STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HEATHER DACUS AND JASON DACUS, individually and as parents and natural guardians of JOSHUA DACUS, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 09-6622N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
FLORIDA HOSPITAL WATERMAN,	)	
Intervenor.	)	

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent Florida Birth-Related Neurological Injury Compensation Association's (NICA's) Motion for Summary Final Order, filed January 15, 2010, and Supplemental Motion for Summary Final Order (As Amended), filed March 4-5, 2010.

STATEMENT OF THE CASE

1. On December 7, 2010, Heather Dacus (mother) and Jason Dacus (father), individually and as parents and natural guardians of Joshua Dacus (Joshua), a minor whose date of birth

is alleged as June 26, 2009, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The only physician named in the Petition as providing obstetrical services at Joshua's birth was Wendy Perrott, M.D. The time and place of injury was given in the Petition as Florida Hospital Waterman.

2. DOAH served NICA with a copy of the claim on December 9, 2009. Wendy Perrott, M.D., was served on December 10, 2009. Florida Hospital Waterman was served on December 17, 2009.

3. On January 15, 2010, Respondent NICA filed a Motion for Summary Final Order, pursuant to Section 120.57(1)(h), Florida Statutes. The predicate for NICA's motion was its assertion that, indisputably, Wendy Perrott, M.D., the only physician named in the Petition as having provided obstetrical services at Joshua's birth, was not a "participating physician," as defined by law, inasmuch as Dr. Wendy Perrott had not paid the required assessment for participation in the Plan. § 766.302(7), Fla. Stat. See also § 766.314(4)(c), Fla. Stat. Attached to the motion was an affidavit of Tim Daughtry, NICA's Custodian of Records, attesting that Dr. Wendy Perrott had not paid the required assessment for participation in the Plan at the time of the injury. The affidavit further attested that NICA's policy

is to annually document exemptions of physicians, assistant resident physicians, and interns, pursuant to Section 766.314(4)(c), Florida Statutes, and that NICA has no records with respect to Dr. Wendy Perrott in relation to an exempt status for the year 2009, the year of Joshua's birth. The affidavit yet further attests that NICA's Physician Data Report (attached and incorporated in the affidavit) shows that in 2009, Dr. Wendy Perrott paid the Two hundred and fifty dollar ($250.00) assessment required by Section 766.314(4)(b)1., Florida Statutes, for non-participating, non-exempt licensed physicians.

4. Petitioners did not timely respond to NICA's Motion for Summary Final Order. Consequently, an Order to Show Cause was entered on February 3, 2010, which provided:

> On January 5, [sic] 2010, Respondent served a Motion for Summary Final Order. To date, Petitioners 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 February 15, 2010, Petitioners shall show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

5. On February 12, 2010, Petitioners filed a Response in Opposition to Respondent's Motion for Summary Final Order, alleging that an anesthesiologist, Joseph Gartner, M.D., also

provided obstetrical services by delivery of anesthesia to an obstetrical patient (Joshua's mother, Heather Dacus) during Joshua's C-section delivery, and transported Joshua to the OB PACU during the post-delivery resuscitative period, and that Respondent must demonstrate both that Dr. Gartner was not a "participating physician" and that no other participating physician was involved with the delivery of "obstetrical services" during labor or during Joshua's post-delivery resuscitative period, in order to prevail on Respondent's Motion for Summary Final Order.

6. On March 2, 2010, Florida Hospital Waterman moved to intervene, and by an Order entered March 10, 2010, Florida Hospital Waterman's Petition for Leave to Intervene was granted, and Florida Hospital Waterman was recognized as an Intervenor. There have been no other petitions to intervene.

7. On March 4, 2010, Respondent filed a Supplemental Motion for Summary Final Order, and on March 5, 2010, Respondent filed an Amended Supplemental Motion for Summary Final Order (As to Certificate of Service). Herein, these items are sometimes referred-to together, as "the Supplemental Motion for Summary Final Order (As Amended)."

8. The Supplemental Motion for Summary Final Order (As Amended), further addressed the issue of "no participating physician" raised in the original Motion for Summary Final

Order, by stating that Joseph Gartner, M.D. (the anesthesiologist specifically named by Petitioners in their response of February 12, 2010), like Dr. Perrott, also was "not a participating physician at the time of injury to Joshua Dacus as he [Dr. Gartner] had not paid the required assessment for participation in the Plan nor was he exempt from payment of the assessment." The Supplemental Motion for Summary Final Order (As Amended), also asserted that "the only potential additional physician listed anywhere within all available relevant medical records relating to Petitioners' claim is Dr. Michael Curtis Baker," who, like Dr. Gartner, "was not a participating physician at the time of injury."

