STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN AND MARIANA PRISCO, ON BEHALF OF AND AS PARENTS AND NATURAL GUARDIANS OF VICTOR PRISCO, A MINOR,	)	
Petitioners,	)	
vs.	)	Case No. 07-5822N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
ANNETTE LAUBSCHER, M.D. and ST. VINCENT'S MEDICAL CENTER, INC.,	)	
Intervenors.	)	

FINAL SUMMARY ORDER

This cause came on to be heard on Respondent's Motion for Summary Final Order, served July 22, 2008.

STATEMENT OF THE CASE

1. On December 31, 2007, John and Mariana Prisco, on behalf of and as parents and natural guardians of Victor Prisco (Victor), 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 January 2, 2008, and on June 20, 2008, following a number of extensions of time within which to do so, NICA served its response to the petition and gave notice that it was of the view that Victor 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. In the interim, Annette Laubscher, M.D., and St. Vincent's Medical Center, Inc., were granted leave to intervene.

3. By Notice of Hearing dated July 23, 2008, a hearing was scheduled for November 17, 2008, to resolve the issue of compensability. However, on July 22, 2008, NICA served, and on July 23, 2008, filed, a Motion for Summary Final Order, pursuant to Section 120.57(1)(h), Florida Statutes.[1] The predicate for the motion was NICA's contention that while Victor's neurologic presentation reveals evidence of substantial mental and physical impairment, his impairments were not the consequence of 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," as required for coverage under the Plan. § 766.302(2), Fla. Stat. See also §§ 766.309(1) and 766.31(1), Fla. Stat.

4. Attached to NICA's motion was an affidavit of Raymond Fernandez, M.D., a pediatric neurologist, who evaluated Victor on May 21, 2008. Based on that evaluation, as well as a review of Victor's medical records and those of his mother, Dr. Fernandez concluded, within a reasonable degree of medical probability, that Victor's neurologic problems were not birth-related. Dr. Fernandez's conclusions were documented in his affidavit, as follows:

> 4. I evaluated VICTOR PRISCO on May 21, 2008. A true and accurate copy of my neurology evaluation is attached hereto as Exhibit 1. All of the statements and opinions expressed therein are true and correct based upon my review of the records, the history taken, and my opinions from the evaluation of the minor child.
>
> 5. It is my opinion that VICTOR PRISCO suffers from a pervasive neurobehavioral syndrome suggestive of autistic spectrum disorder. There has been fluctuation in speech and motor development skills, but probably no true regression over time. There is historical and clinical evidence for substantial mental and physical impairment, and while he will probably improve over time, I suspect he will always be substantially impaired. Etiology is not clear, but we do not have any evidence for Victor's impairment to be the result of a neurological injury due to oxygen deprivation or mechanical injury during labor and delivery. He required only routine care after delivery and was admitted to the regular nursery. He was discharged routinely on day 2 of life (except for mild elevation of bilirubin), so that there is no possibility of acute neurological injury of any type during labor and delivery.

> 6. As such, it is my opinion that VICTOR PRISCO was not permanently and substantially mentally impaired nor was he permanently and substantially 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 VICTOR PRISCO. (Emphasis deleted).

5. Also attached to NICA's motion was an affidavit of Donald Willis, M.D., an obstetrician, specializing in maternal-fetal medicine, who reviewed the medical records of Victor and his mother, and concluded, within a reasonable degree of medical probability, that Victor did not suffer brain damage as a result of oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital. Dr. Willis' conclusions were documented in his affidavit, as follows:

> 3. The Florida Birth-Related Neurological Injury Compensation Association retained me as its expert in maternal-fetal medicine to review the medical records from both VICTOR PRISCO and his mother, MARIANA PRISCO. The purpose of my review of the medical records of VICTOR PRISCO and MARIANA PRISCO was to determine whether an injury occurred in the course of labor, delivery or resuscitation in the immediate post-delivery period in the Hospital due to oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the Hospital.
>
> * * *

