STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LARRY AND CAROL JUTRAS on behalf of and as parents and natural guardians of JOHN MARK JUTRAS, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 04-4471N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
ORLANDO REGIONAL HEALTHCARE SYSTEM, INC., d/b/a ARNOLD PALMER HOSPITAL,	)	
Intervenor.	)	

FINAL ORDER

With the parties' agreement, this case was heard on an agreed record.

STATEMENT OF THE ISSUE

At issue is whether John Mark Jutras, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On December 16, 2004, Larry and Carol Jutras, as the parents and natural guardians of John Mark Jutras (John), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) to resolve whether John suffered an injury compensable under the Plan, and whether Orlando Regional Healthcare System, Inc., d/b/a Arnold Palmer Hospital (Arnold Palmer Hospital), the hospital at which John was born, complied with the notice provisions of the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on December 16, 2004,[1] and on January 13, 2005, Respondent filed a Motion for Summary Final Order, predicated on its perception that the physician named in the petition as having provided obstetrical services at John's birth (William T. Scott, M.D.) was not a participating physician in the Plan because he had not paid the assessment required for participation. Respondent's motion was denied by Order of February 21, 2005, predicated on its failure to negate the likelihood that Dr. Scott was exempt from payment of the assessment required for participation in the Plan, and a hearing was subsequently scheduled for April 26, 2005, to resolve whether obstetrical services were provided by a participating physician at John's birth. In the interim, on April 15, 2005, the parties filed a Joint Motion for Summary

Final Order, predicated on their perception that, indisputably, the record demonstrated that Dr. Scott was not a "participating physician," as defined by the Plan, since he had neither paid the assessment required for participation nor was he exempt from payment of the assessment. Given the record, the parties' motion was granted by order of April 22, 2005, and the claim was dismissed with prejudice.

Shortly thereafter, on May 2, 2005, Arnold Palmer Hospital filed a Petition for Leave to Intervene, and Respondent filed a Petition to Reopen Administrative Proceeding and Set Aside Summary Final Order of Dismissal. Thereafter, on May 6, 2005, the parties being in agreement that there was good cause to do so, Arnold Palmer Hospital's Petition for Leave to Intervene was granted, Respondent's Petition to Reopen Administrative Proceeding and Set Aside Summary Final Order of Dismissal was granted, and the Summary Final Order of Dismissal dated April 22, 2005, was vacated. Additionally, Respondent was directed to file its response to the claim on or before July 1, 2005.

On August 12, 2005, following an extension of time within which to do so, NICA filed its response to Petition for Benefits, and gave notice that it was of the view that John did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, and requested that a

hearing be scheduled to resolve whether the claim was compensable. Accordingly, by Notice of Hearing, dated August 26, 2005, a hearing was scheduled for November 15, 2005, to resolve whether the claim was compensable, whether Arnold Palmer Hospital provided notice as required by the Plan, and, if not, whether the giving of notice was excused because the patient had an emergency medical condition as defined by Section 395.002(8)(b), Florida Statutes, or the giving of notice was not practicable. However, on November 7, 2005, the parties agreed to submit the claim for resolution on an agreed record, and by order of November 9, 2005, the hearing was cancelled.

The parties filed their Agreed Record on November 23, 2005, and were accorded until December 5, 2005, to file proposed orders. Notably, the Agreed Record provided that "Petitioner[s] withdraw[] . . . [their] contention that notice, under section 766.316, Fla. Stat., is an issue in this matter." Subsequently, the parties filed a Proposed Stipulated Final Order, which has been adopted, although not necessarily verbatim.

FINDINGS OF FACT

Preliminary findings

1. Larry and Carol Jutras are the parents and natural guardians of John Mark Jutras, a minor. John was born a live infant on June 25, 2001, at Arnold Palmer Hospital, Orlando, Florida, and his birth weight exceeded 2,500 grams.

2. At birth, obstetrical services were provided, at least in part, by Peter F. McIlveen, M.D., who, at all times material hereto, was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan. More particularly, Dr. McIlveen was a "participating physician" since he was a resident in an approved postgraduate residence program in obstetrics and gynecology, and was exempt from payment of the assessment required for participation. §§ 766.302(7) and 766.314(4)(c) and (5), Fla. Stat.

Coverage under the Plan

3. Pertinent to this case, coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as an "injury to the brain or spinal cord . . . 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." § 766.302(2), Fla. Stat. See also §§ 766.309 and 766.31, Fla. Stat.

4. Here, the parties stipulated that John did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes. Moreover, the parties, offered the medical records related to John's birth and subsequent development; the opinions of Michael Duchowny, M.D., a physician

board-certified in pediatrics, neurology with special competence in child neurology, and clinical neurophysiology; and the opinions of Donald Willis, M.D., a physician board-certified in obstetrics and gynecology, and maternal-fetal medicine, which were consistent with their stipulation.

