

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

TANIA M. RUSSO AND CHINA BAILEY,
INDIVIDUALLY AND AS PARENTS AND NEXT
FRIENDS OF KNOX RUSSO, A MINOR,

Petitioners,

Case No. 21-2374N

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

ORLANDO HEALTH, INC, D/B/A ORLANDO
HEALTH SOUTH LAKE HOSPITAL,

Intervenor.

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon the Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on October 14, 2021.

STATEMENT OF THE CASE

On July 26, 2021, Petitioners, Tania M. Russo and China Bailey, individually and as parents and next friends of Knox Russo (Knox), a minor, 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 identified Tamara Richards, M.D., as the physician who provided obstetric services at the birth of Knox on January 8, 2020, at Orlando Health South Lake Hospital, located in Lake County, Florida.

DOAH served Dr. Richards, Orlando Health South Lake Hospital, and NICA with a copy of the Petition on August 3, 2021.

On September 29, 2021, NICA filed a Response to Petition for Benefits, asserting that Knox did not sustain a “birth-related neurological injury,” as that term is defined in section 766.302(2), Florida Statutes, and requested that a hearing be scheduled to determine compensability. On October 8, 2021, the undersigned entered an Order that required the parties to confer and advise concerning the need for a hearing, if any, and if a hearing is needed, when the parties will be prepared to proceed to a hearing, the issues in dispute, the estimate of time required for hearing, and the choice of venue. On October 13, 2021, the parties filed a Joint Status Report, which stated, in part, “that a final hearing on compensability will not be necessary as the Petitioners and Intervenor do not contest NICA’s determination that this claim does not qualify for NICA benefits.”

On October 14, 2021, NICA filed its Motion for Partial Summary Final Order (Motion). Given the stated position of all parties in the Joint Status Report, the undersigned treats the Motion as unopposed.

FINDINGS OF FACT

1. Knox was born on January 8, 2020, at Orlando Health South Lake Hospital, located in Lake County, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Knox. In a medical report dated August 23, 2021, Dr. Willis summarized his findings and opined, in pertinent part, as follows:

In summary, labor was induced for severe hypertension at 37 weeks gestational age. A non-reassuring FHR pattern developed at complete cervical dilation. Cesarean delivery was difficult due to the fetal head being impacted in the maternal pelvis. The baby was depressed at birth with a cord pH of only 6.83 and a base excess of -18.7. Cooling protocol was initiated for suspected hypoxic ischemic encephalopathy (HIE). Although the baby did not have any seizure activity, MRI was consistent with subtle HIE.

There was an apparent obstetrical event that resulted in the loss of oxygen to the baby's brain during labor, delivery and continuing into the immediate post-delivery period. The oxygen deprivation resulted in at least some degree of brain injury, as identified by MRI on DOL 6, which suggested subtle HIE. I am not able to comment about the severity of the brain injury.

3. NICA retained Luis E. Bello-Espinosa, M.D. (Dr. Bello-Espinosa), a medical expert specializing in pediatric neurology, to examine Knox and to review his medical records. Dr. Bello-Espinosa examined Knox on September 25, 2021. In a medical report dated September 25, 2021, Dr. Bello-Espinosa summarized his examination of Knox and opined, in pertinent part, as follows:

SUMMARY:

Knox is a 19-month-old boy with a history of moderate hypoxic-ischemic encephalopathy of birth. He underwent therapeutic hypothermia for 72-hours. In the NICU, he did not have seizures, apnea or irregular breathing. An MRI of brain showed findings indicative [of] a subtle hypoxic-ischemic injury.

On the evaluation today Knox[']s neurological examination and development are completely normal. There was no evidence of any residual

abnormal cortical, extrapyramidal, cerebellar, upper or lower motor neuro signs.

Results as of question 1: Does the child suffer from both a substantial mental impairment and a substantial physical impairment?

Knox is found to have no substantial physical or mental impairment at this time.

Results as of question 2: If so, are bot the mental and physical impairments permanent?

There are no mental or physical impairments.

Results of question 3: Are such permanent and substantial mental and physical impairments consistent with an injury to the brain or spinal cord acquired due to oxygen deprivation or mechanical injury occurring during labor, delivery or the immediate post-delivery period?

There are no permanent substantial mental or physical impairments.

4. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to Dr. Bello-Espinosa's opinion that Knox is not permanently and substantially mentally and physically impaired, and thus should not be considered for inclusion in the NICA Plan. Dr. Bello-Espinosa's opinion is credited.

5. Pursuant to the Joint Status Report, Petitioners do not oppose the Motion.

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 Legislature established the Plan "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.

8. 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. NICA, 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.

9. If NICA determines that the injury alleged in a claim 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 to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned administrative law judge in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

10. In discharging this responsibility, the administrative law judge must make the following 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).

(b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital.

§ 766.309(1), Fla. Stat. An award may be sustained only if the administrative law judge concludes that the “infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth.” § 766.31(1), Fla. Stat.

11. Section 766.302(2) defines the term “birth-related neurological injury” 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.

12. To be compensable under the Plan, there must have been an obstetrical event, which resulted in loss of oxygen to the baby’s brain during labor, delivery, or resuscitation in the immediate post-delivery period resulting in a permanent and substantial mental impairment and a permanent and substantial physical impairment, inasmuch as both are required to establish compensability. *Fla. Birth-Related Neurological Injury Comp. Ass’n v. Div. of Admin. Hearings*, 686 So. 2d 1349 (Fla. 1997).

13. The evidence, which Petitioners have not refuted or attempted to refute, established that Knox did not suffer a birth-related neurological injury. Therefore, Knox is not eligible for benefits under the Plan.

CONCLUSION

Based on the Findings of Fact and the Conclusions of Law, it is

ORDERED that:

The Petition filed by Tania M. Russo and China Bailey, individually and as parents and next friends of Knox Russo, is dismissed with prejudice.

DONE AND ORDERED this 21st day of October, 2021, in Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
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Filed with the Clerk of the
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this 21st 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).