

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

JAN MIGUEL FALCON MARTY AND  
GENESIS MARIE PINERO ADORNO O/B/O  
GALIA MAREANNA FALCON PINERO, A  
MINOR,

Petitioners,

Case No. 21-2026N

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

ORLANDO HEALTH, INC. D/B/A WINNIE  
PALMER HOSPITAL FOR WOMEN AND  
BABIES,

Intervenor.

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SUMMARY FINAL ORDER OF DISMISSAL

On January 6, 2022, Respondent, Florida Birth-Related Neurological Injury Compensation Association (“NICA”), filed a Motion for Summary Final Order. The Motion is unopposed and relies on the reports and affidavits of Donald Willis, M.D., and Michael Duchowny, M.D., filed November 24, 2021, and January 28, 2022, respectively.

STATEMENT OF THE ISSUE

Whether Galia Mareanna Falcon Pinero (“Galia”) suffered a “birth-related neurological injury,” as defined by section 766.302(2), Florida Statutes (2021), for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan (“Plan”).

PRELIMINARY STATEMENT

On June 2, 2021, Petitioners, Jan Miguel Falcon Marty and Genesis Marie Pinero Adorno, on behalf of Galia, a minor, filed a Petition, Under Protest, for Benefits Pursuant to Florida Statutes Section 776.301 et seq., with the Florida Division of Administrative Hearings (“DOAH”). The Petition named Ricardo Javier Lopez, M.D., and M. Anderson, C.N.M., as the obstetrician and certified nurse midwife, respectively, who delivered Galia on November 17, 2020, and Orlando Health, Inc. (“Hospital”), d/b/a Winnie Palmer Hospital for Women and Babies, as the Hospital where she was born. DOAH sent copies of the Petition via Certified U.S. Mail to NICA, Dr. Lopez, Nurse Midwife Anderson, and the Hospital on July 2, 2021.

On July 16, 2021, the Hospital filed a Petition for Leave to Intervene. The undersigned granted that motion the same day.

After receiving two extensions, NICA filed its Response to Petition for Benefits on November 24, 2021. NICA argued that its experts reviewed the medical records, conducted an examination of Galia, and opined that the claim was not compensable. Both Petitioners and Intervenor informed the undersigned’s office that they did not oppose NICA’s position. In an Order dated December 7, 2021, the undersigned directed NICA to file a motion for summary final order on or before January 6, 2022.

On January 6, 2022, NICA filed its Motion for Summary Final Order. Petitioners and Intervenor did not respond to the motion, which represents that neither party disputes NICA’s assertion that no party opposes its position on compensability.

## FINDINGS OF FACT

1. Petitioners are the parents and legal guardians of Galia.
2. On November 17, 2020, Ms. Pinero gave birth to Galia, a single gestation of 41 weeks, at the Hospital. Galia was delivered by spontaneous vaginal birth and weighed 3,815 grams.
3. Dr. Lopez and Nurse Midwife Anderson provided obstetrical services and delivered Galia.
4. The undisputed available evidence consists of affidavits and reports of two physicians: Dr. Willis, a board-certified obstetrician; and Dr. Duchowny, a board-certified pediatric neurologist.
5. Dr. Willis reviewed the medical records and offered his opinions about Galia's delivery in a report dated November 18, 2021. Dr. Willis summarized his opinions as follows:

In summary, labor was induced at 41 weeks gestational age. The FHR tracing became abnormal, requiring administering of Terbutaline to slow uterine contractions. Although the baby was initially depressed at birth, the cord blood pH was  $> 7.0$  and the 5-minute Apgar score was normal at 8, suggesting there was no significant oxygen deprivation at birth. Bag and mask ventilation was required almost three minutes with eventual transfer to the Transitional Nursery. Seizure activity was noted at seven hours after birth. EEG was consistent with diffuse encephalopathy and MRI showed an acute cerebral infarct.

This baby suffered acute cerebral infarction, which was documented by MRI at 10 hours after birth. The FHR tracing was reassuring during early labor, suggesting the brain injury did not occur just prior to onset of labor. An abnormal FHR tracing shortly before birth resulted in a depressed newborn. However, the cord gas pH of 7.19 and a 5-minute Apgar score of 8 would suggest the baby did not suffer any significant oxygen deprivation or brain injury during labor and delivery. I defer any

opinion concerning brain injury during the post-delivery period. Expert interpretation of the MRI studies and neurological exam of the baby could provide a more accurate opinion concerning this time period.

