

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

BRITTNEY N. COBB, ON BEHALF OF AND AS
PARENT AND NATURAL GUARDIAN OF
ZOEY N. COBB, A MINOR,

Petitioner,

vs.

Case No. 22-0303N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent.

_____ /

FINAL ORDER

On June 28, 2022, Administrative Law Judge Lisa Shearer Nelson of the Florida Division of Administrative Hearings (DOAH) conducted a hearing pursuant to section 120.57(1), Florida Statutes, by means of the Zoom platform.

APPEARANCES

For Petitioner: Brittney N. Cobb, pro se
(Address of record)

For Respondent: Tana D. Storey, Esquire
Rutledge Ecenia, P.A.
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue for resolution is whether Petitioner's infant daughter, Zoey N. Cobb (Zoey), suffered a birth-related injury as that term is defined in section 766.302(2), Florida Statutes.

PRELIMINARY STATEMENT

On January 28, 2022, Petitioner, Brittney N. Cobb (Ms. Cobb or Petitioner), as parent and natural guardian for her daughter, Zoey, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301, *et seq.* (the Petition), alleging that Zoey suffered a birth-related neurological injury. The Petition identified Dr. Jeffrey Schulman, M.D., as the physician providing obstetrical services and North Florida Regional Medical Center (NFRMC) as the hospital where Zoey was born. On February 1, 2022, the Petition was served by certified mail on Respondent, the Florida Birth-Related Neurological Injury Compensation Association (NICA), Dr. Schulman, and NFRMC.

On March 18, 2022, NICA filed a Response to Petition for Benefits, asserting that the claim was not compensable. The parties were directed to file a response indicating whether a hearing was necessary to determine compensability, and if so, to provide mutually agreeable dates for commencing a hearing. After response from the parties, the hearing was noticed for June 28, 2022, and took place as scheduled.

The parties filed a Joint Prehearing Stipulation on June 20, 2022, which included some facts for which evidence at hearing would not be required. Those facts have been included in the Findings of Facts below. At hearing, Joint Exhibit 1, consisting of voluminous medical records, was admitted into evidence. Petitioner testified on her own behalf but presented no additional exhibits. NICA presented no witnesses but NICA Exhibits 1 through 4 (which included reports from Dr. Donald Willis and Dr. Michael Duchowny, as well as Dr. Duchowny's deposition and curriculum vitae) were admitted into evidence. At the conclusion of the hearing, both parties requested 30 days to submit proposed final orders. The parties' request was granted, and they were advised that, notwithstanding their waiver of the time-frames in

Florida Administrative Code Rule 28-206.215, the Final Order would be issued no later than 30 days from submission of their proposed final orders.

The Transcript of the hearing was filed July 28, 2022. On August 1, 2022, a Scheduling Order was issued, directing that proposed final orders be filed no later than August 29, 2022, and that the Final Order would be issued no later than September 28, 2022. NICA filed a Proposed Final Order on August 29, 2022. Petitioner did not file a proposed final order.

All references to Florida Statutes are to the 2020 codification, except where specifically indicated otherwise. All emphasis is in the original.

FINDINGS OF FACT

1. Brittney N. Cobb is Zoey's parent and natural guardian.
2. Zoey was born a live infant on October 9, 2020, at NFRMC, a licensed hospital in Gainesville, Florida. Dr. Jeffrey Schulman, M.D., a participating physician in the NICA Plan, provided obstetrical services.
3. Zoey was a single gestation and weighed 4,075 grams. She was approximately four weeks early, due in part to her mother's gestational diabetes.
4. Zoey experienced a difficult birth. During the birthing process, she suffered shoulder dystocia, and her clavicle was fractured. More importantly, there was an obstetrical event that resulted in the loss of oxygen to Zoey's brain during the delivery, which continued into the immediate post-delivery period.
5. Zoey was transferred from NFRMC to Shands Hospital at the University of Florida (Shands), where she stayed in the Neonatal Intensive Care Unit (NICU) until her discharge on December 3, 2020.
6. Zoey's initial weeks of life were bleak. She was on a ventilator her first 11 days, and had multiple life-threatening issues that complicated her care.

A progress note by Dr. Roberto Borgia on October 11, 2020, Zoey's Day 3, reflects the scope of possibilities her parents were facing:

Baby is critically ill and intubated. Due to EEG finding of burst suppression, minimal response to exam and also evidence of multisystem organ dysfunction, we discussed the suspected severe HIE with the family today. ... Mom was overwhelmed with the above update and left the room to go see the baby. We further discussed the plan for DW Brain MRI tomorrow (~72 hours for best sensitivity to assess for HIE) and if severe it may mean that baby may possibly not be able to breathe on her own, may have severe neurodevelopmental delay, including CP, which may result in visual, hearing loss and worse-case scenario, child being completely bed bound. ... Mom went to bedside and wanted to hold baby and she was able to, without infant deteriorating.

