STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LUKAS MORAN, A MINOR, BY AND THROUGH HIS PARENTS AND NATURAL GUARDIANS, JOSEPH MORAN AND CANDESS MORAN, AND JOSEPH MORAN AND CANDESS MORAN, INDIVIDUALLY,	)	
Petitioners,	)	
vs.	)	Case No. 08-6343N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
WILLIAM T. JOYNER, M.D., AND WILLIAM T. JOYNER, M.D., P.A.,	)	
Intervenors.	)	

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's Motion for Summary Final Order, served September 4, 2009.

STATEMENT OF THE CASE

1. On December 17, 2008, Lukas Moran (Lukas), a minor, by and through his parents and natural guardians, Joseph Moran (father) and Candess Moran (mother), and the parents individually, filed a Petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the

Florida Birth-Related Neurological Injury Compensation Plan (Plan), for injuries allegedly associated with Lukas' birth on February 21, 2007.

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on December 18, 2008.

3. By Orders entered January 28, 2009, and January 29, 2009, respectively, Holy Cross Hospital and William T. Joyner, M.D. and William T. Joyner, M.D., P.A., were granted status as Respondent-Intervenors.

4. On August 3, 2009, following four extensions of time in which to do so, NICA served its Response to the Petition and gave notice that it was of the view that Lukas did not suffer "a birth-related neurological injury" as defined in Section 766.302(2), Florida Statutes, which renders an infant "permanently and substantially impaired," per Section 766.302(3), Florida Statutes. The Response requested that a hearing be scheduled to resolve the issue of compensability. Such a hearing was scheduled for December 2, 2009.

5. By an Order entered August 27, 2009, Holy Cross Hospital's Motion to Withdraw as Respondent-Intervenor, filed August 26, 2009, was granted.

6. On September 4, 2009, NICA served the subject Motion for Summary Final Order.[1] The predicate for the Motion is NICA's

contention that, indisputably, Lukas' neurologic problems were not birth-related, and that no obstetrical event resulted in a loss of oxygen or mechanical trauma.

7. Attached to NICA's Motion was an affidavit of Michael S. Duchowny, M.D., a pediatric neurologist associated with Miami Children's Hospital, who evaluated Lukas on July 20, 2009.[2] Based on that evaluation, as well as a review of Lukas' medical records and those of his mother, Dr. Duchowny concluded, within a reasonable degree of medical probability, that Lukas' neurological problems were likely acquired during intrauterine life as opposed to birth-related, as specifically set out in Dr. Duchowny's written report, which states, in pertinent part:

> I evaluated LUKAS MORAN on July 20, 2009. He is a 26-month-old toddler who was brought by both parents. They supplied historical information.
>
> * * *
>
> PRE- AND PERINATAL HISTORY: Lukas was the product of a probable term gestation given his birth weight of 6 pounds 2 ounces. He remained in hospital for 11 days, two of which were on the ventilator. He was discharged home on no medications. He never experienced seizures.
>
> GROWTH AND DEVELOPMENT: Lukas rolled over at 13 months, sat at 13 months, and stood at age two years. He is not toilet trained. He does not communicate in words.
>
> Lukas is fully immunized and has no known drug allergies. He has never undergone surgery.

PHYSICAL EXAMINATION reveals an appropriately proportioned, well-developed and well-nourished 2.4 year-old boy. His weight is estimated at 30 pounds and he is approximately 30 inches tall. The hair is blond and of normal texture. There are no neurocutaneous stigmata. He has a small nevus flammeus in the posterior occipital midline. The head circumference measures 46.8 centimeters, which falls just at the 2nd percentile for age. The fontanels are closed. The spine is straight without dysraphism. There are no digital, skeletal, or palmar abnormalities. There are no cranial or facial anomalies or asymmetries. The neck is supple without masses, thyromegaly or adenopathy. The cardiovascular, respiratory, and abdominal examinations are unremarkable.

NEUROLOGICAL EXAMINATION reveals Lukas to be alert and cooperative. He did not speak in single words at any time during the examination. However, he understood simple commands and was particularly oriented toward his parents. He did not know body parts. His parents stated that he could "do animal sounds" but I did not hear clear sounds approximating animals and most sounds were repetitious. His attention span appeared age-appropriate. He did not drool. Cranial nerve examination reveals intact visual fields to confrontation testing. He seemed somewhat visually inattentive but was able to track in the horizontal and vertical planes in a conjugate fashion. The pupils are 3 mm and react briskly to direct and consensually presented light. The optic discs appeared pale bilaterally. There are no facial asymmetries. The uvula is midline and the pharyngeal folds are symmetric. Tongue movements are intact in all planes. Motor examination reveals a complex pattern of static hypotonia with dynamic hypertonicity most pronounced in the lower extremities. His most prominent involvement

is in the distal lower extremities, but his ankles can be dorsiflexed to several degrees above neutrality. There were no fasciculations and no focal weakness or atrophy. He is clearly able to stand and bear weight but leans forward and will only take six or eight steps before dropping to his knees or collapsing into his parent's waiting arms. Lukas does have a well-developed pincher grasp and can grasp cubes without difficulty. He could not build a tower. He could transfer blocks to either hand. Deep tendon reflexes are brisk at the biceps and knees. Both plantar responses are upgoing and there are Babinski attitudes to his big toes. There is a borderline crossed adductor response of the pelvic girdle musculature. Sensory examination is intact to withdrawal of all extremities to stimulation. The neurovascular examination reveals no cervical, cranial or ocular bruits and no temperature or pulse asymmetries. There is no evidence of dysmetria or tremor.

