STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VANEL JOCELYN AND CLAUDETTE LAFLEUR, individually, and as parents and natural guardians for JOB JOCELYN, a minor,

Petitioners,

vs. — Case No. 05-3726N

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,

Respondent,

and

UNIVERSITY OF MIAMI, d/b/a MILLER SCHOOL OF MEDICINE and PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL, a/k/a JACKSON HEALTH SYSTEM,

Intervenors.

FINAL SUMMARY ORDER OF DISMISSAL

This cause came on for consideration of Respondent's Motion for Summary Final Order, served January 24, 2006.

STATEMENT OF THE CASE

1. On October 11, 2005, Vanel Jocelyn and Claudette Lafleur, individually, and as parents and natural guardians of Job Jocelyn (Job), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) to

resolve whether Job suffered an injury compensable 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 October 12, 2005, and on December 29, 2005, following an extension of time within which to do so, NICA filed its response to the claim, denied that Job suffered an injury compensable under the Plan, and requested a hearing be scheduled to resolve the issue of compensability. Such a hearing was duly-noticed for June 19 and 20, 2006.

3. In the interim, on January 24, 2006, NICA served a Motion for Summary Final Order, pursuant to Section 120.57(1)(h), Florida Statutes.[1] The predicate for NICA's motion was its assertion that, indisputably, Job's physical impairment, a left Erb's Palsy, was caused by an injury to his left brachial plexis, not the brain or spinal cord; that his expressive language delay was most likely developmentally based and not related to a birth injury; and that Job did not suffer a substantial mental or physical impairment. Attached to NICA's motion was an affidavit of Michael Duchowny, M.D., a pediatric neurologist, who evaluated Job on January 25, 2005.

4. Dr. Duchowny reported the results of his neurologic evaluation, as follows:

NEUROLOGICAL EXAMINATION reveals Job to be alert cooperative and socially interactive. He displays an age appropriate level of curiosity and is quite playful. His behavior seemed appropriate and he had a good attention span for age. He spoke in only single words. He knew body parts but could not identity colors. I could not evaluate his speech articulation. Cranial nerve examination revealed full visual fields to direct confrontation testing. The pupils are 3 mm and react briskly to direct and consensually presented light. Job blinks to threat from directions. The funduscopic examination was brief but appeared normal. The extraocular movements are full and conjugate. Visual fields are intact bilaterally. There are no facial asymmetries. The uvula is midline. The pharyngeal folds are symmetric. The tongue is moist and papillated and moves well in all directions. There is no drooling. Motor examination reveals an obvious asymmetry of the upper extremities. There is loss of muscle bulk at the left shoulder and arm to a lesser degree the left forearm. The hands and fingers appear symmetric. Job cannot elevate the left arm more than 10 degrees above the horizontal plane and apparently cannot raise it over his head. He tends to maintain a posture of adduction, internal rotation and flexion at the shoulder with elbow and to a lesser degree wrist flexion. There is slight ulnar deviation of the left hand. He has difficulty supinating the left hand. There is a good individual finger dexterity bilaterally. Job can grasp a cube with either hand using fine motor coordination and transfers readily. He tends to repeatedly prefer the right and will cross the midline. He is able to build a tower of cubes using the right hand with the left providing support. In contrast there are no asymmetries of strength, bulk or tone of the lower extremities. There is a healed cutaneous burn scar over the dorsum of the

> left foot. Sensory examination revealed suspected diminished left arm movement in response to painful stimulation of the left arm in the C5 and C6 dermatomes. His hand and reflexes are asymmetric and that the left biceps and brachioradialis are trace compared to 2+ on the right. Triceps are bilaterally 1+ and knee jerks and ankle jerks are 2+ bilaterally. Both plantar responses are downgoing. The stance is relatively narrowly based and Job walks in a stable fashion with an obvious upper extremity asymmetry of movement. There is decreased muscle bulk in the medial scapular region with mild left scapular winging. I could not formally assess cerebellar coordination. Neurovascular examination reveals no cervical, cranial or ocular bruits and no temperature or pulse asymmetries.
>
> In SUMMARY, Job's neurologic examination demonstrates findings consistent with a left Erb's Palsy involving the C5 and C6 roots of the brachial plexus. He has left upper extremity and left shoulder atrophy and probably loss of sensation in the C5 and C6 dermatomes. I regard the findings to be most likely permanent and agree that surgical therapy would have little to offer at this point. Job also manifests expressive language delay that in all likelihood is developmentally based. I suspect that this will improve significantly in the future.

