

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

CRISSA GIBSON (TIMS) AND JOSEPH  
GIBSON, SR., ON BEHALF OF AND AS  
PARENTS AND NATURAL GUARDIANS OF  
JOSEPH GIBSON, JR., A MINOR,

Petitioners,

vs.

Case No. 21-1310N

FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION,

Respondent.

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SUMMARY FINAL ORDER OF DISMISSAL

This came before the undersigned on Respondent's Motion for Summary Final Order (Motion), filed November 30, 2021. The Motion represents that Petitioners do not oppose the relief being sought.

In its Motion, the Florida Birth-Related Neurological Injury Compensation Association (NICA) asserts that in order for a claim to be compensable under the Florida Birth-Related Neurological Injury Compensation Plan (the Plan), the statutory prerequisites of section 766.309, Florida Statutes, must be met, including:

(1) The administrative law judge shall make the following determinations based upon all available evidence:

(a) *Whether the injury claimed is a birth-related neurological injury . . .*

\* \* \*

(2) *If the administrative law judge determines that the injury alleged is not a birth-related neurological*

*injury . . .*, she or he shall enter an order . . . .  
(emphasis added).

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

(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 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. (emphasis added).

#### FINDINGS OF FACT

1. On March 31, 2021, Petitioners filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. for benefits pursuant to sections 766.301-766.316, otherwise known as the Plan.

2. The baby was born on May 5, 2020, at North Florida Regional Medical Center (Hospital), located in Gainesville, Florida. The circumstances of the labor, delivery, and birth of the minor child are reflected in the medical records provided by NICA in response to the Petition.

3. In the instant case, NICA has retained Donald C. Willis, M.D., as its medical expert specializing in maternal-fetal medicine. Dr. Willis’s medical report was filed with the Division of Administrative Hearings (DOAH) on June 4, 2021. Upon examination of the pertinent medical records, Dr. Willis opined:

In summary, labor was complicated by a non-reassuring FHR pattern prior to birth. However, the baby was not depressed at birth with Apgar

scores of 7/8. Umbilical cord blood pH was >7.0 and base excess was <12. Resuscitation included stimulation and CPAP supplemental oxygen. The baby was transferred from delivery to the Well Baby Nursery. Seizure activity was observed on DOL 2, but may have been present since birth according to mother's observations. EEG was consistent with encephalopathy and MRI findings concerning for hypoxic brain injury.

Multi-system organ failures are generally seen with birth-related hypoxic injuries. However, this child did not suffer multi-system organ failures, suggesting the brain injury was not related [or] due to oxygen deprivation at birth.

There was no apparent obstetrical event that resulted in brain injury due to loss of oxygen or mechanical trauma during labor, delivery or the immediate post-delivery period.

4. Additionally, NICA retained Raj D. Sheth, M.D., as its medical expert specializing in Pediatric Neurology. Dr. Sheth's medical report was also filed with DOAH on June 4, 2021. Upon examination of the pertinent medical records and performance of an independent medical examination, Dr. Sheth opined:

In SUMMARY, Joseph's neurological examination reflected mild delays in gross motor with scooting with left leg underneath him. He had no evidence of spasticity. His history and neonatal records indicated seizures and evidence of hypoxic ischemic encephalopathy, although the cause does not appear to be related to oxygen deprivation or mechanical injury occurring during labor, delivery or immediate post-delivery period.

At the time of this examination and evaluation Joseph's case indicates that he does not have substantial and permanent mental impairment and does not have substantial physical impairment. As such, Joseph Gibson would not qualify for compensation under the NICA program.

5. The medical reports of Dr. Willis and Dr. Sheth are the only evidence of record relating to the issue of whether the subject claim is compensable as defined by the statute. The Petition, along with the unrebutted medical reports of Dr. Willis and Dr. Sheth, establishes that there are no genuine issues of material fact regarding the compensability of this claim.

#### 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 Plan was established by the Legislature “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.

8. 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. Section 766.305(4) provides that NICA, which administers the Plan, has 45 days from the date that a complete claim is served 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.

9. If NICA determines that the alleged injury 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. However, if NICA disputes the claim, as it does in this case, the dispute must be resolved by the assigned administrative law judge in accordance with chapter 120, Florida Statutes. §§ 766.304, 766.30, and 766.31, Fla. Stat.

10. The first inquiry is whether the infant has sustained a birth-related neurological injury as defined by section 766.302(2), which provides:

“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 amultiple 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. (emphasis added).

11. If the administrative law judge determines that the infant meets the statutory threshold for weight and has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and that as a result of the injury the infant was rendered permanently and substantially mentally and physically impaired, then section 766.309(1) provides that there is a rebuttable presumption that the injury is a birth-related neurological injury.

12. In this case, the evidence does not support a finding that the injury is a birth-related neurological injury. This issue is dispositive with respect to compensability. Based upon this evidence, Joseph Gibson, Jr., did not sustain a birth-related neurological injury as defined in section 766.302(2), and is not eligible for benefits under the Plan.

#### CONCLUSION

Based upon the Findings of Fact and Conclusions of Law provided above, Petitioners’ claim is not compensable under the Plan, and the Petition is dismissed with prejudice.

DONE AND ORDERED this 16th day of December, 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).