5. Dr. Duchowny evaluated John on July 27, 2005, and reported the results of his neurological evaluation as follows:

> NEUROLOGICAL EXAMINATION reveals John to be cooperative but with minimal speech output. He has a thick lingual dysarthria and tends to speak only when provoked. He prefers to play with toys and his eye contact is intermittent. John would cooperate with the examination and there were no behavioral outbursts or temper tantrums. He understood simple commands. Cranial nerve examination reveals full visual fields to direct confrontation testing and normal ocular fundi. The pupils are 3 mm and react briskly to direct and consensually presented light. There are conjugate and full extraocular movements with a slight alternating esotropia. There are no facial asymmetries. The tongue moves well and the uvula is midline. There is no drooling. Motor examination reveals mild generalized hypotonia. There is full range of motion at all joints with excess laxity. No adventitious movements are noted. There is no focal weakness or atrophy. John is able to walk with a symmetric arm swing, although his gait is slightly wide based. The deep tendon reflexes are 1+ and symmetric and both plantar responses are downgoing. The sensory examination revealed withdrawal of all extremities to stimulation. Tests of cerebellar coordination were deferred. The neurovascular examination reveals no cervical, cranial or ocular bruits and no temperature or pulse asymmetries. John was

> excessively attached to a blanket through the examination.
>
> In SUMMARY, John reveals findings consistent with a pervasive developmental disorder. He has delayed language milestones and a prominent speech dysarthria. He additionally demonstrates short attention span, poor eye contact, and diminished social interaction. His examination additionally revealed hypotonia and hyporeflexia. I believe that John is clearly at risk for falling within the autism spectrum.

6. As for the etiology of John's neurologic impairment, it was Dr. Duchowny's opinion, based on the results of his neurologic evaluation of John and review of the medical records, that, while of unknown etiology, John's neurologic impairments were most likely developmentally based, and not associated with oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation. As for Dr. Willis, he, like Dr. Duchowny, was of the opinion that the medical records failed to support a conclusion that John suffered an injury to his brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or the immediate postdelivery period. As for the significance of John's impairment, Dr. Duchowny was of the opinion that John's mental impairment was mild to moderate and his physical impairment was mild, as opposed to substantial, and that he would likely improve with time. The opinions of Doctors

Duchowny and Willis are consistent with the medical records, uncontroverted, and credible.

7. Given the record, it must be resolved that John's impairments were, more likely than not, occasioned by a developmental abnormality, as opposed to events that may have occurred during labor, delivery, or resuscitation. Moreover, regardless of the etiology of John's impairments, he is not permanently and substantially mentally and physically impaired. See, e.g., Wausau Insurance Company v. Tillman, 765 So. 2d 123, 124 (Fla. 1st DCA 2000)("Because the medical conditions which the claimant alleged had resulted from the workplace incident were not readily observable, he was obliged to present expert medical evidence establishing that causal connection."); Ackley v. General Parcel Service, 646 So. 2d 242 (Fla. 1st DCA 1995)(determining cause of psychiatric illness is essentially a medical question, requiring expert medical evidence); Thomas v. Salvation Army, 562 So. 2d 746, 749 (Fla. 1st DCA 1990)("In evaluating medical evidence, a judge of compensation claims may not reject uncontroverted medical testimony without a reasonable explanation.").

CONCLUSIONS OF LAW

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

9. In resolving whether a claim is compensable, 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. 766.302(2).
>
> (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.

10. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes, 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.

11. Here, the proof demonstrated that John's neurologic impairments were not "caused by an injury to the brain or spinal cord . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation" and, regardless of the etiology of his impairments, John was not "permanently and substantially mentally and physically impaired." Consequently, given the provisions of Section 766.302(2), Florida Statutes, John does not qualify for coverage under the Plan. See also 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); Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla.

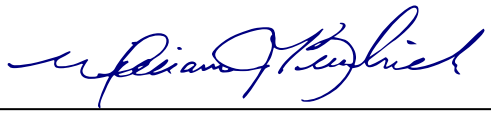
1997)(The Plan is written in the conjunctive and can only be interpreted to require both substantial mental and physical impairment.).

CONCLUSION

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

ORDERED that the claim for compensation filed by Larry and Carol Jutras, as the parents and natural guardians of John Mark Jutras, a minor, is dismissed with prejudice.

DONE AND ORDERED this 20th day of December, 2005, in Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of December, 2005.

ENDNOTE

1/ Consistent with Section 766.305(2), Florida Statutes, DOAH also served the physician (William T. Scott, M.D.) named in the petition as having provided obstetrical services at John's birth, as well as the hospital (Arnold Palmer Hospital) named in the petition as the facility at which John's birth occurred.

COPIES FURNISHED:
(By certified mail)

Kenney Shipley, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(Certified Mail No. 7003 1010 0001 2044 4395)

Mark V. Morsch, Esquire
Mark V. Morsch and Associates, P.A.
2425 Lee Road
Winter Park, Florida 32789
(Certified Mail No. 7003 1010 0001 2044 4401)

Tana D. Storey, Esquire
Roetzel & Andress, LLP
225 South Adams Street, Suite 250
Tallahassee, Florida 32301
(Certified Mail No. 7003 1010 0001 2044 4418)

George W. Tate, II, Esquire
Broad & Cassel
Post Office Box 4961
Orlando, Florida 32802-4961
(Certified Mail No. 7003 1010 0001 2044 4425)

Francis E. Pierce, III, Esquire
Cooney, Mattson, Lance, Blackburn,
Richards & O'Connor, P.A.
Post Office Box 4850
Orlando, Florida 32802-4850
(Certified Mail No. 7003 1010 0001 2044 4432)

William T. Scott, M.D.
24 West Sturtevant Street
Orlando, Florida 32806
(Certified Mail No. 7003 1010 0001 2044 4449)

Orlando Regional Healthcare System, Inc.
d/b/a Arnold Palmer Hospital for
Children and Women
52 West Miller Street
Orlando, Florida 32806
(Certified Mail No. 7003 1010 0001 2044 4456)

Charlene Willoughby, Director
Consumer Services Unit - Enforcement
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7003 1010 0001 2044 4463)

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.