

**STATE OF FLORIDA**  
**DIVISION OF ADMINISTRATIVE HEARINGS**

YANCY VELAZQUEZ AND LUIS VELAZQUEZ  
AND AS PARENTS AND NATURAL  
GUARDIANS OF EMMA VICTORIA  
VELAZQUEZ GUADALUPE, A MINOR,

Petitioners,

vs.

Case No. 22-0250N

FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION,

Respondent.

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SUMMARY FINAL ORDER OF DISMISSAL

On July 14, 2022, Respondent, Florida Birth-Related Neurological Injury Compensation Association (“NICA”), filed a Motion for Summary Final Order, which is supported by the reports and affidavits of Donald Willis, M.D., and Luis Bello-Espinosa, M.D., also filed July 14, 2022. Petitioners have not filed a response to the motion, even though the undersigned confirmed in the Order to Show Cause dated August 5, 2022, that they needed to file their response by August 19, 2022, and that their failure to do so would result in the undersigned issuing a summary final order of dismissal.

STATEMENT OF THE CASE

Whether Emma Victoria Velazquez Guadalupe (“Emma”) suffered a “birth-related neurological injury,” as defined by section 766.302(2), Florida Statutes (2022),<sup>1</sup> for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan (“Plan”).

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<sup>1</sup> References to the Florida Statutes are to the 2022 versions, which have not changed in any way material to the Findings of Fact or Conclusions of Law made herein since 2019.

PRELIMINARY STATEMENT

On January 24, 2022, Petitioners, Yancy Velazquez and Luis Velazquez and as Parents and Natural Guardians of Emma Victoria Velazquez Guadalupe, a minor, filed a Petition, Under Protest, for Benefits Pursuant to Florida Statutes Section 776.301 et seq., with the Florida Division of Administrative Hearings (“DOAH”). The Petition named Carhine Pierre-Lambert, M.D., as the obstetrician who delivered Emma on January 10, 2019, and Central Florida Regional Hospital as the hospital where she was born. DOAH sent copies of the Petition via Certified U.S. Mail to NICA, Dr. Pierre-Lambert, and the hospital on January 27, 2022.<sup>2</sup>

After receiving one extension of time to serve its response, NICA filed a Status Report on April 22, 2022, indicating that it needed releases signed by Petitioners in order to obtain additional medical records regarding the delivery and the child’s treatment. After holding a teleconference with all parties present on April 28, 2022, the undersigned issued an Order on Status Report that day, which directed Petitioners to execute the outstanding releases and gave NICA until June 13, 2022, to respond to the Petition.

On June 13, 2022, NICA filed its Response to Petition for Benefits. NICA argued that its experts reviewed the medical records, conducted an examination of Emma, and opined that the claim was not compensable. In an Order dated June 30, 2022, the undersigned gave NICA until July 15, 2022, to file its motion for summary final order and directed Petitioners to file a response thereto if they opposed the relief requested:

**On or before July 29, 2022**, Petitioners shall file a response to Respondent’s motion for summary final order if they oppose the relief requested

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<sup>2</sup> The letter to Dr. Pierre-Lambert was mailed to the address listed in the Petition, 1071 South Sun Drive, Suite 1043, Lake Mary, Florida 32746, but it was returned as undeliverable by the U.S. Postal Service. This Order is being mailed to Dr. Pierre-Lambert at the mailing address listed on the Florida Department of Health’s website.

therein. Petitioners shall attach thereto medical documentation, affidavits, or any other evidence that they believe supports their position that the claim is compensable. Petitioners are cautioned that the failure to attach sufficient evidence to their response may result in the undersigned concluding that the facts are undisputed that the claim is not compensable and issue an order granting the motion.

On July 14, 2022, NICA filed its Motion for Summary Final Order. In the Motion, NICA indicated that it had attempted to contact Petitioners regarding their position on several occasions, but had not yet received a response. Petitioners did not file a response to NICA's Motion by July 29, 2022, the deadline previously set by the undersigned. Petitioners registered to e-file through the eALJ system on or around April 28, 2022, and, thus, have received copies of all pleadings filed and orders entered via e-service through DOAH's eALJ system. Indeed, Petitioners acknowledged receipt of the Order on Status Report dated April 28, 2022, NICA's Response to Petition for Benefits and supporting expert reports, and the Notice of Appearance filed on June 17, 2022, by NICA's counsel. However, Petitioners had not yet accessed the link to the Order dated June 30, 2022, or NICA's Motion for Summary Final Order.

Accordingly, the undersigned issued an Order to Show Cause dated August 5, 2022, which gave Petitioners until August 19, 2022, to file their response to NICA's motion along with supporting documentation if they intended to challenge NICA's position that the claim is not compensable. The Order to Show Cause stated:

**Petitioners are cautioned that the failure to timely file a response or attach sufficient medical documentation to such a response will result in the undersigned concluding that the facts are undisputed that the claim is not**

**compensable and issuing a summary final order of dismissal.**

In an abundance of caution, a copy of the Order to Show Cause was sent to Petitioners electronically through the eALJ system and via U.S. Mail at their address of record. Although Petitioners have not yet accessed the e-service link to the Order to Show Cause, the copy sent to them via U.S. Mail was not returned to sender. Petitioners' failure to file a response to NICA's Motion for Summary Final Order—as previously warned in two prior Orders—is deemed a concession that they do not contest the relief requested by NICA.

