

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

SHYANY KNIGHT AND GUDIEL JUAREZ
AGUILAR, ON BEHALF OF AND AS PARENTS
AND NATURAL GUARDIANS OF GIANNO
KNIGHT, A MINOR,

Petitioners,

vs.

Case No. 21-2152N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER

On November 16, 2021, Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), filed a Motion for Summary Final Order, which is due for consideration. The Motion for Summary Final Order is unopposed, and relies upon the affidavits of Donald C. Willis, M.D., and Raj D. Sheth, M.D., filed December 3, 2021, as well as the reports from both physicians filed with NICA's Response to Petition for Benefits.

STATEMENT OF THE ISSUE

The issue to be determined is whether the infant, Gianni Knight (Gianno), suffered a birth-related neurological injury as that term is defined in section 766.302(2), Florida Statutes (2019).

PRELIMINARY STATEMENT

On July 1, 2021, Shyany Knight and Gudiel Juarez Aguilar, as parents and natural guardians of Gianni, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq., on behalf of Gianni, seeking a

determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition named Todd Rasner, M.D., as the physician providing obstetrical services and Baptist Medical Center South as the hospital where Gianni was born on May 29, 2020.

NICA, Dr. Rasner, and Baptist Medical Center South were served with the Petition by certified mail on July 13, 2021. Certified mail return receipts were received indicating service on each of them.

On August 23, 2021, NICA filed a response to the Petition, asserting that, based on the review of the medical records provided; the independent medical examination performed; and the expert medical reports prepared based on the records and the examination, Gianni did not suffer a birth-related neurological injury as that term is defined in section 766.302(2).

Petitioners did not respond to the Motion for Summary Final Order, and the Motion represents that Petitioners do not intend to challenge NICA's position on compensability.

FINDINGS OF FACT

1. Gianni was born May 29, 2020, at Baptist Medical Center South.
2. Neither party disputes that Dr. Rasner was a participating physician in the NICA program at the time of Gianni's birth.
3. Dr. Donald C. Willis is a physician board-certified in obstetrics and gynecology and maternal-fetal medicine. He reviewed the medical records related to Gianni's birth, and prepared a report for NICA based on his review. By affidavit filed December 3, 2021, Dr. Willis affirmed that the opinions contained in his report are based on a reasonable degree of medical probability.

4. Dr. Willis's report includes the following summary:

In summary, labor was induced for fetal macrosomia. Vacuum and forceps were used to assist vaginal delivery. Delivery was complicated by shoulder dystocia. Apgar scores were 1/8. The baby suffered a fractured humerus, unilateral paralysis of the diaphragm, subdural hemorrhage and subgaleal hemorrhage related to birth. Expanding subgaleal hemorrhage resulted in blood loss and hypotension. The newborn hospital course was complicated by multisystem organ failures, consistent with birth related oxygen deprivation. MRI on DOL 3 was read by Neuro-Radiology as normal. Despite the above complicated newborn hospital course, it does not appear the birth-related complications resulted in identifiable brain injury.

There was an obstetrical event that resulted in some degree of oxygen deprivation during delivery and continuing into the immediate post delivery period. Fortunately, based on available medical records, it does not appear that the oxygen deprivation result[ed] in identifiable brain injury.

5. At NICA's request, Gianni was examined by Rash D. Sheth, M.D., a board-certified pediatric neurologist. Dr. Sheth's report was submitted with NICA's response to the Petition, and in his affidavit filed December 3, 2021, Dr. Sheth affirmed that the opinions expressed in the report are within a reasonable degree of medical certainty.

6. The summary in Dr. Sheth's report states the following in pertinent part:

In response to your question:

1. "Does the child suffer from both a substantial mental impairment and a substantial physical impairment?"

As of the time of this examination [when Gianni was 14 months old] and evaluation Gianni's case indicates that he does suffer from a right Erb's palsy [as] a direct result of delivery with shoulder

dystocia. Additionally, he sustained a left humeral fracture that has healed well and is not expected to be a source of limitation. The Erbs palsy is permanent and surgical remedies for this are likely to have limited success. Regarding, surgery there is a optimal time window for his evaluation and surgery as well mother is in the process of evaluating this. With regards to hypoxic ischemic encephalopathy the evidence suggest[s] that he did sustain hypoxic ischemic encephalopathy although did not sustain neonatal seizures. ... He did not meet the criteria for brain cooling. In addition to this he has an expressive language delay and gross motor delay as described above. Taken together, Gianni Knight sustained substantial physical impairment with some additional mental impairment.

2. In response to your question “mental and physical impairments likely to be permanent?”

As of the time of this examination his physical impairment is likely to be permanent as a result of his right Erbs palsy.

3. In response to your question “Are such permanent and substantial mental and physical impairments consistent with an injury to the brain acquired due to oxygen deprivation or mechanical injury occurring during labor delivery or the immediate post delivery period?”

Based on the nature of his left humeral fracture and right Erbs palsy which resulted from a vaginal delivery by forceps for a shoulder dystocia his findings are consistent with birth-related trauma that resulted directly in the right Erb’s palsy. He also suffered mild hypoxic ischemic encephalopathy with resulting delays as described above.

As such, Gianni Knight’s case would not meet the criteria for compensation under the NICA program.

7. Taken together, Dr. Willis's and Dr. Sheth's opinions indicate that while there was a birth-related injury that caused some level of physical and mental injury, it does not appear that the injuries meet the definition of a birth-related neurological injury as defined by section 766.302(2).

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings (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 (2021).

9. The Legislature established 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.

10. An injured infant and certain other statutorily-identified people, including the infant's parents, 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 related to whether the child has suffered a birth-related neurological injury.

11. 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, as it does in this case, the dispute must be resolved by the administrative law judge in accordance with chapter 120. §§ 766.304, 766.30, and 766.31, Fla. Stat.

12. 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:

(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.

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

14. The evidence presented, through the physician reports and affidavits, does not establish a birth-related injury as section 766.302(2) defines that term. First, while Dr. Willis concludes there was an obstetrical event that caused some deprivation of oxygen, he finds that the records do not appear to support an identifiable brain injury. Similarly, although Dr. Sheth reports that the child has Erb’s palsy associated with shoulder dystocia, he does not report that this injury, while permanent, is the result of any spinal or brain injury. Finally, while developmental delays for a 14-month old are reported, there is no indication that these delays constitute permanent deficits of the type that would meet the definition provided in section 766.302(2).

Accordingly, it is concluded that Gianni did not suffer a birth-related neurological injury and is not eligible for benefits under the Plan.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law, NICA's Motion for Summary Final Order is GRANTED. Petitioner's claim for benefits under the Plan is dismissed.

DONE AND ORDERED this 6th day of January, 2022, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of January, 2022.

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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).