

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

PRINCESS GRANT, AS PERSONAL AND
NATURAL GUARDIAN OF PRINCE`NYLAN
GRANT, A MINOR,

Petitioner,

vs.

Case No. 21-1309N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

GALENCARE, INC. D/B/A BRANDON
REGIONAL HOSPITAL,

Intervenor.

SUMMARY FINAL ORDER

This cause comes for consideration on Respondent's Unopposed Motion for Summary Final Order, filed on September 28, 2021. Respondent moves for entry of a final order determining that Petitioner's claim is compensable under the provisions of section 766.301, et seq., Florida Statutes.

STATEMENT OF THE CASE

On April 7, 2021, Petitioner, Princess Grant, as personal and natural guardian of Prince'Nylan Grant, ("Prince'Nylan"), a minor, filed a Petition for Compensation Pursuant to Florida Birth Related Neurological Injury Compensation Plan (the "Petition") with the Division of Administrative Hearings ("DOAH") for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan").

The Petition identified Eric Edwards, M.D., Neal Trulock, D.O., Kathryn Leenhouts, M.D., and Jill Young, APRN, as the healthcare practitioners who provided obstetrical services at Prince'Nylan's birth on August 8, 2019, at Brandon Regional Hospital ("Brandon Regional") in Brandon, Florida.

DOAH served Dr. Edwards, Dr. Trulock, Dr. Leenhouts, and Ms. Young with copies of the Petition on April 20, 2021, and served Brandon Regional that same date. DOAH also served Respondent, the Florida Birth-Related Neurological Injury Compensation Association ("NICA"), with a copy of the Petition on April 20, 2021.

Brandon Regional moved to intervene in this matter on April 30, 2021, which was granted.

On July 2, 2021, NICA filed a Response to Petition taking the position that Petitioner's claim is compensable under the Plan.

Petitioner, on September 20, 2021, filed a Notice of Acceptance of NICA's Finding that Prince'Nylan Grant Suffered a Birth Related Neurological Injury acceding to NICA's determination that Prince'Nylan sustained a compensable injury under section 766.302.

On September 28, 2021, NICA filed an Unopposed Motion for Summary Final Order requesting the Administrative Law Judge enter a summary final order finding that Petitioner's claim is compensable under the Plan because Prince'Nylan suffered a "birth-related neurological injury" as defined in section 766.302(2), and that Dr. Edwards and Dr. Leenhouts were "participating physicians" pursuant to section 766.302(7). NICA's motion represents that neither Petitioner nor Brandon Regional opposes the relief requested.

FINDINGS OF FACT

1. Prince'Nylan was born on August 8, 2019, at Brandon Regional located in Brandon, Florida.

2. Eric Edwards, M.D., and Kathryn Leenhouts, M.D., were the delivering physicians for Prince'Nylan's birth at Brandon Regional. At that time, both Dr. Edwards and Dr. Leenhouts qualified as "participating physicians" in the Plan as that term is defined in section 766.302(7).

3. Petitioner was admitted to Brandon Regional on August 8, 2019, to deliver Prince'Nylan. Petitioner was admitted for spontaneous labor.

4. After her arrival at Brandon Regional, Petitioner experienced spontaneous rupture of the membranes. At approximately 7:35 p.m., Petitioner was at category 2 of labor, with fetal monitoring tracing showing moderate variability and late decelerations. There was no recorded fetal heart rate. The delivery note indicated that tachycardia and late decelerations were present prior to birth. The fetal head was delivered with a nuchal cord, which was reduced.

5. Prince'Nylan weighed 3860 grams (8 pounds, 8.2 ounces) at birth.

6. During the course of labor, delivery, or resuscitation in the immediate postdelivery period, Petitioner asserts that Prince'Nylan suffered an injury. Petitioner subsequently filed the Petition with DOAH to determine whether Prince'Nylan's injury qualified as a "birth-related neurological injury" as defined in section 766.302(2).

7. After notification of Petitioner's 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 Prince'Nylan's medical records and condition. NICA sought to determine whether Prince'Nylan suffered a "birth-related neurological injury" as defined in section 766.302(2). Specifically, NICA requested its medical consultants opine whether Prince'Nylan 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 postdelivery period. And, if so, whether this injury rendered Prince'Nylan permanently and substantially mentally and physically impaired.

8. Dr. Willis reviewed Prince'Nylan's medical records and noted:

[Prince'Nylan] was depressed at birth. Apgar scores were 4/7/7 and arterial blood gas pH was 7.19 with a base excess of -13. The newborn was floppy with poor tone, weak cry and clinically poor perfusion. The baby did not respond to stimulation.

* * *

The newborn hospital course was complicated by multi-system organ failures. ... Seizure activity began after re-warming. Respiratory distress worsened, requiring nitric oxide for pulmonary hypertension. The baby was extubated on DOL 7.

* * *

Head ultrasound on DOL 1 was normal. MRI on DOL 8 showed acute ischemic changes, consistent with HIE.^[1] After hospital discharge, the child was subsequently diagnosed with global developmental delay and visual loss.

* * *

The child's brain injury appears to be the result of birth related oxygen deprivation, with or without any contribution due to possible infection.

* * *

In summary, labor was complicated by an abnormal [fetal heart rate] pattern and resulted in a depressed newborn. ... Despite cooling protocol for HIE, the newborn hospital course was complicated by multi-system organ failures, including hypotension, oliguria, feeding difficult [sic],

¹ Hypoxic-ischemic encephalopathy.

respiratory distress and seizures. MRI on DOL 8 showed acute ischemia, consistent with HIE. Cerebral palsy and global developmental delay were diagnosed after hospital discharge.

9. Based on his review of the medical records, Dr. Willis opined that:

[T]here was an obstetrical event that resulted in 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.