FINDINGS OF FACT

1. Petitioners are the parents and legal guardians of Emma.
2. On January 10, 2019, Ms. Velazquez gave birth to Emma, a single gestation of almost 41 weeks, at the hospital. Emma was delivered by cesarean section and weighed 3,020 grams.
3. Dr. Pierre-Lambert provided obstetrical services and delivered Emma.
4. The undisputed available evidence consists of affidavits and reports of two physicians: Dr. Willis, a board-certified obstetrician; and Dr. Bello-Espinosa, a board-certified pediatric neurologist.
5. Dr. Willis reviewed the medical records and offered his opinions about Emma's delivery in a report dated June 13, 2022. Dr. Willis summarized his opinions as follows:

In summary, labor was induced at 40 4/7 weeks. Cesarean section delivery was done at complete cervical dilation for failure of descent. Extraction of the fetus at Cesarean was difficult due to the fetal head located deeply in the maternal pelvis. The one-minute Apgar score was low, likely due to the difficult extraction. However, the baby quickly improved with good color and cry by five-minutes. This would [sic] suggest the baby did not suffer any substantial oxygen deprivation or acidosis at birth. Seizures developed at 12 hours after birth

with MRI finding on DOL 1 consistent with a middle cerebral artery infarction.

The baby was initially depressed at birth, likely related to a difficult extraction at time of Cesarean delivery. However, with only 20 seconds of bag and mask ventilation, the baby rapidly improved and was noted to have good color and cry by five minutes. This would suggest there was no substantial oxygen deprivation or acidosis at birth. The baby suffered a cerebral infarction, documented by seizure activity at 12 hours and confirmed by MRI on DOL 1. Etiology of the cerebral infarction was undetermined, but does not appear to be related to oxygen deprivation or trauma during labor or delivery.

There was no apparent oxygen deprivation or trauma to the baby during labor or delivery that would have led to brain injury.

6. Based on the medical records, Dr. Willis opined to a reasonable degree of medical probability that “there was no apparent oxygen deprivation or trauma to the baby during labor or delivery that would have led to brain injury.”

7. Dr. Bello-Espinosa reviewed the medical records, conducted an independent medical examination (“IME”) on Emma on June 4, 2022, and offered opinions as to whether Emma suffers from permanent and substantial mental and physical impairment caused by oxygen deprivation in a report dated June 4, 2022. Dr. Bello-Espinosa summarized his opinions as follows:

Emma is a 3-year 5-month-old girl born at term who presented at 12-hours of life with refractory acute symptomatic electroclinical and electrographic neonatal status epilepticus, preceded by unremarkable labor and delivery recorded evidence of a hypoxic-ischemic event.

In subsequent immediate work up, Emma was found to have a large left middle cerebral artery ischemic stroke which was deemed to cause her seizures. The etiology of the stroke was never established. Since then, at 6-month of age, Emma developed symptomatic epileptic spasm syndrome, as can be seen after previous large arterial cerebral ischemic strokes. She remains on antiseizure medication.

On the examination, today is evident that Emma has severe neurological sequela. At her current 3-years and 5-months, Emma has a noticeable severe expressive language delay and stereotypical movements consisting of rocking back and forth and bilateral hand flapping. She has evident moderate hypertonia of her right arm and leg, with right-hand fisting and dystonic posturing, which are clinical signs indicative of spastic right hemiparetic cerebral palsy. Emma is not able to walk independently. The right hemiparesis results from injury to the left corticospinal tract and left basal ganglia structures. Her cognitive impairment manifested by the severe expressive language delay, her limited sustained attention, and body stereotypes suggests residual brain dysfunction or encephalopathy after children have had a history of super-refractory status epilepticus and severe epileptic spasms.

\* \* \*

In reviewing all the available documents, the evolution of her acute neonatal refractory status epilepticus, and the reported acute EEG and brain MRI changes, it is evident that Emma had an acute perinatal ischemic stroke that involved the left middle cerebral artery. However, the subsequent cerebrovascular injury was not due to oxygen deprivation of the brain and was not caused by a hypoxic-ischemic mechanism. There was no evidence of mechanical injury that occurred during labor, delivery, or the immediate post-delivery period.

8. Based on the medical records and the IME, Dr. Bello-Espinosa opined to a reasonable degree of medical probability “that Emma has permanent and substantial physical and mental impairment, however, the permanent and substantial mental and physical impairments were not caused by oxygen deprivation or mechanical injury occurring during labor, delivery or the immediate post-delivery period.”

#### CONCLUSIONS OF LAW

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

10. 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.

11. 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.

12. 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.

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

14. 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).

15. 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”).

16. 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.*



17. Based on the Findings of Fact above, the undisputed evidence establishes that, although Emma suffers from permanent and substantial mental and physical impairment, it was not caused by oxygen deprivation or mechanical trauma to her brain or spinal cord during labor, delivery, or the immediate post-delivery period. Thus, Emma did not suffer a birth-related neurological injury and she 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 24th day of August, 2022, in Tallahassee, Leon County, Florida.



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ANDREW D. MANKO  
Administrative Law Judge  
1230 Apalachee Parkway  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 24th day of August, 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).