STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELIZABETH AMISIA AND CHARITABLE MICHEL, individually and as parents and natural guardians of their minor child, CHELE MICHEL,	)	
Petitioners,	)	
vs.	)	Case No. 04-2368N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
UNIVERSITY OF MIAMI, d/b/a UNIVERSITY OF MIAMI SCHOOL OF MEDICINE and PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY,	)	
Intervenors.	)	

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration of Respondent's Motion for Summary Final Order, served October 19, 2004.

STATEMENT OF THE CASE

1. On June 28, 2004, Elizabeth Amisia and Charitable Michel, individually and as parents and natural guardians of their minor child, Chele Michel (Chele), filed a petition (claim) with the Division of Administrative Hearings (DOAH) to

resolve whether Chele suffered an injury compensable under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). Pertinent to the pending motion, the petition stated:

> 5. Petitioner does not allege that CHELE MICHEL suffered brain damage as the result of the birth related neurological injury. However, this Petition for Benefits is being submitted as a result of the filing of a Motion to abate civil action by counsel for the physicians and hospital. This Petition is submitted so that a determination may be made as to whether there is any compensable injury under NICA. Petitioner alleges that CHELE MICHEL suffered a brachial plexus palsy [attributable to a shoulder dystocia encountered during delivery] that resulted in limited use of her left arm.

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on July 8, 2004, and on September 10, 2004, following an extension of time within which to do so, NICA filed its response to the claim and, based on the opinions of their experts, denied that Chele suffered an injury compensable under the Plan. In the interim, University of Miami, d/b/a University of Miami School of Medicine, and the Public Health Trust of Miami-Dade County, requested and were accorded leave to intervene.

3. Given NICA's response to the petition, an Order was entered on September 14, 2004, which accorded the parties 14 days to advise the administrative law judge (ALJ) as to the earliest date they would be prepared to proceed to hearing on

the issue of compensability, their estimate of the time required for hearing, and their choice of venue. In response, Petitioners filed a "Request for the Administrative Law Judge to Dispense with Compensability Hearing," wherein they requested that, given the opinions of NICA's experts (Doctors Michael Duchowny and Donald Willis), the ALJ "dispense with any compensability hearing, determine the claim is not compensable . . . and forthwith enter an Order that the . . . claim is not compensable." Not surprisingly, the University of Miami took exception to the relief requested by Petitioners, and in so doing stated:

> 4. As a threshold matter, the Petitioners' Request must be denied because there is no evidence in the record reflecting that CHELE MICHEL has not suffered a compensable injury under the Plan. While NICA has denied compensability, no affidavits or reports were attached to its response to the Petition for Benefits. Further, the Petitioners have failed to file any evidence establishing that CHELE MICHEL's injury is not NICA compensable.
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> 5. In addition, as no discovery has been conducted in this matter to date, it would be premature to dispense with a compensability hearing at this time. As a party who has a substantial interest in the outcome of the Petition for Benefits, the University of Miami is entitled to take discovery to determine whether CHELE MICHEL has been rendered permanently and substantially mentally and physically impaired. To that end, the University would, at a minimum, seek to take the deposition of the Petitioners' expert. If,

> at deposition, the Petitioners' expert agrees with NICA's experts that CHELE MICHEL did not suffer a compensable injury under the Plan, the University would likely be amenable to dispensing . . . [with] a compensability hearing. Prior to that time, however, the University intends to take whatever discovery is appropriate under the DOAH rules.
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> WHEREFORE, Intervenor, UNIVERSITY OF MIAMI, respectfully requests that the DOAH deny the Petitioners' Request for the Administrative Law Judge to Dispense with Compensability Hearing.

4. By Order of October 5, 2004, Petitioners' Request for the Administrative Law Judge to Dispense with Compensability Hearing was denied, and by Notice of Hearing, dated October 7, 2004, a hearing was scheduled for January 18, 2005, to resolve whether the claim was compensable.

