

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

ROBERT MASSON AND ALYSSA BOICH, O/B/O
DARLENE MASSON, A MINOR,

Petitioners,

Case No. 21-2807N

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

PASCO-PINELLAS HILLSBOROUGH
COMMUNITY HEALTH SYSTEM, INC, D/B/A
ADVENTHEALTH WESLEY CHAPEL, FLORIDA
MEDICAL CLINIC, LLC; MICHAEL G.
JACKSON, M.D.; AND SANTO J. PANIELLO,
M.D.,

Intervenors.

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SUMMARY FINAL ORDER ON COMPENSABILITY

This matter came before the undersigned on Respondent's Motion for Partial Summary Final Order (Motion), filed January 10, 2022.

STATEMENT OF THE CASE

On August 31, 2021, Petitioners filed a "Petition, Under Protest, for Benefits Pursuant to Florida Statutes Section 766.301 et seq." (Petition) at the Division of Administrative Hearings (DOAH). The Petition named Michael Gerard Jackson, M.D., as the physician who provided obstetric services at the birth of Darlene Masson (Darlene) on July 30, 2015, at Adventhealth Wesley Chapel (AdventHealth), in Wesley Chapel, Florida.

The Petition alleges, inter alia, that Petitioner, Alysa Boich, was not provided with proper notice as required by section 766.316, Florida Statutes. DOAH served Respondent with a copy of the Petition on or before September 19, 2021. On September 16, 2021, DOAH mailed a copy of the Amended Petition by certified mail to Dr. Jackson and AdventHealth.

On October 1, 2021, AdventHealth filed its Petition for Leave to Intervene, and an order granting intervention was issued the same day. Also, on October 1, 2021, Florida Medical Clinic, LLC; Michael G. Jackson, M.D.; and Santo J. Paniello, M.D.'s Motion to Intervene was filed. Said motion was ultimately granted on January 13, 2022.

On January 3, 2022, Respondent filed a Notice of Compensability and Request for Evidentiary Hearing on Compensability. Pursuant to this filing, Respondent suggested that the subject claim is compensable; however, pursuant to section 766.313, Respondent contends the claim is time-barred as it was not filed within five years of Darlene's birth. Accordingly, Respondent requested a bifurcated hearing, wherein compensability would be first addressed.

By Order dated January 3, 2022, the parties were ordered to confer and advise the undersigned in writing no later than January 17, 2022, as to the need for a hearing. Respondent's Motion was filed on January 10, 2022, and requests a summary final order determining that Darlene did suffer a birth-related neurological injury, as defined in section 766.302(2) but concluding, as a matter of law, that the claim is not compensable as it is time-barred.

On January 18, 2022, a telephonic status conference was conducted with counsel for all parties in attendance. During the telephonic conference, counsel for Petitioners and Intervenors represented that there was no

opposition to Respondent's Motion and that there was no objection to the undersigned ruling on Respondent's Motion. The parties further represented that disputed issues of material fact remain concerning whether the notice requirements of section 766.316 were satisfied. Accordingly, jurisdiction is reserved to address the notice issue.

FINDINGS OF FACT

1. Darlene was born a live infant on July 30, 2015, at AdventHealth, located in Wesley Chapel, Florida.
2. AdventHealth is a "hospital," as defined by section 766.302(6).
3. At the time of birth, Darlene weighed at least 2,500 grams.
4. Obstetrical services were delivered by Drs. Jackson and Paniello in the course of the subject labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.
5. At the time of Darlene's birth, Drs. Jackson and Paniello were "participating physician[s]," as defined in section 766.302(7).
6. Donald Willis, M.D., an obstetrician specializing in maternal-fetal medicine, was retained by Respondent to review the medical records for Darlene and her mother, Alyssa Boich. In his affidavit, dated December 30, 2021, Dr. Willis opines, to a reasonable degree of medical probability, in pertinent part, as follows:

5. In summary, labor was complicated by a non-reassuring FHR pattern during the last 30 minutes and thick meconium at birth. The newborn was significantly depressed with Apgar scores of 0/1/3/3/5. Initial intubation failed due [sic] thick meconium. Resuscitation included respiratory support, chest compressions, epinephrine and intravenous fluid boluses. Despite a reasonable cord blood gas pH of 7.24, the baby became severely acidotic with an arterial blood gas (ABG) at 40 minutes with a pH of only 6.86 with a base excess of -20. The newborn hospital course was

complicated by multisystem organ failures, including respiratory depression, seizures, renal failure, coagulopathy, poor perfusion and elevated lactic acid and liver function studies. EEG was consistent with hypoxic ischemic encephalopathy (HIE) which was confirmed by MRI on DOL 7. The baby was subsequently diagnosed with intractable epilepsy, microcephaly and global development delay.

