

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

DON MICHEL AND MARIE PETIT HOMME,  
AS PARENTS AND NATURAL GUARDIANS  
OF AMBER MICHEL, A MINOR,

Petitioners,

vs.

Case No. 21-0949N

FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

FLORIDA HEALTH SCIENCES CENTER,  
INC., D/B/A TAMPA GENERAL HOSPITAL;  
KATIE E. PETERSON, APRN, CNM; KARI  
ZINKOVICH, APRN, CNM; M & D CARE,  
INC., D/B/A WOMEN'S HEALTH CARE; AND  
UNIVERSITY OF SOUTH FLORIDA BOARD  
OF TRUSTEES,

Intervenors.

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PARTIAL SUMMARY FINAL ORDER

On July 12, 2021, Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), filed an Unopposed Motion for Summary Final Order, asserting that Amber Michel (Amber), the child of Don Michel and Marie Petit Homme, suffered a birth-related neurological injury as that term is defined in section 766.302(2), Florida Statutes. The motion asserts that neither Petitioners nor Intervenors object to the entry of a final order based on the Motion for Summary Final Order, and Petitioners and Intervenors do not intend to rebut the opinions of NICA's experts, as described more fully below.

STATEMENT OF THE ISSUE

Whether Petitioners' minor child suffered a birth-related neurological injury as that term is defined in section 766.302(2).

PRELIMINARY STATEMENT

On March 15, 2021, Petitioners, Don Michel and Marie Petit Homme, as parents and natural guardians of Amber, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. (Petition) with the Florida Division of Administrative Hearings (DOAH). Petitioners identified Kristen Turner, M.D., as the physician providing obstetrical services, and Tampa General Hospital as the hospital where Amber was born. NICA, Dr. Turner, and Tampa General Hospital were served copies of the Petition by certified mail, and certified mail receipts indicate that all parties received the Petition. The Petition does not challenge the notice provided to Petitioners.

Florida Health Sciences Center, d/b/a Tampa General Hospital, as well as Katie Peterson, APRN, CNM; Kari Zinkovich, APRN, CNM; M&D Care, Inc., d/b/a Women's Health Care; and University of South Florida Board of Trustees all filed motions to intervene, which were granted by Orders dated April 13 and 23, 2021.

On June 15, 2021, NICA responded to the Petition, stating that, based upon the opinion of its experts, Amber had suffered a birth-related neurological injury and that her injury was compensable under the NICA Plan. NICA requested a hearing on the issue of compensability, and on June 16, 2021, an Order was issued directing the parties to provide available dates for conducting a hearing and an estimate regarding how long the hearing would take.

On July 9, 2021, NICA filed a Status Report indicating that the parties did not believe that a hearing was necessary, and that NICA would be filing an Unopposed Motion for Summary Final Order, which it did on July 12, 2021.

It is noted that the Unopposed Motion for Summary Final Order does not indicate what relief, if any, is available or should be provided to Petitioners. That issue will be addressed at the end of this Partial Summary Final Order.

The Motion for Summary Final Order is supported by the expert reports and affidavits of Drs. Donald Willis and Luis Bello-Espinosa. The physicians' opinions are unrebutted. Based on the allegations in the Petition and the expert opinions of the above-named physicians, the following facts are found:

#### FINDINGS OF FACT

1. Amber Michel was born on February 23, 2019, at Tampa General Hospital, where Kristen Turner, M.D., provided obstetrical services.
2. Amber weighed 3,340 grams at birth.
3. At the time of Amber's birth, Dr. Turner was a participating physician in the NICA program, as the term "participating physician" is defined in section 766.302.
4. At NICA's request, Dr. Donald Willis, an expert in maternal fetal medicine, conducted a review of the medical records of Marie Petit Homme and Amber. Based upon his review of the medical records, and his education, training, and experience, Dr. Willis opined that, in his professional opinion within a reasonable degree of medical certainty, "[t]here was an obstetrical event that resulted in the loss of oxygen to the baby's brain during labor, delivery, and continuing into the immediate post delivery period. The oxygen deprivation resulted in brain injury." His report is consistent with this conclusion, noting that:

The mother was admitted to the hospital at 38 4/7 weeks with spontaneous rupture of the membranes. Amniotic fluid was clear. Cervical dilation was 1 cm on admission.

The fetal heart rate (FHR) tracing during labor was reviewed. A baseline FHR of 155 bpm with appropriate variability was present on admission. Recurrent FHR decelerations began about 50 minutes prior to delivery. Cesarean section was done for a non-reassuring FHR pattern. Birth weight was 3,340 grams.