Dr. Willis, however, was "unable to comment on the severity of the brain injury."

10. Dr. Bello-Espinosa, on the other hand, did offer an opinion as to the extent of Prince'Nylan's injury. Dr. Bello-Espinosa reviewed Prince'Nylan's medical records, as well as conducted an independent medical examination ("IME") of Prince'Nylan on June 18, 2021. Dr. Bello-Espinosa observed, within a reasonable degree of medical probability:

Prince was awake and alert but did not interact at all. He did not have any joint attention. He was constantly fussing. There was no structured language. He did not communicate verbally or non-verbally.

* * *

Functionally, Prince sat on his own power, but with poor truncal tone. Prince did not bear weigh [sic] when he was placed in the standing position, and did not walk.

* * *

SUMMARY:

* * *

On the examination today is evident that Prince has severe neurological sequela. At 22-month of

age, Prince has severe developmental language and motor delays. He has delays of cortical abilities manifested by no expressive language, and does not appear to have severe impaired receptive language. On his motor exam has moderate axial hypotonia with poor head and truncal control, moderate hypertonia in both arms and legs, intermittent abnormal hand fisting, and dystonic posturing of hand and feet. These signs are indicative of extrapyramidal dysfunction, resulting in a severe degree of dystonic quadriparetic cerebral palsy.

11. Dr. Bello-Espinosa ultimately opined that based on the IME, "Prince is found to have substantial mental and physical impairment at this time." He also found that Prince's "substantial mental and physical impairments are permanent." Finally, Dr. Bello-Espinosa concluded, "I do feel that there is enough evidence to recommend Prince is included in the NICA program."

12. Based on the opinions of Dr. Willis and Dr. Bello-Espinosa, NICA determined that Petitioner's claim is compensable under section 766.302(2).

13. A review of the documents in the record reveals no contrary evidence to dispute the findings and opinions of Dr. Willis and Dr. Bello-Espinosa. Their opinions are credible and persuasive.

14. Based on "all available evidence" in the record, Prince'Nylan suffered a brain injury during labor, delivery, or resuscitation in the immediate postdelivery period that meets the requirements for compensation under section 766.309(1). Accordingly, Prince'Nylan is eligible for an award of NICA benefits under the Plan.

CONCLUSIONS OF LAW

15. 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.

16. The Florida Legislature created the Plan as a means to alleviate the high costs of medical malpractice insurance for physicians 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.

17. To seek compensation under the Plan, a legal representative on behalf of an injured infant files a claim with DOAH. §§ 766.302(3) and 766.305(1), Fla. Stat. NICA, which administers the Plan, then 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.

18. If NICA determines that the injury is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the ALJ to whom the claim has been assigned. § 766.305(7), Fla. Stat.

19. When considering whether a claim is compensable under the 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. 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. 766.302(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; 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.

20. The term "birth-related neurological injury" is defined in section 766.302(2) as:

[I]njury 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.

21. 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 Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings*, 686 So. 2d 1349, 1356 (Fla. 1997).

22. If a claim qualifies for compensation, section 766.31(1) lists the expenses and payments the ALJ shall award "[u]pon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth."

23. The burden of proof in this matter falls on Petitioner, as the "claimant," to prove that Prince'Nylan 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 Petitioner demonstrates 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).

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

25. Turning to the injury in this case, the competent substantial evidence establishes that Prince'Nylan suffered a "birth-related neurological injury" as defined in section 766.302(2). Dr. Willis, following his review of the medical records, concluded that Prince'Nylan experienced oxygen deprivation during his birth, which resulted in brain injury. Dr. Willis was not able to assess the severity of Prince'Nylan's brain injury. However, Dr. Bello-Espinosa persuasively opined that Prince'Nylan sustained substantial mental and physical impairments, which are permanent. Dr. Willis's and Dr. Bello-Espinosa's opinions are credited. Accordingly, based on the evidence in the record, the undersigned determines that Prince'Nylan suffered a "birth-related neurological injury."

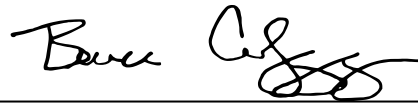
26. In conclusion, the evidence in the record establishes that Petitioner's claim meets the statutory requirements for compensability under the Plan. Prince'Nylan suffered a "birth-related neurological injury" during the course of the labor, delivery, or resuscitation in the immediate postdelivery period as described in section 766.302(2). The evidence further shows that the obstetrical services provided at Prince'Nylan's birth were delivered by a "participating physician" as defined in section 766.302(7). Accordingly, Prince'Nylan is eligible for an award of NICA benefits under section 766.31.

DISPOSITION

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

1. Petitioner's Petition for compensation under the NICA Plan is APPROVED.
2. NICA shall make immediate payment of all actual expenses previously incurred, and shall make payment for future expenses as incurred pursuant to section 766.31(1)(a).
3. Princess Grant, as the parent and natural guardian of Prince'Nylan, is entitled to the full award authorized under section 766.31(1)(d)1.a.
4. Petitioner is also entitled to an award of reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees, pursuant to section 766.31(1)(e).
5. The parties are accorded 45 days from the date of this Final Order to resolve, subject to approval by the Administrative Law Judge, the amount and manner in which any portion of the above-listed awards should be paid. If not resolved within such period, the parties will so advise the Administrative Law Judge, and a hearing will be scheduled to determine such issues.
6. Pursuant to section 766.312, the Division of Administrative Hearings retains jurisdiction over this matter to address the amount of an award pursuant to section 766.31, as well as to resolve any disputes regarding the parties' compliance with the terms of this Final Order.

DONE AND ORDERED this 21st day of October, 2021, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
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).