STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMANUEL A. OLIVARES, a minor, by and through his parents and natural guardians, MILAGROS OLIVARES AND DANIEL ALPIZAR, AND MILAGROS OLIVARES AND DANIEL ALPIZAR, individually,	)	
Petitioners,	)	
vs.	)	Case No. 09-3844N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
JERRY GILLES, M.D., AND PUBLIC HEALTH TRUST,	)	
Intervenors.	)	

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's Renewed Motion for Summary Final Order served May 17, 2010.

STATEMENT OF THE CASE

1. On July 20, 2009, Petitioners Milagros Olivares and Daniel Alpizar (parents) filed, with the Division of Administrative Hearings (DOAH), a Petition (claim) on behalf of their son, Emanuel A. Olivares (a minor), and individually in their own right, for compensation under the Florida Birth-

Related Neurological Injury Compensation Plan (Plan), for injuries allegedly associated with Emanuel's birth on March 20, 2005, at Jackson Memorial Hospital.

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on July 24, 2009.

3. By an Order entered August 24, 2009, Jerry Gilles, M.D., was granted status as an Intervenor, and by an Order entered November 10, 2009, the Public Health Trust was granted status as an Intervenor.[1]

4. On November 19, 2009, following extensions of time in which to do so, NICA filed its Response to the Petition (Notice of Non-compensability and Request for Evidentiary Hearing on Compensability) and gave notice that NICA was of the view that Emanuel did not suffer "a birth-related neurological injury" as defined in Section 766.302(2), Florida Statutes. The Response further requested a hearing be scheduled to resolve the issue of compensability.

5. On December 3, 2009, NICA filed a Motion for Summary Final Order,[2] which, by an Order entered February 9, 2010, was denied without prejudice.

6. Since that time, NICA has deposed its experts, Donald C. Willis, M.D., and Michael Duchowny, M.D., and

Petitioners have had the opportunity to attend and participate in those depositions if they chose to do so.[3]

7. The deposition transcripts were filed concurrently with Respondent's Renewed Motion for Summary Final Order on May 21, 2010.

8. Attached to NICA's Renewed Motion for Summary Final Order were the medical reports and affidavits of medical physicians Donald C. Willis, M.D., and Michael S. Duchowny, M.D., referenced in their depositions, as explained in the endnotes hereto.

9. The predicate for the Renewed Motion for Summary Final Order is NICA's contention that, indisputably, Emanuel's problems are not birth-related, in that there was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery, or the immediate post-delivery period in the hospital.

10. Donald C. Willis, M.D., is, by education, training, and experience, qualified as an expert in obstetrics, gynecology, and maternal-fetal medicine. He examined the medical records for Emanuel's birth, and opined as follows, via his report, dated October 8, 2009:

> In summary, Caesarean section delivery was done for failure to progress in labor. There was no fetal distress during labor. The baby was not depressed at birth and had an uncomplicated newborn hospital stay and

> discharged home at about 48 hours of life. There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery or the immediate post delivery period.[4]

11. Dr. Willis also was deposed on April 6, 2010, at which time, he gave the following opinion within a reasonable degree of medical certainty:

> Q. Now, Dr. Willis, before I ask you specific detailed opinions, have you formed an overall opinion as to whether or not there was an obstetric event that resulted in the loss of oxygen or a mechanical trauma to the baby during labor, delivery or the immediate post-delivery period?
>
> A. Yes, I did evaluate the records for that and I do not feel that there was any obstetrical event that resulted in oxygen deprivation or mechanical trauma to the baby during labor, delivery or the immediate post-delivery period. (Willis Deposition, pgs. 6-7).

12. Michael S. Duchowny, M.D., is, by education, training, and experience qualified as an expert in pediatric neurology. Per his medical report of November 4, 2009, adopted in his deposition of April 27, 2010,[5] he opined:

> In SUMMARY, Emanuel's neurological examination reveals findings consistent with substantial mental and physical impairment. Emanuel manifests a spastic quadriparesis with absence of speech development and non-ambulation. I reviewed the medical records sent on September 16, 2009. They reveal that Emanuel was born without Complication with Apgar scores of 6, 9 and 9 at 1, 5 and

> 10 minutes. There were no significant postnatal complications.
>
> Emanuel's most recent MRI brain scan of the brain performed at Miami Children's Hospital on June 5, 2009 was reviewed. This study demonstrates bilateral signal abnormality in the basal ganglia with signal characteristics consistent with calcification. There is no significant atrophy or evidence of white matter abnormalities. These findings are inconsistent with hypoxic or ischemic brain damage. The records therefore do not provide support for Emanuel's neurological abnormalities being acquired in the course of labor and delivery nor due to oxygen depravation [sic] or mechanical injury. I therefore do not believe that Emanuel is eligible for compensation under the NICA statute.

13. Further, at his deposition of April 27, 2010, Dr. Duchowny provided the following testimony:

> A. Yes. Based on both my evaluation of Emanuel on November 4, 2009, and my review of the medical records, which had been sent to me on September 16, 2009, I was of the opinion that although Emanuel has substantial mental and motor impairment, that his impairments were not acquired in the course of labor and delivery, and they were not due to either oxygen depravation [sic] or mechanical injury occurring at birth.
>
> Q. How about during the post-delivery period, during the immediate post-delivery resuscitative period?
>
> A. That would include that as well.
>
> Q. Okay. Were your findings consistent with, or inconsistent with any type of hypoxic or ischemic brain damage?