In SUMMARY, Lukas' evaluation reveals evidence of delayed motor and cognitive development. By history, he has a cortical visual impairment, although it was not clear today that his vision is definitely compromised despite clinical evidence of optic nerve hypoplasia. He has a complex pattern of muscle tone consisting of both hypotonia and hypertonia together with hyperreflexia and pathological reflexes.

I had an opportunity to review medical records which were mailed to me on January 12, 2009. They indicate that Lukas was a small for gestational age infant. His Apgar scores and first set of arterial blood gases were within normal limits. His postnatal course included ventilatory support for two days and antibiotic treatment for suspected sepsis. An MRI scan performed on February 6, 2008 revealed delayed myelination in the subcortical white

> matter and corpus callosum with focal encephalomalacia around the left frontal horn and periventricular leukomalacia. An EEG on March 19, 2008 was interpreted as normal.
>
> In summary, the findings on clinical examination and a record review suggest that Lukas' neurological problems, particularly the optic nerve hypolasia, hypotonia and delayed myelination on MRI were more likely acquired during intrauterine life and not from asphyxia or mechanical injury during labor and delivery. I, therefore, do not believe that Lukas is compensable within the NICA program. (Emphasis supplied.)

8. Also attached to NICA's Motion was the affidavit and report of Donald C. Willis, M.D., an obstetrician specializing in maternal-fetal medicine, who reviewed the medical records NICA had received from both Lukas and his mother. He concluded within a reasonable degree of medical probability that:

* * *

> In summary, this child was delivered prematurely by elective repeat Cesarean section. The fetal heart rate monitor before birth did not suggest fetal distress and the baby was not depressed at birth. The newborn course was complicated by respiratory distress related to prematurity. There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain. The patient was not in labor. (Emphasis supplied.)

9. No party filed any timely response in opposition to the Motion for Summary Final Order, as provided for in Florida Administrative Code Rules 28-106.103 and 28-106.204, so on

September 18, 2009, the Administrative Law Judge then-assigned to this cause entered an Order to Show Cause providing:

> On September 4, 2009, Respondent served a Motion for Summary Final Order. To date, Petitioners and Intervenors have not responded to the motion. Fla. Admin. Code R. 28-106.103 and 28-106.204(4). Nevertheless, and notwithstanding they have been accorded the opportunity to do so, it is
>
> ORDERED that by September 30, 2009, Petitioners and Intervenors show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

10. On September 19, 2009, Petitioner filed a Response to Motion for Summary Final Order Dated September 4, 2009, which stated, in pertinent part:

* * *

> Petitioners hereby declare that they have no opposition to the entry of a Summary Final Order in accordance with the Motion for Summary Final Order filed by the FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, dated September 4, 2009.
>
> The Petitioners have no opposition to the Argument set forth by the Florida Birth-Related Neurological Injury Compensation Association that the claim is not compensable under the Plan as the statutory requisites have not been met.
>
> This Court [sic] should reflect in its Summary Final order, pursuant to Sections 766.309 and 120.57(1)(h) of Florida Statutes, that the subject claim is not compensable in that the Petitioner, LUKAS

> MORAN, a minor, does not qualify for coverage under the plan as defined by Florida Statute 766.302(2).
>
> * * *

11. Petitioners' Response further states, "The Petitioners have no objection to the ALJ resolving the issue of notice in the Summary Final Order."

12. No other response to the September 18, 2009, Order has been filed.

13. In light of there being no dispute on the issue of non-compensability, it is not necessary for this Summary Final Order to address any issue of notice.

14. Given the record, Petitioners' and Respondent's concurrence, and the absence of any response in opposition from Respondent-Intervenor William T. Joyner, M.D., and William T. Joyner, M.D., P.A., it is undisputed that Lukas' neurological problems most likely arose during intrauterine life, as opposed to being birth-related. Consequently, for reasons appearing more fully in the Conclusions of Law, NICA's Motion for Summary Final Order is well-founded.[3]

CONCLUSIONS OF LAW

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

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. Here, indisputably, Lukas' neurologic problems arose in utero and 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." Consequently, given the provisions of Section 766.302(2), Florida Statutes, Lukas 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).

22. Where, as here, the administrative law judge determines that ". . . the injury alleged is not a birth-related neurological injury . . . she or he shall enter an order [to such effect] and shall 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 Florida Birth-Related Neurological Injury Compensation Association's Motion for Summary Final Order is granted, and the Petition for Compensation filed by Lukas Moran, by and through his parents and natural guardians Joseph Moran and Candess Moran, and by the parents individually, be and the same is dismissed with prejudice.

DONE AND ORDERED this 28th day of October, 2009, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of October, 2009.

ENDNOTES

1/ The Motion for Summary Final Order was filed with DOAH September 8, 2009.

Section 120.57(1)(h), Florida Statutes (2008), 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. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other

information required by law to be contained in the final order.

2/ See, e.g., Vero Beach Care Center v. Ricks, 476 So. 2d 262, 264 (Fla. 1st DCA 1985)("Lay testimony is legally insufficient to support a finding of causation where the medical condition involved is not readily observable."); Ackley v. General Parcel Services, 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."); 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 obligated to present expert medical evidence establishing that causal connection.").

3/ 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 that 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." 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.