The baby was depressed at birth with Apgar scores of 1/1/2. Arterial included chest compressions, intubation, epinephrine and normal saline bolus. The baby was taken to the NICU in respiratory distress. Cooling protocol was initiated for suspected hypoxic ischemic encephalopathy (HIE).

The newborn hospital course was complicated by multi-system organ failures. ... Seizure activity began shortly after birth and confirmed by EEG. Feeding difficult[y] required Nissen fundoplication with GT placement for feedings.

Head ultrasound on the day of birth was normal. MIR on DOL [day of life] 17 had findings consistent with hypoxic brain injury. Physical exam at time of hospital discharge (DOL 52) was consistent with poor muscle tone, absent graps and absent swallow and gag reflex.

5. Also, at NICA's request, Dr. Bello-Espinosa, who is a pediatric neurologist, conducted a review of the medical records for both Amber and her mother, and performed an independent medical examination of the child when she was two years, three months old. Dr. Bello-Espinosa opined that, within a reasonable degree of medical certainty, Amber has permanent and substantial physical and mental impairments, and those injuries are a result of an injury occurring during labor and delivery or the immediate post-delivery period. As part of his report, Dr. Bello-Espinosa stated:

Amber does not roll, does not sit and does not crawl, and does not walk. Amber does not talk and does not have a social smile. She has a non-purposeful grimace.

\* \* \*

Amber is a 2-year, 3-month old girl with a history of severe hypoxic-ischemic encephalopathy at birth. ... On the examination, today is evident Amber has severe neurological sequela. At 2-year 3-month of age, Amber has signs of severe impairment of her cortical abilities resulting in severe cognitive and mental impairments. Amber has severe axial hypotonia. She also has severe hypertonia in both arms and legs, resulting in spastic quadriparesis. These findings indicate combined severe cerebral palsy.

In addition, she has remote symptomatic epileptic seizures evidenced by the recent episode of prolonged convulsive status epilepticus.

6. Claimants and Intervenors do not dispute the findings by either Dr. Willis or Dr. Bella-Espinosa, and those opinions are credited.

#### CONCLUSIONS OF LAW

7. DOAH has jurisdiction over the parties and the subject matter of these proceedings pursuant to sections 120.569, 120.57(1), and 766.304, Florida Statutes.

8. The Legislature created the Florida Birth-Related Neurological Injury Compensation Plan (the Plan) “for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims” related to births occurring on or after January 1, 1989. § 766.303(1), Fla. Stat.

9. An injured infant and certain other identified people, including the infant’s parents, may seek compensation under the Plan by filing a claim for compensation with the Division of Administrative Hearings. §§ 766.302(3),

766.303(2), and 766.305(1), Fla. Stat. Section 766.305(4) directs NICA to file a response to the petition within 45 days from the date that a completed claim is served and to submit relevant written information related to whether the child has suffered a birth-related neurological injury.

10. If NICA determines that there is a birth-related neurological injury that is compensable under the Plan, it may award compensation to the claimant, provided that the award is approved by the assigned administrative law judge. § 766.305(7), Fla. Stat. If NICA disputes the claim, the dispute must be resolved by the administrative law judge in accordance with chapter 120. §§ 766.304, 766.30, and 766.31, Fla. Stat.

11. The initial inquiry is whether the infant has suffered a birth-related neurological injury as that term is defined in section 766.302(2), which provides as follows:

(2) “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 in 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.

12. In this case, it is undisputed that Amber has suffered a birth-related neurological injury as section 766.302(2) defines the term. It is also undisputed that obstetrical services were delivered by a participating physician, Dr. Turner.

13. Section 766.315(1)(d) further provides that, if raised by the claimant or other party, the ALJ shall make factual findings regarding whether the physician and hospital complied with the notice requirements of section

766.316. The Petition filed in this case does not raise the issue of notice. Moreover, there has been no request to amend the Petition to raise the issue, and no other party has alleged a failure to give notice.

CONCLUSION

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

1. The claim for compensation filed by Petitioners is compensable.
2. Jurisdiction is retained to resolve the amount of compensation due.

Within thirty (30) days from the date of this Partial Summary Final Order, the parties shall resolve, subject to the approval of the undersigned, the amount and manner of payment of an award to Petitioners; the reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees and costs; and the amount owing for expenses previously incurred. If the parties cannot resolve these issues within this period, the parties shall file a joint status report advising the undersigned and that a hearing will be required. Once these issues have been resolved, either by stipulation or by hearing, an award will be issued consistent with section 766.31.

DONE AND ORDERED this 29th day of July, 2021, in Tallahassee, Leon County, Florida.



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LISA SHEARER NELSON  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of July, 2021.

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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).