STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TOD MURTO AND MOLLY PERI, ON BEHALF OF AND AS PARENTS AND NATURAL GUARDIANS OF NOAH MURTO, A MINOR,	)	
Petitioners,	)	
vs.	)	Case No. 07-0605N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent.	)	

FINAL ORDER

This cause came on to be heard on the parties' Joint Stipulation of Facts and Agreed Record, with exhibits, filed June 11, 2007.

PRELIMINARY STATEMENT

On February 5, 2007, Ted Murto and Molly Peri, on behalf of and as parents and natural guardians of Noah Murto (Noah), 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).

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on

February 6, 2007,[1] and on May 3, 2007, following an extension of time within which to do so, NICA responded to the petition and gave notice that it was of the view that Noah 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 the issue.

Given NICA's response to the petition, an Order was entered on May 7, 2007, which directed that "the parties . . . confer and advise the . . . [administrative law judge] no later than May 21, 2007, as to the earliest date they will be prepared to proceed to hearing on the issue of compensability, their estimate of the time required for hearing, and their choice of venue.

On May 22, 2007, the parties filed a Joint Motion to Submit Stipulation of Facts and Proposed Order to Resolve Petitioners' Claim in Lieu of Contested Hearing (Joint Motion), and on June 11, 2007, the parties filed a Joint Stipulation of Facts and Agreed Record, with exhibits. By their stipulation, the parties agreed to the facts set forth in paragraph 1 of the Findings of Fact which follow, and agreed that the record consists of the following exhibits:

a. Exhibit 1: Prenatal records of Edwin Hayes, M.D., for Molly Peri

b. Exhibit 2: Hospital record of Holmes Regional Medical Center for Noah Murto

c. Exhibit 3: Office records of Joseph Cimino, M.D., for Noah Murto

d. Exhibit 4: Office records of John Weare, Jr., M.D., for Noah Murto

e. Exhibit 5: Report of Paul Carney, M.D., dated April 19, 2007

f. Exhibit 6: Report of Donald Willis, M.D., dated April 2, 2007

g. Exhibit 7: Office records of Early Steps-CATCH of Brevard for Noah Murto

The parties' Joint Motion was approved by Order of June 11, 2007, and they were accorded until June 21, 2007, to file a proposed order. The parties filed such a proposal and it has been duly-considered.

FINDINGS OF FACT

1. By their Joint Stipulation of Facts and Agreed Record, the parties stipulated to the following facts:

> a. The Petitioners filed a Petition for Benefits under the Florida Birth-Related Neurological Injury Compensation Plan ("Plan") on February 5, 2007, stating that, "It is alleged that NOAH MURTO suffered brain damage as a result of a birth-related neurological injury."
>
> b. NICA conducted its review of the instant claim and retained as its medical experts, Paul R. Carney, M.D. [, a pediatric neurologist,] and Donald C. Willis, M.D. [, a physician board-certified in maternal-fetal medicine], to opine whether an injury occurred in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital due to oxygen

deprivation or mechanical injury which renders the child permanently and substantially mentally and physically impaired.

c. After conducting the review of the medical records, Dr. Willis opined that, "There was no apparent obstetrical event that would have been expected to result in loss of oxygen and brain injury to the child." Further, Dr. Carney, upon examination of the child [, at age 10-months,] and the pertinent medical records, opined that, "Developmentally, he is currently on track. He at this time is not noted to suffer permanent substantial mental or physical impairment."

d. Further, Dr. Carney, after examining the child and reviewing the pertinent records, stated, "At this time, the child does have a need for occupational and physical therapy given very subtle issues noted on his motor exam. It is felt that this patient has a very favorable prognosis but he will require ongoing therapy for this time." As pointed out by Dr. Carney in his said Report, the child is meeting his developmental milestones such as rolling over, sitting up unassisted, crawling, pulling himself up to stand and walking while holding onto furniture.

e. Based primarily on Dr. Carney's opinions, together with the available medical records, the parties hereby agree and stipulate 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, which specifically requires that the injury render "the infant permanently and substantially mentally and physically impaired." §766.302(3), Florida Statutes.

2. The parties' stipulation is consistent with the record, which demonstrates that Noah is neither substantially mentally nor substantially physically impaired. Consequently, for reasons appearing more fully in the Conclusions of Law, the claim is not compensable, and it is unnecessary to resolve the etiology of Noah's impairments.

CONCLUSIONS OF LAW

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

4. 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.

5. 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(4), Fla. Stat.

6. 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. However, if a dispute exists, it 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.

7. 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.

8. 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.

9. Here, the record demonstrated that Noah was not "permanently and substantially mentally and physically impaired." Consequently, Noah does not qualify for coverage under the Plan. § 766.302(2), Fla. Stat. 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 a 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).

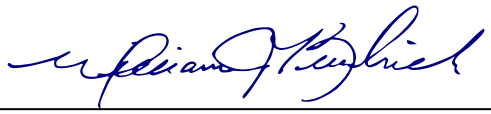
10. Where, as here, the administrative law judge determines that "the injury alleged is not a birth-related neurological injury . . . he [is required to] enter an order [to such effect] and . . . cause a copy of such order to be sent immediately to the parties by registered or certified mail." § 766.309(2), 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 Ted Murto and Molly Peri, on behalf of and as parents and natural guardians of Noah Murto, a minor, is dismissed with prejudice.

DONE AND ORDERED this 25th day of June, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of June, 2007.

ENDNOTE

1/ Consistent with Section 766.305(2), Florida Statutes, DOAH also served the physician (Edwin Bruce Hayes, M.D.) named in the petition as having provided obstetrical services at Noah's birth, as well as the hospital (Holmes Regional Medical Center) named in the petition as the facility at which Noah's birth occurred. To date, neither the physician nor the hospital has requested leave to intervene or otherwise sought leave to participate in these proceedings.

COPIES FURNISHED:
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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.