5. Based on his neurologic evaluation and review of the medical records, Dr. Duchowny opined that:

> 5. It is my opinion that JOB JOCELYN suffers from neither a substantial mental nor motor impairment originating within the central nervous system. (The central nervous system is commonly understood to mean that portion of the nervous system consisting of the brain and spinal cord).

> Rather, his neurologic impairment originates in the left brachial plexus and constitutes a peripheral nerve injury. He has a left Erb's Palsy involving the C-5 and C-6 nerve roots, and his deficits are the probable loss of sensation in the C-5 and C-6 dermatomes. These findings are most likely permanent and would not be considered substantial.
>
> 6. JOB also manifests expressive language delay that in all likelihood is developmentally based, and does not derive from any birth-related neurological injury. I expect that this will improve significantly in the future. I do not believe that this mental impairment is either permanent [ ]or substantial.
>
> 7. As such, it is my opinion that JOB JOCELYN is <u>not</u> permanently and substantially mentally and physically impaired due to oxygen deprivation or mechanical injury occurring during the course of labor, delivery or the immediate post-delivery period in the hospital during the birth of JOB JOCELYN.

6. On February 3, 2006, Intervenor University of Miami filed a Response in Opposition to NICA's Motion for Summary Final Order, noting it had not had an opportunity to obtain discovery on the issue of compensability, and requested that NICA's motion be summarily denied. NICA's motion and the University of Miami's response were addressed by Order of February 13, 2006, as follows:

> 1. Ruling on Respondent's Motion for Summary Final Order is deferred until April 14, 2006, to accord the parties the opportunity to complete any discovery they feel appropriate, and to file any further

> response to Respondent's Motion for Summary Final Order they feel may be appropriate. Thereafter, Respondent's motion will be addressed without further delay.
>
> 2. Intervenor's request that Respondent's motion be "summarily denied" is DENIED.

Thereafter, at the University of Miami's request, ruling on NICA's motion was deferred until May 18, 2006.[2]

7. On May 17, 2006, the University of Miami filed its Response to NICA's Motion for Summary Final Order, and on May 19, 2006, a copy of Dr. Duchowny's deposition, taken May 2, 2006. Petitioners and the Public Health Trust did not respond to NICA's motion, and no further evidence was offered (by affidavit, deposition, or otherwise) to address the issues raised by NICA's motion.

8. With regard to Dr. Duchowny's deposition, it is noted that the opinions expressed by Dr. Duchowny were wholly consistent with those expressed in his affidavit and report of neurologic evaluation, heretofore discussed. Briefly stated, based on his evaluation and review of the medical records, Dr. Duchowny opined that there was no evidence that Job suffered an injury to the brain or spinal cord (the central nervous system) during birth; that the only physical impairment Job evidenced was a left Erb's Palsy (which likely resulted from an injury to the left brachial plexus during delivery); that the only evidence of mental impairment was an expressive language

delay, that was likely developmentally based (related to brain immaturity, as opposed to injury), and would likely improve; and that Job was neither substantially mentally nor substantially physically impaired.

9. With regard to Dr. Duchowny's opinions and the University of Miami's position on NICA's motion, the University of Miami noted the following in its response:

> 5. On May 2, 2006, Dr. Duchowny's deposition was taken, wherein he reiterated his opinion that Job did not suffer any substantial mental impairment and that any injuries suffered by Job related to the peripheral nervous system, not the central nervous system . . . . Dr. Duchowny also refuted the Petitioners' allegation [in their petition] that Job suffered from hypoxic ischemic encephalopathy, which he defined as "[b]rain damage caused by lack of oxygen, lack of blood supply or both." . . . Dr. Duchowny testified that, although the physicians at Jackson Memorial Hospital might have suspected that there was a central nervous system injury such as hypoxic ischemic encephalopathy, such suspicions were inconsistent with his findings after his evaluation of the patient and the records of the physical therapists and subsequent treaters whose records he reviewed. . . . Dr. Duchowny further testified that, had Job sustained a brain injury, such injury would have manifested itself when he evaluated Job at age 2 and would not manifest later in time. . . . As no structural brain injury was found during this evaluation of Job, Dr. Duchowny was confident that Job did not sustain any such injury as a result of the labor and delivery process. . . .

