STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AARON EUGENE BOONE, JR., ON BEHALF OF AND AS PARENT AND NATURAL GUARDIAN OF ANDREW O.D. BOONE, A MINOR,

Petitioner, Case No. 21-0948N

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,

Respondent,

and

ADVENTIST HEALTH SYSTEMS/SUNBELT, INC. D/B/A ADVENTHEATH ORLANDO,

Intervenor.
_____/

SUMMARY FINAL ORDER OF DISMISSAL

This cause came before the undersigned on Respondent Florida Birth-Related Neurological Injury Compensation Association's ("NICA") unopposed Motion for Summary Final Order, filed on April 29, 2021.

STATEMENT OF THE CASE

Whether Andrew O.D. Boone ("Andrew") suffered a "birth-related neurological injury," as defined by section 766.302(2), Florida Statutes,[1] for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan ("Plan").

1 All references to the Florida Statutes are to the 2019 versions, unless otherwise specified.

PRELIMINARY STATEMENT

On March 15, 2021, Aaron Eugene Boone, Jr., on behalf of and as Parent and Natural Guardian of Andrew, filed a Petition for NICA Benefits with the Florida Division of Administrative Hearings ("DOAH"). Petitioner filed the Petition under protest, alleging that Andrew did not suffer permanent and substantial physical and mental impairment due to an oxygen deprivation event during delivery.

The Petition named Bianca Stewart, M.D., Sobiah Mallick, M.D., Nikorn Roy Arunakul, M.D., and Sabely Nichols, C.N.M., as the physicians and midwife who provided obstetrical services to deliver Andrew on May 12, 2020, and Adventist Health Systems/Sunbelt, Inc., d/b/a AdventHealth Orlando ("Hospital") as the Hospital where he was born. On March 22, 2021, DOAH sent copies of the Petition via Certified U.S. Mail to NICA, Dr. Stewart, Dr. Mallick. Dr. Arunakul, Nurse Midwife Nichols, and the Hospital.

On March 29, 2021, the Hospital filed a Petition for Leave to Intervene in this proceeding and an Application to Permit Discovery. In two Orders dated March 30, 2021, the undersigned granted the Hospital's motion to intervene but denied the Hospital's request for discovery without prejudice to re-filing it after NICA responded to the Petition if a final hearing would be necessary.

On April 21, 2021, NICA filed a Notice of Non-Compensability and Request for Evidentiary Hearing on Compensability. NICA argued that its expert reviewed the medical records and opined that the claim was not compensable. Neither Petitioner nor Intervenor opposed NICA's position.

On April 29, 2021, NICA filed a Motion for Summary Final Order, supported by an affidavit and report from an obstetrician. NICA argued that the claim was not compensable because the oxygen deprivation that likely

occurred during the delivery did not cause Andrew to suffer any identifiable brain injury. Petitioner and Intervenor do not oppose NICA's motion.

FINDINGS OF FACT

1. Petitioner is the parent and natural guardian of Andrew.

2. On May 12, 2020, Claudie Blanc gave birth to Andrew, a single gestation of 37 weeks, at the Hospital. Andrew was delivered by cesarean section and weighed 3,210 grams.

3. The Petition named physicians Bianca Stewart, M.D., Sobiah Mallick, M.D., and Nikorn Roy Arunakul, M.D., and Nurse Midwife Sabely Nichols, C.N.M., as the medical professionals who provided obstetrical services and were present at the birth.

4. The undisputed record evidence consists of an affidavit and report of Donald Willis, M.D., an obstetrician specializing in maternal-fetal medicine.

5. Dr. Willis reviewed the medical records and summarized his opinions about Andrew's delivery in a report dated March 29, 2021.

6. Dr. Willis noted that Ms. Blanc was admitted to the Hospital for induction of labor due to hypertension at 37 weeks' gestational age. A cesarean section was ultimately performed due to a non-reassuring fetal heart rate pattern caused by a placenta abruption.

7. At birth, Andrew was depressed with no heart rate or respiratory effort. Resuscitation efforts included chest compressions, intubation, saline fluid boluses, and blood transfusions. His APGAR scores were zero at one minute, five at five minutes, and seven at ten minutes. Andrew was taken to intensive care and underwent body cooling for suspected hypoxic-ischemic encephalopathy ("HIE"). Because his respiratory distress improved, the Hospital extubated Andrew later that same day. An EEG was read as mildly abnormal due to non-specific findings, but no seizure activity was noted clinically. A head ultrasound performed on the date of his birth was negative for HIE. An MRI performed five days after the birth also was normal. Andrew

was discharged home after spending 16 days in the Hospital. A six-month pediatric follow up noted normal muscle tone and motor development, and no developmental delays.

8. Based on the medical records, Dr. Willis opined to a reasonable degree of medical probability that an obstetrical event resulting in some degree of oxygen deprivation to the brain likely occurred during the birth, but it did not result in any identifiable brain injury.

CONCLUSIONS OF LAW

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

10. 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.

11. 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.

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

13. 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 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.
>
> (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.

14. 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 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.

§ 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).

15. Petitioner has 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").

16. If Petitioner meets his burden, section 766.309(1) provides that there is a rebuttable presumption that the injury is a birth-related neurological injury. Conversely, if Petitioner does not meet his burden, the undersigned is required to issue an order dismissing the Petition. *Id.*

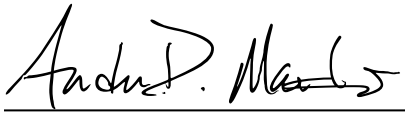
17. Based on the Findings of Fact above, the undisputed evidence establishes that, although an oxygen deprivation event likely occurred during the delivery, it did not cause Andrew to sustain a brain injury. Thus, he did not suffer a "birth-related neurological injury." § 766.302(2), Fla. Stat.

18. Accordingly, based on the Findings of Fact above and the undisputed evidence, Andrew is not eligible for benefits under the Plan.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law herein, Petitioner's claim is not compensable, NICA's unopposed Motion for Summary Final Order is granted, and the Petition is dismissed with prejudice.

DONE AND ORDERED this 10th day of May, 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).