

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

JASMIN CASEY O/B/O IZABELLA HEWITT,  
A MINOR,

Petitioner,

vs.

Case No. 22-1330N

FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION,

Respondent.

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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 August 15, 2022.

STATEMENT OF THE CASE

On April 22, 2022, Petitioner, Jasmin Casey, on behalf of Izabella Hewitt (Izabella), a minor, filed a Petition, Under Protest, 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 Emilio Antonetti, M.D., as the physician who provided obstetric services at the birth of Izabella on July 16, 2021, at Ascension Sacred Heart Pensacola, located in Escambia County, Florida.

DOAH served Dr. Antonetti, Ascension Sacred Heart Pensacola, and NICA with a copy of the Petition on May 3, 2022.

On June 17, 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 July 5, 2022, the parties filed a Joint Status Report, which stated that Petitioner did not challenge NICA’s finding of non-compensability and would not request a final hearing.

On August 15, 2022, NICA filed its Motion. The Motion reflects that Petitioner does not oppose the Motion.

#### FINDINGS OF FACT

1. Izabella was born on July 16, 2021, at Ascension Sacred Heart Pensacola, located in Escambia County, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Izabella. In a medical report dated May 25, 2022, Dr. Willis summarized his findings and opined, in pertinent part, as follows:

In summary, labor was complicated by a non-reassuring FHR pattern. A fetal heart rate in the 60-70 bpm range was noted and emergency Cesarean section was done. The baby was depressed at birth with Apgar scores of 1/1/1 despite a reasonable cord blood pH of 7.38. Resuscitation required intubation and chest compressions followed by epinephrine and normal saline boluses. EEG was consistent with seizure activity shortly after birth. Metabolic acidosis continued during the immediate post-delivery period. The initial arterial blood gas pH was 7.1 with a base excess of -16. MRI on DOL 5 was consistent with hypoxic ischemic brain injury.

I am unable to completely explain the relatively normal umbilical cord blood pH of 7.38 with Apgar scores of 1/1/1 and significant clinical newborn depression. The cord blood gas could be incorrect or acidosis worsened immediately after birth. In

either event, oxygen deprivation occurred that resulted in brain injury.

There was an obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery and continuing into the immediate post delivery period. The oxygen deprivation resulted in brain injury as indicated by seizure activity and MRI findings consistent with hypoxic ischemic injury. I am not able to comment about the severity of the injury.

3. NICA retained Luis E. Bello Espinosa, M.D. (Dr. Espinosa), a medical expert specializing in pediatric neurology, to examine Izabella and to review her medical records. Dr. Espinosa examined Izabella on June 11, 2022. In a medical report dated June 11, 2022, Dr. Espinosa summarized his examination of Izabella and opined, in pertinent part, as follows:

Izabella is an Eleven-month-old girl with a history of moderate hypoxic-ischemic encephalopathy at birth, for which she underwent therapeutic hypothermia for 72-hours. She had acute symptomatic electroclinical and electrographic seizures in the NICU, and an MRI of the brain obtained on the 7<sup>th</sup> day of life showed findings indicative of an acute hypoxic-ischemic injury.

On the evaluation today, Izabella has no evidence of abnormal upper or lower motor neuron dysfunction. She has no abnormal symptoms of corticospinal, extrapyramidal, brain stem, cerebellar or spinal cord dysfunction. There are no signs of abnormal behavior for her age, and no signs suggest residual brain dysfunction or encephalopathy.

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

Izabella is found to have no evidence of substantial mental or physical impairment at this time.

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

Izabella has no evidence of permanent mental and 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?

In reviewing all the available documents, the evolution of her symptoms, the acute EEG and brain MRI changes, and her acute neonatal seizures, it is evident that Izabella has an acute hypoxic event at birth, which resulted in oxygen deprivation to specific areas of the brain which were found on her MRI done on day 7 of life. The changes were described as minimal, involving only the basal ganglia, with the rest of the brain spared of any abnormalities.

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)?

Izabella does not have substantial mental or physical impairments that occurred during labor, delivery, or the immediate post-delivery period.

Considering the clinical presentation, I do feel there not enough evidence to recommend Izabella 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 opinion of Dr. Espinosa that Izabella did not suffer an injury that meets the definition of a birth-related

neurological injury under section 766.302(2). Dr. Espinosa's opinion is 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 the parties do not refute, established that Izabella did not suffer a birth-related neurological injury under the definition of section 766.302(2). Therefore, Izabella 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 Jasmin Casey, on behalf of Izabella Hewitt, a minor, is dismissed with prejudice.

DONE AND ORDERED this 18th day of August, 2022, in Tallahassee, Leon County, Florida.



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ROBERT J. TELFER III  
Administrative Law Judge  
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Filed with the Clerk of the  
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this 18th day of August, 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).