> 5. It is my opinion that labor, delivery and newborn hospital course were apparently uncomplicated. There was no apparent obstetrical event that resulted in loss of oxygen to the fetus during labor and delivery. The delivery was by spontaneous vaginal birth. Birth weight was 3071 grams (6 lbs 12 ozs). The baby was not depressed at birth. Apgar scores were 8/9. No resuscitation was required. The newborn hospital course was normal and discharge[] occurred on day two of life. There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during delivery or the immediate post-delivery period.
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> 6. As such, it is my opinion that there was no oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery in the Hospital. Further, in that there was no oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in the Hospital, then accordingly, there was no causal event which would have rendered VICTOR PRISCO permanently and substantially mentally and physically impaired as a result of same. (Emphasis deleted).

6. Neither Petitioners nor Intervenors responded to the Motion for Summary Final Order. Therefore, on August 5, 2008, an Order to Show Cause was entered, as follows:

> On July 22, 2008, 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
>
> ORDERED that by August 15, 2008, Petitioners and Intervenors show good cause in writing,

> if any they can, why the relief requested by Respondent should not be granted.

7. On August 11, 2008, Petitioners filed their Response to Order to Show Cause, and stated:

> The premise of this NICA claim is based on mechanical injury sustained during the birth process. In this case, mechanical injury is defined as any physical or chemical action taken to affect the course of labor induction. An over dosage of the labor inducing drug Pitocin falls into this category. It can be shown in the birth records that an excessive amount of Pitocin (defined as an amount greater than the manufacturer's recommended dosage) was administered for a period of time exceeding 7 hours. Also, the intrauterine catheter was placed after the recommended dosage was already exceeded.
>
> * * *
>
> It remains our position on this matter that the birth process caused our son's current condition. We respectfully request the Motion for Summary Final Order be denied so we may properly prepare for hearing.

Attached to the response were several documents, described as follows: A "Pitocin Administration Sheet from Monarch Pharmaceuticals," a "Pitocin MSDS Safety Sheet," and a "Labor Flow summary sheet (derived from birth records)." Notably, the response was not verified, and the documents attached to the response were not sworn to, certified, authenticated, or otherwise shown to be competent proof. Intervenors did not respond to the Order to Show Cause. Consequently, neither

Petitioners nor Intervenors offered evidence, by affidavit or otherwise, to generate a genuine issue of material fact. See Bifulco v. State Farm Mutual Automobile Insurance Co., 693 So. 2d 707 (Fla. 4th DCA 1997)(The documents attached to the 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 otherwise admissable.); Lenhal Realty, Inc. v. Transamerica Commercial Financial 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."); Vero Beach Care Center v. Ricks, 476 So. 2d 262, 264 (Fla. 1st DCA 1985)("[L]ay testimony is legally insufficient to support a finding of causation where the medical condition involved is not readily observable."); Ackley v. General Parcel Service, 646 So. 2d 242, 245 (Fla. 1st DCA 1994)("The determination of the cause of a non-observable medical condition, such as a psychiatric illness, is essentially a medical question."). Therefore, NICA's Motion for Summary Final Order is well-founded. Turner Produce Company, Inc. v. Lake Shore Growers Cooperative Association, 217

So. 2d 856, 861 (Fla. 4th DCA 1969)(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 a material fact. It is not sufficient for an opposing party merely to assert that an issue does exist."). Accord, Roberts v. Stokley, 388 So. 2d 1267 (Fla. 2d DCA 1980); Perry v. Langstaff, 383 So. 2d 1104 (Fla. 5th DCA 1980).

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. 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.

10. 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 within five years of the infant's birth. §§ 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.

11. 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. 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.

12. 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.

13. 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.

14. Here, indisputably, Victor's neurologic impairments were not the consequence of 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." Consequently, given the provisions of Section 766.302(2), Florida Statutes, Victor 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).

15. 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 John and Mariana Prisco, on behalf of and as parents and natural guardians of Victor Prisco, a minor, be and the same is dismissed with prejudice.

It is further ORDERED that the hearing scheduled for November 17, 2008, is cancelled.

DONE AND ORDERED this 19th day of August, 2008, 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 19th day of August, 2008.

ENDNOTE

1/ 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 . . . .

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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.