5. In the interim, on October 19, 2004, NICA served a Motion for Summary Final Order, pursuant to Section 120.57(1)(h), Florida Statutes. The predicate for NICA's motion was its assertions that, indisputably, Chele's neurologic impairment (a left Erb's Palsy) originated in the left brachial plexus, not the brain or spinal cord, and while such injury may have resulted in significant physical limitations in the left upper extremity, Chele's neurologic functioning, mental and physical, was otherwise fully preserved. Attached to NICA's motion was an affidavit of Michael Duchowny, M.D., a pediatric neurologist associated with Miami Children's Hospital, who,

based on his review of Chele's medical records and his evaluation of Chele's on August 18, 2004, concluded:

> 5. It is my opinion that CHELE MICHEL suffers from neither a substantial mental nor motor impairment originating within the central nervous system.[1] Rather, her neurologic impairment originates in the left brachial plexis and constitutes a peripheral nerve injury. She has a left Erb's Palsy involving the C-5 and C-6 nerve roots, and her deficits are moderately severe and permanent. Her mental function is entirely normal, and she has neither a permanent nor severe mental impairment, nor any mental impairment whatsoever.

6. Neither Petitioners nor Intervenors responded to NICA's Motion for Summary Final Order. Consequently, an Order to Show Cause was entered on November 3, 2004, which provided:

> On October 19, 2004, Respondent served a Motion for Summary Final Order. To date, neither Petitioners nor Intervenors have responded to the motion. Fla. Admin. Code R. 28-106.204(4). Accordingly, it is
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> ORDERED that within 10 days of the date of this Order, Petitioners and Intervenors show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

7. On November 12, 2004, Intervenor, University of Miami, filed its response to the Order to Show Cause, and stated:

> 2. While a review of Dr. Duchowny's affidavit and medical report reflects that this claim is probably not compensable under the Plan, the University of Miami has not yet been afforded the opportunity to cross-examine Dr. Duchowny with respect to his opinions. As a party who has a substantial

> interest in the outcome of his proceeding, the University of Miami is entitled to take any discovery necessary to determine whether CHELE MICHEL has been rendered permanently and substantially mentally and physically impaired. Thus, the University would request that it be given the opportunity to take the deposition of Dr. Duchowny before the DOAH considers dismissing this action. If, at deposition, Dr. Duchowny testifies that Chele Michel did not suffer a compensable injury under the Plan, the University would likely be amendable to entering into a joint stipulation for dismissal at that time.
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> WHEREFORE, Intervenor, UNIVERSITY OF MIAMI, respectfully requests that the DOAH deny NICA's Motion for Summary Final Order.

Intervenor, Public Health Trust of Miami-Dade County filed its response to the Order to Show Cause on November 16, 2004, and adopted the University of Miami's response.

8. Intervenors' responses to the Order to Show Cause were addressed by Order of November 18, 2004, as follows:

> This cause came on for consideration on Intervenor, University of Miami's Response to Order to Show Cause Why NICA's Motion for Final Summary Order Should Not be Granted, filed November 12, 2004, and Intervenor, Public Health Trust's Notice of Joinder in Intervenor, University of Miami's Response to Order to Show Cause Why NICA's Motion for Final Summary Order Should Not Be Granted, filed November 16, 2004. The premises considered, it is
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> ORDERED that, although Intervenors have yet to avail themselves of the opportunity for discovery in this case, their request that they be given further opportunity to take Dr. Duchowny's deposition is granted, and

> ruling on Respondent's Motion for Summary Final Order is deferred until December 17, 2004, to accord Intervenors a further opportunity to depose Dr. Duchowny and file any further response to the Motion for Summary Final Order. Thereafter, the undersigned will address Respondent's Motion for Summary Final Order without further delay.
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> Intervenors' request that Respondent's Motion for Summary Final Order be denied is denied.

9. On December 2, 2004, Intervenor, University of Miami, filed its response (a Motion to Defer DOAH's Determination on Respondent's Motion for Summary Final Order) to the Order of November 18, 2004, and stated:

> 3. On November 19, 2004, the UNIVERSITY OF MIAMI contacted Dr. Duchowny's office to procure dates for his deposition. On November 29, 2004, Dr. Duchowny's office advised that Dr. Duchowny was unavailable during the entire month of December and that the earliest dates that he would be available were January 13, 2005, January 20, 2005, and January 21, 2005. As January 13, 2005 was the only date provided for a time prior to the January 18, 2005 final hearing, the UNIVERSITY OF MIAMI accepted that date.
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> 4. In light of the foregoing, the UNIVERSITY OF MIAMI will not be able to take Dr. Duchowny's deposition or respond to Respondent's Motion for Summary Final Order prior to December 17, 2004 in the absence of an order compelling Dr. Duchowny to appear for deposition prior to that date. Accordingly, the UNIVERSITY OF MIAMI respectfully requests that the DOAH defer ruling on the Motion for Protective Order [sic] until a reasonable time after the UNIVERSITY OF MIAMI is afforded the

opportunity to take Dr. Duchowny's deposition.