* * *

6. It is my opinion that there was an apparent obstetrical event that resulted in loss of oxygen during labor and delivery which worsened in the immediate post-delivery period. The oxygen deprivation resulted in brain injury.

7. Respondent further retained Luis E. Bello-Espinosa, M.D., a pediatric neurologist. Dr. Bello-Espinosa was retained to review the available medical records and conduct an examination of Darlene to determine whether she suffers from an injury, which rendered her permanently and substantially mentally and physically impaired; and whether such injury is consistent with an injury caused by oxygen deprivation or mechanical injury occurring during the course of labor, delivery, or the immediate post-delivery period in the hospital.

8. Dr. Bello-Espinosa conducted the examination on December 18, 2021. In his affidavit dated January 4, 2022, he opines, to a reasonable degree of medical probability, that Darlene has mental and physical impairments that are permanent and substantial and that said impairments occurred during labor and delivery. His affidavit further affirms the opinions set forth in his report authored on December 18, 2021, which are set forth, in pertinent part, as follows:

SUMMARY:

Darlene is a 6-year 4-month girl with a history of severe hypoxic-ischemic encephalopathy of birth, presenting with initial very low Apgars, severe acidosis, with supportive evidence on EEG of extreme suppression of the brain activity and MRI changes of restricted diffusion in multiple areas of the brain, all indicative of an acute severe bilateral diffuse ischemic event occurring at birth.

On the examination today [sic] is evident that Darlene has severe neurological sequela. At 6-years of age, Darlene has profound intellectual disability, is non-verbal, has severe ataxic cerebral palsy, in addition to severe multiple modalities treatment resistant epilepsy. She is at high risk of SUDEP (Sudden unexpected death in epilepsy).

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

Darlene is found to have substantial physical and mental impairment at this time.

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

The mental and physical impairments are permanent.

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?

In reviewing all the available documents, the evolution of her symptoms, the acute prolonged severe suppression of the cerebral activity of the EEG and brain MRI changes indicative of severe HIE, it is evident that Darlene had an acute

hypoxic event perinatally. The injury is felt to be acquired due to oxygen deprivation of the brain. The injuries are felt to be birth-related.

Results as of question 4: Did the permanent and substantial mental and physical impairments themselves occur during labor, delivery or the immediate post-delivery period (which period continues until the baby is medically stable)?

The permanent substantial mental and physical impairments occurred during labor and delivery.

9. The undisputed opinions of Drs. Willis and Bello-Espinosa are credited. Based on their opinions, the undersigned finds that Darlene sustained an injury to the brain caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which rendered Darlene permanently and substantially mentally and physically impaired.

CONCLUSIONS OF LAW

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

11. The Florida Birth-Related Neurological Injury Compensation Association Plan (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.

12. 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.

13. 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, as alleged in the Petition, 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.

14. In discharging this responsibility, the ALJ is required to make the following threshold determinations 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.

15. 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.

16. The evidence establishes that the injury sustained by Darlene is a birth-related neurological injury. Darlene was born a live infant weighing at least 2,500 grams. The unrefuted evidence further establishes that there was an injury to Darlene’s brain caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital. The undisputed evidence further establishes that said injury has rendered her permanently and substantially mentally and physically impaired.

17. The undisputed evidence further establishes that obstetrical services were delivered by participating physicians, Drs. Jackson and Paniello, in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, AdventHealth.

18. In addressing compensability, the ALJ must also consider whether the claim for compensation is timely filed. Pursuant to section 766.313, “[a]ny claim for compensation under ss. 766.301-766.316 that is filed more than 5 years after the birth of an infant alleged to have a birth-related neurological injury shall be barred.” Here, Darlene was born on July 30, 2015, and the Petition was filed on August 31, 2021. Accordingly, because the Petition was

filed more than five years after Darlene's birth, Petitioners are barred from pursuing a remedy under the Plan.

CONCLUSION

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

1. Respondent's Motion is granted.
2. Jurisdiction is reserved to determine whether the notice requirements of section 766.316 were satisfied.

DONE AND ORDERED this 28th day of January, 2022, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of January, 2022.

COPIES FURNISHED:
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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).