7. Despite this bleak beginning, Zoey began to improve and make remarkable progress. She was taken off the ventilator on October 20, 2020 (Day 11), with respiration then supported by use of a CPAP, then weaned from the CPAP on October 22, 2020. On that day, progress notes indicate that Zoey was "much more stable – remains admitted for continued respiratory support, feeding tube dependence, and monitoring of a steadily worsening direct hyperbilirubinemia."

8. Zoey was discharged from Shands on December 3, 2020, with a feeding tube because of her continued difficulties in getting sufficient nutrition by mouth. Once home, her feeding difficulties improved and when she was approximately three months old, the feeding tube was removed.

9. Petitioner filed the Petition on Zoey's behalf when she was approximately 15 months old.

10. The Florida Birth-Related Neurological Injury Compensation Plan (Plan) is designed to provide coverage for care on a no-fault basis, for a

limited class of catastrophic injuries that result in unusually high costs for care and rehabilitation. *See* § 766.301(2), Fla. Stat.

11. Coverage under the Plan requires that the infant suffer permanent and substantial mental and physical impairments as a result of an injury to the brain or spinal cord occurring during the course of labor, delivery, or resuscitation in the immediate post-delivery period.

12. The parties have stipulated that there was an obstetric event that resulted in oxygen deprivation to Zoey's brain during delivery. Zoey's records were reviewed by Dr. Donald C. Willis, an expert in maternal-fetal medicine. Dr. Willis summarized his opinion in his report to NICA dated February 22, 2022, stating in part:

In summary, delivery at 36 weeks gestational age was complicated by a prolonged second stage of labor. Vacuum extraction was applied to assist vaginal delivery, which was further complicated by a shoulder dystocia. Resuscitation required intubation and chest compressions. Hemorrhagic shock resulted from blood loss due to an expanding subgaleal hemorrhage, most likely related to vacuum extraction. The newborn course was complicated by multisystem organ failures. EEG was consistent with diffuse encephalopathy. Head ultrasound on the day of birth suggested hypoxic brain injury. MRI on DOL 3 was consistent with hypoxic ischemic encephalopathy and confirmed a large subgaleal hematoma.

There was an obstetrical event that resulted in loss of oxygen to the baby's brain during 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.

13. The issue that remains is whether that obstetric event resulted in substantial and permanent mental and physical impairment.

14. To that end, on March 16, 2022, Zoey was examined via Zoom by Michael Duchowny, M.D., a board-certified pediatric neurologist. At the time of the examination, Zoey was approximately 17 months old. While the examination was conducted by Zoom as opposed to in person, Dr. Duchowny spent approximately 75 minutes with Zoey and her mother.

15. Dr. Duchowny is a senior staff attending physician at Nicklaus Children's Hospital, Department of Neurology, with the comprehensive epilepsy program, and is a clinical professor of neurology for both University of Miami's and Florida International University's medical schools. He has special qualifications in child neurology and clinical neuropsychology, and routinely sees children suffering from neurological injuries. In addition to examining Zoey, Dr. Duchowny reviewed her medical records.

16. Dr. Duchowny's report, which details his observations from his examination of Zoey, includes the following information:

Zoey presents as a non-fluent toddler who makes a variety of sounds but did not communicate verbally. She was prone to crying especially when she was not held. Zoey easily maintained a sitting position and rose to standing without assistance. When not crying, she was pleasant and socially engaged. Zoey was attracted by a hand puppet and had an age-appropriate level of attention for the animated puppet face. Zoey evidenced curiosity regarding her surroundings and had well-directed search behaviors. Zoey was not irritable or oppositional. She reliably demonstrated an age-appropriate activity level and stream of attention.

* * *

Coordination and Gait: Zoey easily stood without support and walked independently. Sitting and standing balances were stable and she walked with symmetric arm swing and age-appropriate stability. Head control is well-developed. She did not demonstrate abnormal stepping or placing responses. She used her hands cooperatively and

transferred between hands. Zoey stacked a short tower of Lego toys.

17. Dr. Duchowny reported that Zoey had an absence of expressive language, and speech and oromotor apraxia, as well as delayed social development and withdrawn behavior. However, he did not observe any substantial motor impairment, and did not recommend inclusion in the NICA program. In Dr. Duchowny's deposition, he confirmed the findings in his report, stating that Zoey does not suffer from a substantial motor deficit and had developed age-appropriate motor function. While Dr. Duchowny believed that Zoey has a developmental language disorder, he did not believe that it is permanent, but rather, that she will improve over time. Given these findings, he did not believe that Zoey met the requirements for inclusion in the NICA program.

