

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

MINDI SWARTZEL, ON BEHALF OF AND AS
PARENT AND NATURAL GUARDIAN OF
TILLY-MARIE BARBER, A MINOR,

Petitioner,

vs.

Case No. 22-0302N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

KRISTEN COOK, CNM, AND FLORIDA
PHYSICIAN PROTECTIVE PARTNERSHIP,
LLC,

Intervenors.

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon the Respondent's Motion for Summary Final Order (Motion) filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on July 28, 2022, and the undersigned's Order to Show Cause, entered August 10, 2022.

STATEMENT OF THE CASE

On January 26, 2022, Petitioner, Mindi Swartzel, on behalf of and as parent and natural guardian of Tilly-Marie Barber (Tilly-Marie), 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 Kristen Cook as the nurse midwife who provided obstetric services at the birth of Tilly-Marie, on April 25, 2021, at North Florida Regional Medical Center, now known as HCA Florida North Florida Hospital (NFRMC), located in Alachua County, Florida.

DOAH served Ms. Cook, NFRMC, and NICA with a copy of the Petition on February 1, 2022. On February 22, 2022, Ms. Cook and Florida Physician Protective Partnership, LLC (Ms. Cook's employer), filed a Petition for Leave to Intervene. On March 2, 2022, the undersigned entered an Order Granting Motion to Intervene.

On March 7, 2022, NICA filed a Response to Petition for Benefits, which stated its determination that the instant claim is not compensable as the injury does not meet the definition of a "birth-related neurological injury" as defined in section 766.302(2), Florida Statutes. On March 25, 2022, the parties filed a Joint Response to Order, which stated that Petitioner requested a hearing in this matter, but that NICA and Intervenors did not believe a hearing was necessary. On April 5, 2022, the undersigned entered a Notice of Hearing, which set this matter for final hearing on September 15, 2022.

On July 28, 2022, NICA filed its Motion. After Petitioner failed to timely respond to the Motion, the undersigned entered an Order to Show Cause, that ordered Petitioner, on or before August 23, 2022, to show cause, in writing, why the Motion should not be granted and a summary final order be entered finding that Petitioner's claim is not compensable. Petitioner failed to respond to either the Motion or the Order to Show Cause.

FINDINGS OF FACT

1. Tilly-Marie was born on April 25, 2021, at NFRMC, located in Alachua County, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Tilly-Marie. In a medical report dated March 7, 2022, Dr. Willis summarized his findings and opined, in pertinent part, as follows:

In summary, labor was induced at 37 weeks for well controlled Gestational Diabetes and mild preeclampsia. Delivery was by spontaneous vaginal birth. The baby was not depressed with Apgar scores of 8/9. NICU care was never required. The newborn hospital course was uncomplicated with discharge home at 44 hours after birth.

The child was subsequently diagnosed with abnormal muscle tone and developmental delay of unknown etiology. MRI was negative for hypoxic ischemic brain injury and genetic studies, including microarray were normal.

There was no obstetrical event that resulted in the loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery or the immediate post delivery period.

3. NICA retained Luis E. Bello-Espinosa, M.D. (Dr. Espinosa), a medical expert specializing in pediatric neurology, to examine Tilly-Marie and to review her medical records. Dr. Espinosa examined Tilly-Marie on February 12, 2022. In a medical report dated February 12, 2022, Dr. Espinosa summarized his examination of Tilly-Marie and opined, in pertinent part, as follows:

Tilly is a nine-month-old girl with a history of developmental delay and failure to thrive of undetermined etiology. The review of her records demonstrated no findings to indicate the presence of perinatal distress nor evidence of any birth-related hypoxic-ischemic injury.

On her examination today, Tilly has discrete dysmorphic features, axial and distal hypotonia with preservation of normal reflexes. Tilly did not display any evidence of extrapyramidal signs, neither abnormal upper or lower motor neuron signs as can be seen after a brain or spinal cord injury due to birth-related insults. Tilly's clinical presentation of hypotonia with preservation of reflexes, developmental delays, and failure to thrive suggest a probable potential metabolic-genetic process that could be very challenging and difficult to diagnose in many instances. Further testing should be considered.

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

Tilly ... does not have evidence of substantial physical and mental impairments related to her birth.

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

Tilly does not have evidence of permanent mental and physical impairments related to her birth.

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 the available documents and the evolution of her symptoms, there is no evidence indicating that Tilly had an acute hypoxic event perinatally. There is no birth-related injury due to oxygen deprivation of the brain.

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)?

Tilly's developmental delays and failure to thrive are not related to any events that may have occurred during labor, delivery, or the immediate post-delivery period.

Considering the clinical presentation, I feel that there is not enough evidence to recommend Tilly be included in the NICA program.

4. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinions of Dr. Willis and Dr. Espinosa that Tilly-Marie did not suffer an injury that meets the definition of a birth-related neurological injury under section 766.302(2). Dr. Willis's and Dr. Espinosa's opinions are credited.

CONCLUSIONS OF LAW

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

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. To be compensable under the Plan, there must have been an obstetrical event which resulted in loss of oxygen to the baby’s brain or spinal cord injury 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 Inj. Comp. Ass’n v. Div. of Admin. Hearings*, 686 So. 2d 1349 (Fla. 1997).

12. The evidence, which is unrefuted, established that Tilly-Marie did not suffer a birth-related neurological injury under the definition of section 766.302(2). Therefore, Tilly-Marie is not eligible for benefits under the Plan.

CONCLUSION

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

ORDERED that:

The Petition filed by Mindi Swartzel, on behalf of and as parent and natural guardian of Tilly-Marie Barber, a minor, is dismissed with prejudice. The final hearing in this matter, scheduled for September 15, 2022, is hereby cancelled.

DONE AND ORDERED this 25th day of August, 2022, in Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th 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).