10. On December 17, 2004, a hearing was held to address Intervenor's response to the Order of November 18, 2004, and an Order was entered that day, as follows:

> This cause came on for consideration of Intervenor University of Miami's Motion to Defer DOAH's Determination on Respondent's Motion for Summary Final Order, filed December 2, 2004. Upon consideration and consistent with the discussion, and the parties' concurrence, at hearing on December 17, 2004, it is
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> ORDERED that:
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> 1. Intervenor's motion is granted, and Intervenor University of Miami, as well as Intervenor Public Health Trust of Miami-Dade County, are accorded until 5:00 p.m., January 14, 2005, to file any further response they may have to Respondent's Motion for Summary Final Order and to deliver same to the other parties of record.
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> 2. The undersigned will address Respondent's Motion for Summary Final Order, giving due consideration of any further response, the morning of January 17, 2005, and will advise all parties as to whether the motion has been granted or denied. If denied, the case will proceed to hearing on January 18, 2005, as scheduled.

11. Intervenors elected not to file any response in opposition to the Motion for Summary Final Order. Consequently, given the record, it is indisputable that, while Chele suffered a mechanical injury, permanent in nature (to her left brachial plexus) during the course of birth, such injury is unrelated to

the brain or spinal cord and, regardless of the origin of her injury, she was not rendered permanently and substantially mentally and physically impaired. Therefore, NICA's Motion for Summary Final Order is well-founded. §§ 120.57(1)(h), 766.302(2), and 766.309, Fla. Stat.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. § 766.301, et seq., Fla. Stat.

13. The Florida Birth-Related Neurological Injury Compensation 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.

14. 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 the Division of Administrative Hearings. §§ 766.302(3), 766.303(2), 766.305(1), and 766.313, Fla. Stat. The Florida Birth-Related Neurological Injury Compensation Association, 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(3), Fla. Stat.

15. 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(6), 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.

16. 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).
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> (b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery 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 post-delivery 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.

17. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), to mean:

> injury to the brain or spinal cord of a live infant weighing at least 2,500 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.

18. Here, indisputably, Chele's neurologic impairment was not caused by an injury to the brain or spinal cord and, whatever the cause, she is not permanently and substantially mentally and physically impaired. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Chele does not qualify for coverage under the Plan. See also Florida Birth-Related Neurological Injury Compensation Association v.

Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla. 1997)(The Plan is written in the conjunctive and can only be interpreted to require both substantial mental and physical impairment.); Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 2d DCA 1995)("[B]ecause the Plan . . . is a statutory substitute for common law rights and liabilities, it should be strictly construed to include only those subjects clearly embraced within its terms."), approved, Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996).

19. Where, as here, the administrative law judge determines that ". . . the injury alleged is not a birth-related neurological injury . . . he [is required to] enter an order [to such effect] and . . . cause a copy of such order to be sent immediately to the parties by registered or certified mail." § 766.309(2), Fla. Stat. Such an order constitutes final agency action subject to appellate court review. § 766.311(1), Fla. Stat.

CONCLUSION

Based on the foregoing Statement of the Case and Conclusions of law, it is

ORDERED that Respondent's Motion for Summary Final Order is granted, and the petition for compensation filed by Elizabeth Amisia and Charitable Michel, individually and as

parents and natural guardians of their minor child, Chele Michel, be and the same is dismissed with prejudice.

It is further ORDERED that the hearing scheduled for January 18, 2005, is cancelled.

DONE AND ORDERED this 18th day of January, 2005, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of January, 2005.

ENDNOTE

1/ The "central nervous system" is commonly understood to mean "that portion of the nervous system consisting of the brain and spinal cord." See "central nervous s." under "system," Dorland's Illustrated Medical Dictionary, Twenty-eighth Edition (1994).

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Sections 120.68 and 766.311, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original of a notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 766.311, Florida Statutes, and Florida Birth-Related Neurological Injury Compensation Association v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992). The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.