9. In support of the foregoing argument, the Supplemental Motion for Summary Final Order (As Amended), had attached to it an affidavit of Tim Daughtry, NICA's Records Custodian, together with a "NICA Physician Data Report." Mr. Daughtry attested, and the report shows, that in 2009, the year in which Dr. Gartner participated in the delivery of Joshua Dacus, Dr. Gartner did not pay the assessment required for participation in the Florida Birth-Related Neurological Injury Compensation Plan; that NICA has no records with respect to Dr. Gartner in relation to an exempt status for the year 2009; and that, to the contrary, Dr. Gartner had paid the assessment required by Section

766.314(4)(b)1., Florida Statutes, for non-participating, non-exempt licensed physicians.

10. Also attached to the Supplemental Motion for Summary Final Order (As Amended) is an affidavit by Katherine Alexander, Claims Manager for NICA. By her affidavit, Ms. Alexander asserts that she has personal and specific knowledge, based on her review of all relevant medical records relating to the instant claim,[1] and that these records show:

> . . . there were three (3) physicians involved in the care of Heather Dacus and Joshua Dacus at or around the time of labor, delivery or resuscitation in the immediate post delivery period. Those three physicians were Wendy Perrott, M.D. (obstetrician), Joseph Gartner, M.D. (anesthesiologist), and Michael Curtis Baker, M.D. (admitting physician). My review and analysis of all relevant medical records reveals that no other physicians licensed in Florida performed obstetrical services on Heather Dacus or Joshua Dacus during the course of labor, delivery or resuscitation in the immediate post delivery period."

11. Ms. Alexander's affidavit further avers that, "As stated in the affidavits filed herewith by Tim Daughtry, custodian of records for NICA, Wendy Perrott, M.D., Joseph Gartner, M.D., and Michael Curtis Baker, M.D., were not 'participating physicians' in NICA in 2009, as that term is defined in Section 766.302(7), Florida Statutes."

12. Finally, attached to the Supplemental Motion for Summary Final Order (As Amended) is another affidavit by Tim Daughtry, together with a supportive "NICA CARES physician payment history/report" applicable to Michael Curtis Baker, M.D. By this affidavit, Mr. Daughtry attested, and the NICA records show, that in 2009, the year in which Joshua was born, Dr. Michael Curtis Baker was not a "participating physician" in the Plan; that NICA has no records with respect to Dr. Baker in relation to an exempt status for the year 2009; and that, to the contrary, Dr. Baker paid the assessment required by Section 766.314(4)(b)1., Florida Statutes, for non-participating, non-exempt, licensed physicians.

13. On March 10, 2010, an Order was entered, permitting all parties to file responses to the Supplemental Motion for Summary Final Order (As Amended) within 12 days.

14. On March 11, 2010, Petitioners filed a Response to Supplemental Motion for Summary Final Order, asserting that "the affidavits filed in support of the Supplemental Motion for Summary Final Order are limited in scope and fail to eliminate all genuine issues of material fact regarding possible exemptions from the requirement of paying a five thousand dollar ($5,000.00) assessment for the year 2009," and seeking the opportunity to take depositions of Wendy Perrott, M.D., Joseph Gartner, M.D., Michael Curtis Baker, M.D., Tim Daughtry,

and/or Kathe Alexander,[2] and further seeking "sufficient opportunity to respond to the Supplemental Motion for Summary Final Order thereafter."

15. Several motions intervened, all of which were addressed by a March 30, 2010, Order which also required the completion of discovery and the filing of responses to the Supplemental Motion for Summary Final Order (As Amended), by May 10, 2010.

16. Intervenor Florida Hospital Waterman filed a Response to Respondent's Motion for Summary Final Order and Amended Supplemental Motion for Summary Final Order on May 10, 2010, whereby Florida Hospital Waterman prayed for additional discovery and response time. An Order entered May 17, 2010, provided, in pertinent part:

> The parties shall confer, and on or before June 1, 2010, provide the undersigned with a reasonable estimate of the date that discovery will be completed for purposes of Petitioners' and Intervenor's filing responses to the pending Motion(s).

17. On May 27, 2010, the parties filed a Joint Notice in Response, praying for an extension of time in which to complete discovery through June 30, 2010, and to assign a date thereafter for responses to the pending motion(s). An Order, entered June 3, 2010, extended discovery through June 30, 2010, and

extended the time for responses to the Supplemental Motion for Summary Final Order (As Amended) to July 12, 2010.