> 6. The University of Miami agrees with Dr. Duchowny's determination that Job did not sustain any significant neurological injuries, including hypoxic ischemic encephalopathy, at or around the time of his birth. The Petitioners, however, maintain [in their petition] that Job did suffer such injuries and rely on Jackson Memorial Hospital's medical records as a basis for that contention. To the extent that the DOAH determines that the references in the medical records to neurological injuries contain any evidentiary value, the DOAH should find there are genuine issues of material fact and elect to resolve the issue of compensability at the final hearing. If, on the other hand, the DOAH agrees with Dr. Duchowny that the references merely reflect the physicians unconfirmed suspicions regarding Job's diagnosis and that the evidence in the record does not otherwise support a finding of compensability, NICA's motion should be granted . . . .

10. The hospital records the University of Miami referenced, were attached to Dr. Duchowny's deposition and are the only hospital records submitted in this case. Of note, those records consist of three consultation reports (of September 26, 2002, September 27, 2002, and September 30, 2002), which reflect a diagnosis of perinatal asphyxia and hypoxic/ischemic encephalopathy (HIE), as the likely cause of Job's difficulties immediately following birth. As for Job's subsequent development, there is no evidence to contradict the opinions of Dr. Duchowny that Job's current presentation fails to reveal any evidence of an injury to his central nervous system or that Job is not substantially mentally or physically

impaired. Consequently, given the record, it is indisputable that, while Job evidences some neurologic impairment, it was not related to a brain or spinal cord injury that occurred during labor, delivery, or resuscitation. Moreover, regardless of the origin of his impairments, Job is not permanently and substantially mentally and physically impaired. Therefore, NICA's Motion for Summary Final Order is well-founded.[3] §§ 120.57(1)(h), 766.302(2), and 766.309, Fla. Stat.

CONCLUSIONS OF LAW

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

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. Here, indisputably, Job's neurologic impairment was 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, whatever the cause, he is not permanently and substantially mentally and physically impaired. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Job 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).

18. 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 Vanel Jocelyn and Claudette Lafleur, individually and as parents and natural guardians of Job Jocelyn, a minor, be and the same is dismissed with prejudice.

It is further ORDERED that the hearing scheduled for June 19 and 20, 2006, is cancelled.

DONE AND ORDERED this 23rd day of May, 2006, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of May, 2006.

<u>ENDNOTES</u>

1/ Pertinent to this case, Section 120.57(1)(h), Florida Statutes, provides:

> (h) Any party to a proceeding in which an administrative law judge of the Division of Administrative Hearings has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order . . . .

2/ On April 10, 2006, the University of Miami filed an Agreed Motion to Defer Ruling on NICA's Motion for Summary Final Order. That motion was addressed by Order of April 12, 2006, as follows:

> ORDERED that Intervenor's motion is granted and ruling on Respondent's Motion for Summary Final Order is deferred until May 12, 2006, to accord the parties the opportunity to complete any discovery they feel appropriate, and to file any further response to Respondent's Motion for Summary Final Order. Thereafter, Respondent's motion will be addressed without further delay.

On May 12, 2006, the University of Miami filed a Motion for Extension of Time to Respond to NICA's Motion for Summary Final Order. That motion was addressed by Order of May 18, 2006, as follows:

> ORDERED that Intervenor's motion is granted and the parties are granted until May 17, 2006, to file any response to NICA's Motion for Summary Final Order. Thereafter, NICA's motion will be addressed without further delay.

3/ Notably, when, as here, the "moving party presents evidence to support the claimed non-existence of a material issue, he . . . [is] entitled to a summary judgment unless the opposing party comes forward with some evidence which will change the result; that is, evidence to generate an issue of material fact. It is not sufficient for an opposing party merely to assert that an issue does exist." Turner Produce Company, Inc. v. Lake Shore Growers Cooperative Association, 217 So. 2d 856, 861 (Fla. 4th DCA 1969). Accord, Roberts v. Stokley, 388 So. 2d 1267 (Fla. 2d DCA 1980); Perry v. Langstaff, 383 So. 2d 1104 (Fla. 5th DCA 1980).

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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.