imaging studies were not done during the newborn hospital course. Brain MRI at three years of age was normal.

There was likely some degree of oxygen deprivation at birth, based on the low Apgar scores and cord blood pH < 7.00. However, the baby responded to resuscitation efforts with no identifiable brain injury.

Although there was an obstetrical event that resulted in some degree of oxygen deprivation to the baby during labor and delivery and possibly extending into the immediate post-delivery period, the oxygen deprivation did not result in identifiable brain injury.

3. NICA retained Luis E. Bello-Espinosa, M.D. (Dr. Bello-Espinosa), a medical expert specializing in pediatric neurology, to examine Oliver and to review his medical records. Dr. Bello-Espinosa examined Oliver on

February 5, 2021. In a medical report dated February 7, 2021, Dr. Bello-Espinosa summarized his examination of Oliver and opined, in pertinent part, as follows:

Oliver is a four-year-six-month-old boy with a history of perinatal depression after birth. He had rapid recovery in the NICU. He did not need therapeutic hypothermia. He did not have symptomatic seizures or other clinical signs to indicate a perinatal hypoxic event. His neurological examination today was completely normal except for dysfluency of speech as frequently seen in children with mixed receptive-expressive language disorders.

* * *

Oliver does not suffer of a substantial mental or physical impairment at this time.

* * *

Oliver does not have mental or physical impairments.

* * *

In reviewing all the available documents, the evolution of [his] symptoms, there is no evidence of mental and physical impairments due to severe injury to the brain acquired due to oxygen deprivation to the brain occurring during the labor-delivery period.

* * *

There are no permanent substantial mental and physical impairments that occurred during birth.

Considering the clinical presentation, I feel there is no[t] enough evidence to recommend Oliver be included in the NICA program.

4. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinion of Dr. Willis that it is unlikely that any significant oxygen deprivation occurred prior to the birth of Oliver that resulted in identifiable brain injury. Dr. Willis's opinion is credited. There are no expert opinions filed that are contrary to Dr. Bella-Espinosa's opinion that Oliver should not be considered for inclusion in the NICA program. Dr. Bella-Espinosa's opinion is credited.

5. Petitioner has failed to respond to the Motion.

CONCLUSIONS OF LAW

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

7. The Legislature established the Plan "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.

8. 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. NICA, 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.

9. If NICA determines that the injury alleged in a claim 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 to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute

must be resolved by the assigned administrative law judge in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

10. In discharging this responsibility, the administrative law judge must make the following determination 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. An award may be sustained only if the administrative law judge concludes that the “infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth.” § 766.31(1), Fla. Stat.

11. Section 766.302(2) defines the term “birth-related neurological injury” 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.

12. To be compensable under the Plan, there must have been an obstetrical event which resulted in loss of oxygen to the baby's brain during labor, delivery, or resuscitation in the immediate post-delivery period resulting in a permanent and substantial mental impairment and a permanent and substantial physical impairment, inasmuch as both are required to establish compensability. *Fla. Birth-Related Neurological Injury Comp. Ass'n v. Div. of Admin. Hearings*, 686 So. 2d 1349 (Fla. 1997).

13. The evidence, which Petitioner has not refuted or attempted to refute, established that Oliver did not suffer a birth-related neurological injury. Therefore, Oliver is not eligible for benefits under the Plan.

CONCLUSION

Based on the Findings of Fact and the Conclusions of Law, it is

ORDERED that:

The Petition filed by Meghan Gibson and Jarrod Gibson, as parents and natural guardians of Oliver Gibson, is dismissed with prejudice.

DONE AND ORDERED this 30th day of March, 2021, in Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
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 30th 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. 7020 1290 0001 6309 9027)

Simone Marsteller, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(Certified No. 7020 2450 0002 1970 5701)

Ronald S. Gilbert, Esquire
Colling Gilbert Wright & Carter, LLC
801 North Orange Avenue, Suite 830
Orlando, Florida 32801
(Certified No. 7020 1290 0001 6309 9034)

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 5589)

Gabrielle Osborne, Esquire
Beytin, McLaughlin, McLaughlin, O'Hara,
Kinman & Bocchino, P.A.
1706 East Eleventh Avenue
Tampa, Florida 33605
(Certified No. 7020 1290 0001 6309 9058)

Jeremy T. Palma, Esquire
Rissman, Barrett, Hurt,
Donahue & McLain, PA
Suite 1400
201 East Pine Street
Orlando, Florida 32801
(Certified No. 7020 1290 0001 6309 9041)

David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest 6th Court
Plantation, Florida 33324
(Certified No. 7020 2450 0002 1970 5596)

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).