STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DONNA WILLIAMS AND JOHNNY H. WILLIAMS, on behalf of and as parents and natural guardians of JOHN HENRY WILLIAMS, II, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 05-1629N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent.	)	

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on to be heard on Respondent's Motion for Summary Final Order, filed August 23, 2005.

STATEMENT OF THE CASE

1. On May 5, 2005, Donna Williams and Johnny H. Williams, on behalf of and as parents and natural guardians of John Henry Williams, II (John), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on May 6, 2005, and on July 21, 2005, NICA filed a Motion for Summary Final Order, pursuant to Section 120.57(1)(h), Florida

Statutes. The predicate for NICA's motion was its contention that John's birth weight was 1,620 grams, less than the statutory minimum required for coverage under the Plan (at least 2,500 grams for a single gestation or, in the case of a multiple gestation, at least 2,000 grams). That motion was addressed by Order of August 1, 2005, as follows:

> ORDERED that Respondent's motion is denied. Bifulco v. State Farm Mutual Automobile Insurance Co., 693 So. 2d 707 (Fla. 4th DCA 1997)(The documents attached to motion for summary judgment could not be considered since they were not sworn to or certified, were not accompanied by an affidavit of the records custodian or other proper person attesting to their authenticity or correctness, and were not admissible.); Lenhal Realty, Inc. v. Transamerica Commercial Finance Corp., 615 So. 2d 207, 209 (Fla. 4th DCA 1993)("[A]n affidavit in support of a motion for summary judgment is defective if it fails to be made on personal knowledge, set forth facts that would be admissible in evidence, and affirmatively show that the affiant is competent to testify as to the matters stated in the affidavit.")
>
> It is further ORDERED that Respondent file its response to the Petition for Benefits within 10 days of the date of this Order.

3. NICA filed its Response to Petition for Benefits on August 9, 2005, 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, because his birth weight did not meet the statutory minimum for coverage under the Plan. By Notice of Hearing, dated August 11, 2005, a hearing was scheduled for October 18, 2005, to resolve whether John's birth

weight met the minimum weight required for coverage under the Plan. Thereafter, on August 23, 2005, NICA again filed a Motion for Summary Final Order predicated on its contention that John's birth weight did not meet the statutory minimum for coverage under the Plan. However, this time, NICA attached to the motion two certificates of the records custodian of Sacred Heart Hospital, attesting to the authenticity of the medical records (attached to the certificates) for Donna Williams' admission of July 14, 2001, through July 22, 2004, and for John Henry Williams' birth on July 20, 2004, and immediate postnatal course, which demonstrated that John was a single gestation, and that his birth weight was 1,620 grams.

4. On September 6, 2005, Petitioners filed their response to the Motion for Summary Final Order.[1] Pertinent to the motion, that response stated:

> Please accept this as an appeal to the Motion For Summary Final Order from the Florida Birth-Related Neurological Injury Compensation Association, Respondent.
>
> The birth weight requirement to be a compensable claim was truly unclear to me at the time of filing. Being a parent of a child with disabilities due to being 10 weeks pre-mature, sometimes clouds your

> minds. I surely did not file the claim with false motives or intentions.
>
> This claim was filed strictly with the intentions of someone hearing mine and my son's traumatic birth story and hopefully agreeing that some procedures from hospital professionals were at fault for the neurological injury resulting in his disabilities. The hope of compensation was only for help in the expense of therapy and equipment that he needs now and will need throughout the years.
>
> However, my appeal is also based that . . . at least 2500 grams in weight should not even be a considering factor for compensation.

5. Given the record, it is undisputed that John's birth weight did not meet the statutory minimum for coverage under the Plan. Consequently, NICA's Motion for Summary Final Order, for reasons appearing more fully in the Conclusions of Law, is well-founded.

CONCLUSIONS OF LAW

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

7. 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.

8. 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.

9. 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.

10. 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 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.

11. 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 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. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

12. Here, indisputably, John's birth weight was 1,620 grams. 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).

13. 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 Findings of Fact and Conclusions of law, it is

ORDERED that the claim for compensation filed by Donna Williams and Johnny H. Williams, on behalf of and as parents and natural guardians of John Henry Williams, II, a minor, is dismissed with prejudice.

DONE AND ORDERED this 22nd day of September, 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 22nd day of September, 2005.

ENDNOTE

1/ Petitioners' response to NICA's motion was a letter dated and filed September 6, 2005. However, the letter was not provided to the undersigned until September 7, 2005, and by that time an order dated September 7, 2005, had been entered giving the Petitioners 10 days to "show good cause in writing, if any they can, why the relief requested by Respondent should not be granted." That same date, a letter was posted to Petitioners, as follows:

> Your letter of September 6, 2005, was
> provided to me today, after my order issued

> noting you had failed to respond to the Motion for Summary Final Order. Please rest assure[d] I will consider your response, and will allow you until September 19, 2005, to file any further response to the Motion for Summary Final Order or a response to my Order of September 7, 2005. Thereafter, I will address the Respondent's Motion for Summary Final Order.

To date, Petitioners have not filed any further response to the Motion for Summary Final Order or a response to the Order of September 7, 2005.

COPIES FURNISHED:
(Via certified mail)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
1435 Piedmont Drive, East, Suite 101
Tallahassee, Florida 32308
(Certified Mail No. 7099 3400 0010 4399 5629)

Donna Williams
Johnny H. Williams
5313 Cathy Street
Milton, Florida 32583
(Certified Mail No. 7099 3400 0010 4399 5612)

Charles A. Horan, III, M.D.
5120 Bayou Boulevard, Suite 1
Pensacola, Florida 32503-2198
(Certified Mail No. 7099 3400 0010 4399 5605)

Sacred Heart Hospital
5151 North 9th Avenue
Pensacola, Florida 32504
(Certified Mail No. 7099 3400 0010 5599)

Charlene Willoughby, Director
Consumer Services Unit - Enforcement
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7099 3400 0010 4399 5582)

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.