18. On July 15, 2010, Intervenor filed a Motion seeking additional time to respond through August 2, 2010, and on July 15, 2010, an Agreed Motion to the same effect was filed. By an Order, entered July 16, 2010, discovery was left open, and the parties were granted until August 2, 2010, to respond to the Supplemental Motion for Summary Final Order (As Amended).

19. No responses were filed, so on August 19, 2010, an Order was entered, which read, in pertinent part:

> Prior orders in this cause provided for any responses in opposition to the pending Motion for Summary Final Order and Supplemental Motion for Summary Final Order as amended, to be filed on or before August 2, 2010. No responses have been filed.
>
> In an abundance of caution, the parties are provided to and until September 1, 2010, in which to schedule, with the office of the undersigned, oral argument by telephonic conference call to take place no later than September 15, 2010, with regard to the Motion for Summary Final Order and Supplemental Motion for Summary Final Order as amended. Failure to schedule such a hearing will result in disposition of the pending motions upon the pleadings and record.

20. On August 30, 2010, an Order was entered, which provided:

> All responses in opposition to the Motion for Summary Final Order and Supplemental

> Motion for Summary Final Order as amended were to be filed by August 2, 2010.
>
> In an abundance of caution, it is ORDERED:
>
> All parties shall show cause on or before September 10, 2010, why a summary final order of dismissal should not be entered.

21. To instant date, no party has scheduled a telephonic conference hearing, and no party has filed any further discovery or any response in opposition to Respondent's Motion for Summary Final Order and Supplemental Motion for Summary Final Order As Amended.

22. Respondent NICA has eliminated as "participating physicians" all physicians appearing in the medical records submitted as part of Petitioners' claim, and after six months for discovery and responses in opposition to the pending motion(s), no counter-affidavits/or depositions have been filed. Accordingly, given the record, there is no dispute of material fact. Specifically, there is no dispute that the only physician named in the Petition as providing obstetrical services during the birth of Joshua Dacus, as well as all physicians appearing in the medical records provided as part of Petitioners' claim, were not "participating physicians," as that term is defined by Section 766.302(7), Florida Statutes. Accordingly, NICA's Motion for Summary Final Order is, for reasons appearing more fully in the Conclusions of Law, well-founded.[3]

CONCLUSIONS OF LAW

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

24. 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.

25. 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), and 766.305(1), Fla. Stat. NICA, 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.

26. 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.

27. 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 postdelivery 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 postdelivery 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.

28. Pertinent to this case, "participating physician" is defined in Section 766.302(7), Florida Statutes, to mean:

> . . . a physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full-time or part-time and who had paid or was exempted from payment at the time of the injury the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury occurred. . . .

29. Here, indisputably, NICA's motion(s) and supporting affidavits and documentation have shown that the physician, shown to have provided obstetrical services during Joshua's birth, as well as those physicians whose names otherwise appear within the records provided by Petitioners as part of their Petition/Claim, were not "participating physician(s)," as that term is defined in Section 766.302(7), Florida Statutes, and as that term is used in Sections 766.301 through 766.316, Florida Statutes. Consequently, Joshua does not qualify for coverage under the Plan.

30. Where, as here, the administrative law judge determines that ". . . obstetrical services were not delivered by a participating physician at the birth, 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 Statement of the Case and Conclusions of Law, it is

ORDERED that Respondent Neurological Injury Compensation Association's Motion for Summary Final Order and Supplemental Motion for Summary Final Order (As Amended), is granted, and the petition for compensation filed by Heather Dacus and Jason Dacus, individually and as parents and natural guardians of Joshua Dacus, a minor, is dismissed with prejudice.

DONE AND ORDERED this 28th day of September, 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 28th day of September, 2010.

ENDNOTES

1/ Section 766.305(3(a), Florida Statutes, provides:

> (3) The claimant shall furnish to the Florida Birth-Related Neurological Injury Compensation Association the following information, which must be filed with the association within 10 days after the filing of the petition as set forth in subsection (1):
>
> (a) All available relevant medical records relating to the birth-related neurological injury and a list identifying any unavailable records known to the claimant and the reasons for the records' unavailability.

2/ Petitioners named five people but inadvertently inserted the number four (4) in the pleading.

3/ Where, 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." Turner Produce Company, Inc. v. Lake Shore Growers Cooperative Association, 217 So. 2d 856, 861 (Fla. 4th DCA 1969). Accord Roberts v. Stokley, 338 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.