There was no obstetrical event that resulted in some loss of oxygen to the baby's brain during labor or delivery that would have resulting brain injury. I have no opinion concerning severity of the brain injury.

6. Based on the medical records, Dr. Willis opined to a reasonable degree of medical probability that no obstetrical event occurred during birth that caused Galia to suffer significant oxygen deprivation that would have resulted in brain injury.

7. Dr. Duchowny reviewed the medical records, conducted an independent medical examination ("IME") on Galia on August 9, 2021, and offered his opinions as to whether Galia suffers from permanent and substantial mental and physical impairment caused by oxygen deprivation in a report dated November 22, 2021. Dr. Duchowny summarized his opinions as follows:

Galie has substantial mental and motor impairments. However, her initially stable neurological status after birth prior to seizure onset and absence of neonatal encephalopathy, together with an abnormal neurological outcome and a significant brain injury on MR imaging are inconsistent with the acquisition of her injury during labor and delivery. The fetal heart rate abnormalities observed during labor are consistent with depleted fetal reserves rather than timing a sentinel event. Apart from the occurrence of seizures, there is also no evidence of acute deterioration in the immediate post-delivery period. It is more like that Galia's brain injury was acquired shortly before birth. Sepsis is most likely the cause of Galia's neurological problems although a prenatal hypoxic-ischemic cause cannot be excluded.

8. Based on the medical records and the IME, Dr. Duchowny opined to a reasonable degree of medical probability that, although Galia has substantial mental and motor impairments caused by a brain injury, the injury most likely occurred before labor and delivery.

#### 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 first determines if the child suffered a “birth-related neurological injury” based on the available evidence.

14. Pursuant to section 766.302(2), 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.

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. Petitioners have 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 Petitioners meet their burden, section 766.309(1) provides that there is a rebuttable presumption that the injury is a birth-related neurological injury. Conversely, if Petitioners do not meet their burden, the undersigned is required to issue an order dismissing the Petition. *Id.*


17. Based on the Findings of Fact above, the undisputed available evidence establishes that, although Galia suffers from substantial mental

and physical impairment, the brain injury did not occur as a result of oxygen deprivation during labor, delivery, or the immediate resuscitation period thereafter. Thus, Galia did not suffer a birth-related neurological injury and she is not eligible for benefits under the Plan.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law herein, Petitioners' 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 4th day of February, 2022, in Tallahassee, Leon County, Florida.



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ANDREW D. MANKO  
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 4th day of February, 2022.

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. 7021 1970 0000 4860 7239)

Simone Marstiller, Secretary  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 1  
Tallahassee, Florida 32308  
(Certified No. 7021 1970 0000  
4860 7291)

Kim Kellum, Esquire  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308  
(Certified No. 7021 1970 0000 4860 7246)

Brooke India Charlan, Esquire  
Morgan & Morgan, P.A.  
20 North Orange Avenue, Suite 1600  
Orlando, Florida 32801  
(Certified No. 7021 1970 0000 4860 7253)

Kenney Shipley, Executive Director  
Florida Birth-Related Neurological  
Injury Compensation Association  
Post Office Box 14567  
Tallahassee, Florida 32317  
(Certified No. 7021 1970 0000 4860 7277)

M. Mark Bajalia, Esquire  
Bajalia Law  
11512 Lake Mead Avenue, Suite 301  
Jacksonville, Florida 32256  
(Certified No. 7021 1970 0000 4860 7260)

Ricardo Lopez, M.D.  
7243 Della Drive, Suite H  
Orlando, Florida 32819  
(Certified No. 7021 1970 0000 4860 7338)

Thomas M. Hoeler, Esquire  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308  
(Certified No. 7021 1970 0000  
4860 7345)

Jack Tobias Cook, Esquire  
Morgan & Morgan, P.A.  
20 North Orange Avenue, 9th Floor  
Orlando, Florida 32801  
(Certified No. 7021 1970 0000  
4860 7307)

Bradley P. Blystone, Esquire  
Marshall, Dennehey, Warner,  
Coleman and Goggin  
315 East Robinson Street, Suite 550  
Orlando, Florida 32801  
(Certified No. 7021 1970 0000  
4860 7314)

Michelle Anderson, CNM  
601 East Rollins Street  
Orlando, Florida 32803  
(Certified No. 7021 1970 0000  
4860 7321)

#### 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).