

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHAYLA R. GORDON ON BEHALF OF AND AS
PARENT AND NATURAL GUARDIAN OF
ARIEL L. IVEY, A MINOR,

Petitioner,

vs.

Case No. 21-2314N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This matter came before the undersigned on Respondent's Motion for Summary Final Order (Respondent's Motion), filed September 23, 2021. Petitioner does not oppose Respondent's Motion.

STATEMENT OF THE CASE

On July 23, 2021, Petitioner filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. (Petition) with the Division of Administrative Hearings (DOAH) for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition named Richard Kreinest, M.D., as the physician who provided obstetric services to Shayla R. Gordon, for the birth of Ariel L. Ivey (Ariel) at UF Shands Hospital, in Gainesville, Florida, on December 27, 2016.

On August 2, 2021, DOAH mailed a copy of the Petition to Respondent, Dr. Kreinest, and UF Shands Hospital via certified mail. Respondent was served with the same on August 3, 2021.

On August 26, 2021, Respondent filed its Response to Petition for Benefits, wherein Respondent maintained that the claim was not compensable because Ariel did not sustain a “birth-related neurological injury,” as defined by section 766.302(2), Florida Statutes. Respondent requested that a bifurcated hearing be scheduled to address the issues of compensability and noticed first, and, if required, to address the amount of an award in a second hearing.

On September 9, 2021, the undersigned issued an Order Requiring Response directing the parties to communicate and advise, on or before September 23, 2021, whether a final hearing would be required; and, if so, an estimate of the time required to conduct the hearing and several mutually agreeable dates to conduct the hearing.

On September 23, 2021, Respondent filed a status report indicating that it did not believe a hearing was necessary; however, Respondent had not been able to obtain Petitioner’s position. On the same date, Respondent filed Respondent’s Motion.

At Petitioner’s request, a telephonic status conference was conducted on October 4, 2021, with Petitioner and Respondent in attendance. The undersigned advised Petitioner that additional time may be provided, if necessary, to respond to Respondent’s Motion. Petitioner advised, however, that Petitioner was not opposing Respondent’s Motion.

FINDINGS OF FACT

1. Ariel was born on December 27, 2016, at UF Shands Hospital, in Gainesville, Florida.
2. Ariel was a single gestation and her weight at birth exceeded 2,500 grams.

3. As set forth in greater detail below, the unrefuted evidence establishes that Ariel did not sustain a “birth-related neurological injury,” as defined by section 766.302(2).

4. Donald Willis, M.D., a board-certified obstetrician specializing in maternal-fetal medicine, was retained by Respondent to review the pertinent medical records of Ms. Gordon and Ariel and opine as to whether Ariel sustained an injury to her brain or spinal cord caused by oxygen deprivation or mechanical injury that occurred during the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.

5. In his report, dated August 12, 2021, Dr. Willis summarized his findings and opinions, in pertinent part, as follows:

The mother was a 20 year old G1 involved in a high-velocity automobile accident with airbag deployment at 39 weeks gestational age. Fetal bradycardia was noted on arrival to the hospital with a fetal heart rate in the 50’s. Placental abruption was suspected and she was taken directly for emergency Cesarean section delivery.

Monitoring for uterine contractions and maternal pelvic exam for cervical dilation were not done due to the emergent nature of the mother’s condition. There was no history suggesting that the mother was in labor at time of the accident.

* * *

In summary, the mother was involved in a high-velocity automobile accident, which resulted in placental abruption and fetal bradycardia. The mother was not in labor. Emergency Cesarean section was done with delivery of a severely depressed baby. Apgar scores were 0/0/1. The newborn hospital course was complicated by multi-system organ failures, consistent with in-utero oxygen deprivation. MRI was consistent with HIE. The baby’s brain injury occurred prior birth [sic] and would not be considered a birth related injury.

6. In his supporting affidavit, Dr. Willis opines, to a reasonable degree of medical probability, that Ariel's brain injury occurred prior to birth and when Ms. Gordon was not in labor.

7. Respondent also retained Raj D. Sheth, M.D., a pediatric neurologist, to review the medical records of Ms. Gordon and Ariel, and to conduct an Independent Medical Examination (IME) of Ariel. The purpose of his review and IME was to determine whether Ariel suffered from a permanent and substantial mental and physical impairment as a result of an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury in the course of labor, delivery, or resuscitation in the immediate post-delivery period.

8. Dr. Sheth reviewed the pertinent medical records and, on August 25, 2021, conducted the IME. In his report, prepared the same day as the examination, he summarized his findings and opinions, which are set forth, in pertinent part, as follows:

In SUMMARY, Ariel was born by emergency laparotomy/CS due to uterine trauma sustained in a severe motor vehicle collision which resulted in placental separation and subsequently vaginal hemorrhage. On delivery findings and by Apgar scores she sustained severe hypoxic-ischemic encephalopathy and had to be resuscitated. Her initial EEG was isoelectric, and she required brain cooling. Her MRI scan of the brain obtained in the NICU indicated severe diffuse hypoxic-ischemic encephalopathy with evidence of blood intracranially. Ariel's examination reveals severe diffuse spastic quadriparesis right side more affected than the left with delays in gross motor, fine motor, personal social and language areas that are significant. She is not able to ambulate or feed independently.

* * *

Based on the severe motor vehicle accident and traumatic spleen that mother sustained prior to arrival at ER and the placental separation and vaginal bleeding that was observed in the ER prior to the laparotomy, the injury to the brain occurred prior to arrival in the ER and prior to labor, delivery, or immediate post delivery period.

9. In his supporting affidavit, Dr. Sheth opines, to a reasonable degree of medical probability, that the injury to Ariel's brain did not occur in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.

10. The undisputed and unopposed findings and opinions of Drs. Willis and Sheth are credited. The undersigned finds that Ariel did not sustain an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.

CONCLUSIONS OF LAW

11. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. §§ 766.301-766.316, Fla. Stat.

12. The Plan was established by the Legislature "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims" relating to births occurring on or after January 1, 1989. § 766.303(1), Fla. Stat.

13. The injured infant, her or his 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. Respondent, which administers the Plan, 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.

14. If Respondent determines that the injury alleged is a claim that is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the administrative law judge (ALJ) to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, compensability is disputed, the dispute must be resolved by the assigned ALJ in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

15. In its present posture, the ALJ is required to make the following threshold determination based upon the 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. 766.303(2).

§ 766.309(1), Fla. Stat.

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

“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.

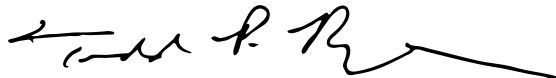
17. If the ALJ determines that the injury is not a birth-related neurological injury, he or she is required to enter an order and immediately provide a copy to the parties. § 766.309(2), Fla. Stat.

18. The undisputed and unopposed evidence establishes that there was not an injury to Ariel's brain caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital. To the contrary, the available evidence establishes that the injury to Ariel's brain occurred prior to labor, delivery, or resuscitation. Thus, it is concluded that she did not sustain a compensable birth-related neurological injury, as defined in section 766.302(2), and, therefore, is not eligible for benefits under the Plan.

CONCLUSION

Based on the Findings of Fact and the Conclusions of Law, it is ORDERED that Respondent's Motion is granted and the Petition is dismissed with prejudice.

DONE AND ORDERED this 8th day of October, 2021, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
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this 8th day of October, 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).