18. At hearing, Ms. Cobb testified about the family's observations of Zoey's abilities and behaviors. She also testified that Zoey's treating neurologist, Suman Ghosh, M.D., had advised her that Zoey's injuries were a result of the hypoxic ischemic encephalopathy (HIE), and expressed confusion as a result of Dr. Duchowny's opinion that her lack of speech is a developmental disorder.

19. Progress notes from Zoey's 14-month visit with Dr. Ghosh on December 13, 2021, were included in the record. In those notes, Dr. Ghosh notes that Zoey was "social, interactive and mimics speech well," with "good eye contact throughout and very playful." He described her overall muscle tone as normal, and her gait as normal. Her scores on the Bayley Scale of Infant and Toddler Development indicates that her language scores were very low, and Dr. Ghosh recommended a formal audiology examination and speech therapy. Her motor and cognitive scores were listed as average.

20. Dr. Ghosh's notes are consistent with Dr. Duchowny's assessment of Zoey's condition.

21. Dr. Duchowny’s opinion is also consistent with the entirety of the medical records, and is credited. Ms. Cobb’s testimony is also credible and totally understandable, given what she and her family endured in dealing with the difficulties of Zoey’s birth and her lengthy stay in the NICU. It is consistent with the information provided to the family early in Zoey’s stay at Shands. However, the information provided at that time appears to have been provided to brace the family for the “worse-case scenario,” and is described in those terms. Thankfully, Zoey has progressed in a manner that many would consider miraculous, given the events surrounding her birth.

22. Although the evidence indicates that Zoey does continue to have some challenges, her current condition does not rise to the level of permanent and substantial impairments, either in terms of motor development or cognitive development. Dr. Duchowny seemed certain that her language disorder will improve, and she will not regress. Accordingly, there is not sufficient evidence to demonstrate that Zoey suffered a birth-related neurological injury required to be eligible for Plan benefits.

CONCLUSIONS OF LAW

23. DOAH has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.57(1) and 766.304.

24. The Legislature created the Plan to “provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation” caused by birth-related neurological injuries. § 766.301(2), Fla. Stat.

25. An injured infant and certain other identified people, including the infant’s parents or guardians, 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. Section 766.305(4) provides that NICA, which administers the Plan, has 45 days from the date that a complete claim is served to file a response to the petition and to submit relevant written

information related to whether the child has suffered a birth-related neurological injury. In this case, NICA fulfilled that responsibility by its response that Zoey did not suffer a birth-related neurological injury as that term is defined in section 766.302(2).

26. If NICA determines that there is a birth-related neurological injury that is compensable under the Plan, it may award compensation to the claimant, provided that the award is approved by the assigned administrative law judge. § 766.305(7), Fla. Stat. If NICA disputes the claim, as it does in this case, the dispute must be resolved by the administrative law judge in accordance with chapter 120. §§ 766.304, 766.30, and 766.31, Fla. Stat.

27. The initial inquiry is whether the infant has suffered a birth-related neurological injury, as that term is defined in section 766.302(2), which provides:

(2) “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 in 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.

28. If the administrative law judge determines that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and finds that as a result of the injury, the infant was rendered permanently and substantially mentally and physically impaired, then section 766.309(1) provides a rebuttable presumption that the injury is a birth-related neurological injury.

29. Petitioner is the party seeking to demonstrate that the infant suffered a birth-related neurological injury. Accordingly, she bears the burden of proof by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.; *Fla. Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981).

30. The Supreme Court of Florida has stated, "A 'preponderance' of the evidence is defined as 'the greater weight of the evidence,' *Black's Law Dictionary* 1201 (7th ed.1999), or evidence that 'more likely than not' tends to prove a certain proposition." *Gross v. Lyons*, 763 So. 2d 276, 280 (Fla. 2000) (citing *American Tobacco Co. v. State*, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997)).

31. In this case, Petitioner has not demonstrated that Zoey suffered a birth-related neurological injury as that term is defined in section 766.302(2). There is no dispute that she suffered an injury at birth, and the trauma experienced by her parents during her first weeks is unimaginable. However, the evidence shows that the injury she suffered did not result in substantial and permanent mental and physical impairments that would qualify her for inclusion in the Plan.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law, the Petition is dismissed with prejudice.

DONE AND ORDERED this 12th day of September, 2022, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
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this 12th day of September, 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).