> A. I thought that Emanuel's findings were not consistent with either hypoxic or ischemic brain damage. (Duchowny Deposition pgs. 7-8).

and,

* * *

> Q. In reaching your opinion, do you feel that this was a close call, or are you very clear in your opinion that you're expressing, that his injuries were not sustained at all during the course of labor, delivery or the immediate post-delivery period?
>
> A. Yeah. I think it's a clear case. I mean, my heart goes out to Emanuel and his mother, who is here today. And I'm sorry, because I know he's very neurologically impaired. But putting together his evaluation and the medical records, it's clear that his injuries were not sustained during labor or delivery, and were not the result of oxygen depravation [sic] or mechanical injury. I think it is very clear, not a borderline call. (Duchowny Deposition, pgs. 10-11).

14. Note, 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."). 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.").

15. No party filed any timely response in opposition to NICA's Renewed Motion for Summary Final Order, as provided for in Florida Administrative Code Rules 28-106.103 and 28-106.204, so on June 2, 2010, an Order to Show Cause was entered, providing:

> On May 17, 2010, Respondent served a Renewed 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 that they have been accorded the opportunity to do so, it is
>
> ORDERED that by June 14, 2010, Petitioners and Intervenors shall show good cause, in writing, if any they can, why the relief requested by Respondent should not be granted.

16. Intervenors filed no timely response to the Renewed Motion for Summary Final Order or the June 2, 2010, Order to Show Cause.

17. On June 11, 2010, Petitioner Milagros Alpizar (mother) filed a letter wherein she provided a new address and two telephone numbers for Petitioners. Her letter also related how

difficult it is, and how much more difficult it is becoming, to care for the child, Emanuel. However, her letter contained no argument in opposition, or evidence to refute, the pending Renewed Motion for Summary Final Order and its supporting materials.

18. Nonetheless, Petitioners' June 11, 2010, letter, together with the mother's telephone call to the undersigned's secretary, representing that due to the change of address, Petitioners had received no papers, pleadings, or orders since May 1, 2010, resulted in the entry, on June 18, 2010, of an Order Regarding Service and Order to Show Cause, which read:

> This cause came on for consideration upon Petitioners' notification of a change of address and telephone number. Albeit Petitioners have the affirmative obligation to keep the Division and all parties advised of any change of their address, it is now apparent this was not done.
>
> Accordingly, it is ORDERED:
>
> 1. Petitioners shall henceforth be served at the address provided by their correspondence filed June 11, 2010. (See "copies list" below.)
>
> 2. By copies attached to this Order, Petitioners are herewith provided a copy of Respondent's Renewed Motion for Summary Final Order filed May 21, 2010, the Order to Show Cause entered herein on June 2, 2010, and all other items filed since May 1, 2010.
>
> 3. In an abundance of caution, Petitioners are granted to and until July 5, 2010, in which to file a response showing cause, in

> writing, filed with the Division of Administrative Hearings, and served upon the other parties, why Respondent's Renewed Motion for Summary Final Order should not be granted.

19. July 5, 2010, was a legal holiday. However, to date of instant Order, Petitioners have filed no response to the June 18, 2010, Order Regarding Service and Order to Show Cause.

20. Consequently, neither Petitioners nor Intervenors have offered evidence, by affidavit or otherwise, to generate a genuine issue of material fact.

21. Given the record, it is undisputed that Emanuel's problems most likely were not acquired in the course of labor and delivery nor are they due to oxygen deprivation or mechanical injury. Consequently, for reasons appearing more fully in the Conclusions of Law, NICA's Motion for Summary Final Order is well-founded.[6]

CONCLUSIONS OF LAW

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

23. 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.

24. 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.

25. 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 766.031, Fla. Stat.

26. 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.

27. 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.

28. Here, indisputably, Emanuel's neurologic problems were not ". . . 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, Emanuel 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); Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla. 1997).

29. 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 Renewed Motion for Summary Final Order is granted, and the petition for compensation filed by Emanuel Olivares, by and through his parents and natural guardians Milagros Olivares [Alpizar] and Daniel Alpizar, and Milagros Olivares [Alpizar] and Daniel Alpizar, individually, is dismissed with prejudice.

DONE AND ORDERED this 20th day of July, 2010, 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 20th day of July, 2010.

ENDNOTES

1/ The Public Health Trust was named in an abated Circuit Court proceeding, and the Petition herein alleges that the Public Health Trust owns and operates Jackson Memorial Hospital where Emanuel was born.

2/ Section 120.57(1), Florida Statutes (2009), 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.

3/ In fact, Milagros Alpizar (the mother, a/k/a "Milagros Olivares") attended Dr. Duchowny's deposition.

4/ This report was adopted as Exhibit 2 of Dr. Willis' deposition (See Finding of Fact 11).

5/ This November 4, 2009, report was not attached to the copy of Dr. Duchowny's deposition filed with DOAH but it is adopted and referred-to in that deposition as "Exhibit 2." A copy of Dr. Duchowny's November 4, 2009, report was identified and incorporated as part of his affidavit, filed with NICA's Motion for Summary Final Order. The report (without affidavit) is attached to NICA's Renewed Motion for Summary Final Order.

6/ 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." 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.