

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

JANNA AND SHANE HOLCOMBE,
INDIVIDUALLY AND AS PARENTS AND
NATURAL GUARDIANS OF SHANE
HOLCOMBE, JR., MINOR CHILD,

Case No. 21-2317N

Petitioners,

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

BAYFRONT HMA MEDICAL CENTER, LLC
D/B/A BAYFRONT,

Intervenor.

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SUMMARY FINAL ORDER OF DISMISSAL

On January 13, 2022, Respondent, Florida Birth-Related Neurological Injury Compensation Association (“NICA”), filed a Motion for Summary Final Order. The Motion is unopposed and relies upon the reports of Donald Willis, M.D., and Michael Duchowny, M.D., filed January 13, 2022.

STATEMENT OF THE ISSUE

Whether Shane Holcombe, Jr. (“Shane”), 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 July 26, 2021, Petitioners Janna and Shane Holcombe, individually and as parents and natural guardians of Shane, a minor, filed a Petition for Benefits Pursuant to Florida Statutes Section 776.301 et seq., with the Florida Division of Administrative Hearings (“DOAH”). The Petition named Solimar Jimenez Diaz, M.D., and Amy Johnson, C.N.M., as the obstetrician and certified nurse midwife, respectively, who delivered Shane on June 20, 2019, and Bayfront Medical Center (“Hospital”) as the Hospital where he was born. DOAH sent copies of the Petition via Certified U.S. Mail to NICA, Dr. Diaz, Nurse Midwife Johnson, and the Hospital on August 3, 2021.

On August 11, 2021, the Hospital filed a Petition to Intervene in this proceeding. The undersigned granted that motion on August 16, 2021.

After receiving two extensions, NICA filed its Response to Petition for Benefits on November 12, 2021. NICA argued that its experts reviewed the medical records, conducted an examination of Shane, and opined that the claim was not compensable. In an Order to Show Cause dated November 16, 2021, the undersigned directed Petitioners and Intervenor to file a status report providing their respective positions on the issue of compensability. On November 23, 2021, NICA filed a Status Report indicating that Intervenor believed the claim was compensable and, thus, a final hearing was necessary. The undersigned scheduled the final hearing for February 28, 2022.

The parties thereafter engaged in discovery and Intervenor’s expert performed an independent medical examination (“IME”) of Shane. Based on that discovery, NICA filed an unopposed Motion to Cancel Final Hearing on January 13, 2022, advising that a final hearing was no longer necessary because all parties now agreed that the claim was not compensable. In an Order dated January 14, 2022, the undersigned cancelled the final hearing.

On January 13, 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 all parties agree with its position on compensability.

FINDINGS OF FACT

1. Petitioners are the parents and legal guardians of Shane.

2. On June 20, 2019, Ms. Holcombe gave birth to Shane, a single gestation of 37 weeks, at the Hospital. Shane was delivered by spontaneous vaginal birth and weighed 3,460 grams.

3. Dr. Diaz and Nurse Midwife Johnson provided obstetrical services and delivered Shane.

4. The undisputed available evidence consists of 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 Shane's delivery in a report dated August 20, 2021. Dr. Willis summarized his opinions as follows:

In summary, labor was induced for maternal hypertension. The FHR tracing was non-reassuring during last 30 to 40 minutes prior to birth. The baby was depressed at birth with APGAR scores 2/3/5. Cord blood pH was 7.04 with a base excess of -11. Seizure activity began about 12 hours after birth. MRI on DOL 7 showed an intraventricular hemorrhage and MRI spectroscopy was suggestive of [hypoxic ischemic encephalopathy or] HIE.

There was an apparent 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. I am not able to comment about the severity of the injury.

6. Dr. Duchowny reviewed the medical records, conducted an IME on Shane on November 8, 2021, and offered his opinions as to whether Shane suffers from permanent and substantial mental and physical impairment in a report dated November 9, 2021. Dr. Duchowny summarized his opinions as follows:

In summary, Shane's evaluation reveals a modest delay in expressive language, hypotonia and a history of epilepsy. He has social issues that raise a question of autism spectrum disorder. In contrast, Shane's other domains of cognitive function including receptive language, motor milestones, behavior and attention span are well-developed and age-appropriate.

* * *

Based on review of the medical records and the findings on the Zoom evaluation, I believe that Shane does not have either a substantial mental or motor impairment. I am therefore not recommending consideration for Shane's acceptance in the NICA program.

7. The opinions of Dr. Willis and Dr. Duchowny indicate that, although there was an oxygen deprivation event during labor, delivery, and the immediate post-delivery period that caused Shane to suffer a brain injury, it did not result in substantial mental and physical impairment sufficient to qualify as a "birth-related neurological injury," as defined in section 766.302(2).

CONCLUSIONS OF LAW

8. DOAH has jurisdiction over the parties and exclusive jurisdiction over the subject matter of this case. § 766.304, Fla. Stat.

9. 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.

10. 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.

11. 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.

12. In determining compensability, the ALJ first determines if the child suffered a “birth-related neurological injury” based on the available evidence.

13. 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).

14. 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”).

15. 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.*

16. Based on the Findings of Fact above, the undisputed available evidence establishes that, although there was an oxygen deprivation event occurring during labor, delivery, and the immediate post-delivery period that caused Shane to suffer a brain injury, it did not result in substantial mental and physical impairment. Thus, Shane did not suffer a birth-related neurological injury and he 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 25th day of January, 2022, in Tallahassee, Leon County, Florida.



ANDREW D. MANKO
Administrative Law Judge
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Filed with the Clerk of the
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this 25th 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).