STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PATRICK GUETTLER, a minor, by and through his mother MELISSA GUETTLER and his father, CONRAD GUETTLER AND MELISSA GUETTLER AND CONRAD GUETTLER as mother and father respectively of PATRICK GUETTLER,	)	
Petitioners,	)	
vs.	)	Case No. 10-2191N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
INDIAN RIVER MEMORIAL HOSPITAL, INC., d/b/a INDIAN RIVER MEDICAL CENTER,	)	
Intervenor.	)	

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's Motion for Summary Final Order, served July 16, 2010.

STATEMENT OF THE CASE

1. On April 19, 2010, a Petition for Benefits, styled, Patrick Guettler, a minor, by and through his mother Melissa Guettler and his father Conrad Guettler, and Melissa Guettler and Conrad Guettler as mother and father of

Patrick Guettler, was filed with the Division of Administrative Hearings (DOAH), for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan), for injuries allegedly associated with Patrick Guettler's birth on July 22, 2008.

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on April 26, 2010; George J. Fyffe, M.D., on April 28, 2010; Indian River Medical Center on or about April 29, 2010; Phillip Alex Nye, M.D., on June 28, 2010; and John P. Lindenthal, M.D., also on June 28, 2010. These are the only hospitals and/or medical personnel named in the Petition as present at birth. Only Indian River Memorial Hospital, Inc., d/b/a Indian River Medical Center, has intervened herein.

3. On June 18, 2010, following an extension of time in which to do so, NICA served its Response to the Petition and gave notice that it was of the view that the minor child, Patrick Guettler, did not suffer a "birth-related neurological injury," which renders an infant "permanently and substantially mentally and physically impaired," per Subsections 766.302(2) and (3), Florida Statutes. NICA requested that a hearing be scheduled to resolve the issue of compensability. On June 22, 2010, a scheduling order was entered to permit the parties to select hearing dates and otherwise advise the undersigned

concerning their needs regarding a hearing on any issues raised in the Petition. On July 16, 2010, Respondent served and filed the subject Motion for Summary Final Order.[1]

4. Petitioners filed Petitioners' Joinder in Respondent's Motion for Summary Final Order on August 2, 2010.

5. The Intervenor did not timely respond to the Motion as permitted by Florida Administrative Code Rules 28-106.103 and 28-106.204(4). In an abundance of caution, on August 23, 2010, an Order to Show Cause why the Motion for Summary Final Order should not be granted was entered, which provided:

> On July 16, 2010, Respondent NICA served a Motion for Summary Final Order. On August 2, 2010, Petitioners filed a Joinder in Respondent's Motion for Summary Final Order. By their filings, Petitioners and NICA seek dismissal of this cause upon agreed non-compensability for the reasons cited in Respondent's Motion.
>
> To date, 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 August 17, 2010, Intervenors [sic] shall show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

6. On August 13, 2010, Intervenor filed a Response to Order to Show Cause praying for a delay of the final disposition of this matter "until after August 31, 2010, to afford

Intervenor the opportunity to provide evidence this matter should not be disposed of by the granting of Respondents [sic] Motion for Summary Final Order." However, on August 26, 2010, Intervenor's counsel of record filed a letter stating, in pertinent part:

> This is to confirm that my client, the intervenor, Indian River Medical Center, Inc. will not oppose the summary disposition of the case.

7. The predicate for the Motion for Summary Final Order is that, indisputably, the child, Patrick Guettler, is not permanently and substantially mentally impaired, nor permanently and substantially physically impaired.

8. Attached to NICA's Motion for Summary Final Order was the affidavit of Michael S. Duchowny, M.D., a pediatric neurologist and Professor of Neurology at the University of Miami School of Medicine, which affidavit incorporated Dr. Duchowny's letter-report dated June 9, 2010, concerning his independent medical examination of Patrick on that date. Based on his examination/evaluation,[2] Dr. Duchowny concluded, within a reasonable degree of medical probability that:

* * *

> 5. Patrick Guettler's neurological examination reveals evidence of fine motor coordination and articulation problems with fully preserved cognitive abilities. A review of the medical records indicates a high likelihood that Patrick's neurologic

> problems were sustained during labor and delivery but his present neurologic examination does not reveal a substantial mental or motor impairment. . . . Because of Patrick's preserved neurological status, I believe he is not compensable under the NICA statute.
>
> 6. As such, it is my opinion that Patrick Guettler is not permanently and substantially mentally impaired nor is he permanently and substantially physically impaired due to oxygen deprivation or mechanical injury occurring during the course of labor, delivery or the immediate postdelivery period in the hospital during the birth of Patrick Guettler.

9. Given the record, it is undisputed that Patrick's problems, even if they may be the result of oxygen deprivation or mechanical injury, do not amount to material and substantial mental impairment or material and substantial physical impairment. 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

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

11. 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.

12. 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.

13. 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.

14. 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.

15. 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. (Emphasis added).

16. Here, indisputably, Patrick Guettler's problems, although birth-related and neurologic in nature, do not render him both "permanently and substantially mentally impaired" and "permanently and substantially physically impaired." Consequently, given the provisions of Section 766.302(2), Florida Statutes, Patrick Guettler does not qualify for coverage under the Plan. See Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997)(The Plan is written in the conjunctive and can only be interpreted to require both substantial mental and physical impairment.). See also Humana of Fla., 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, Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996).

17. 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

1. The hearing now scheduled for October 26, 2010, is hereby cancelled; and

2. Respondent Florida Birth-Related Neurological Injury Compensation Association's Motion for Summary Final Order is granted, and the Petition for Compensation filed herein naming Patrick Guettler, as the child addressed by Sections 766.301-766.316, Florida Statutes, be and the same is dismissed with prejudice.

DONE AND ORDERED this 1st day of September, 2010, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of September, 2010.

ENDNOTES

1/ Section 120.57(1)(h), 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.

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. Gen. Parcel Servs., 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 Ins. Co. 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 Co., Inc. v. Lake Shore Growers Coop. Ass'n, 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).

COPIES FURNISHED:
(Via Certified Mail)

Nancy La Vista, Esquire
Lytal, Reiter, Clark, Fountain and Williams, LLP
515 North Flagler Drive, Suite 1000
West Palm Beach, Florida 33401
(Certified Mail No. 7010 0290 0001 2352 0697)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(Certified Mail No. 7010 0290 0001 2352 0703)

Roy R. Watson, II, Esquire
Adams, Coogler, Watson, Merkel,
Barry & Kellner, P.A.
Nations Bank Tower, Suite 1600
1555 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401
(Certified Mail No. 7010 0290 0001 2352 0710)

David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest Sixth Court
Plantation, Florida 33324
(Certified Mail No. 7010 0290 0001 2352 0727)

George J. Fyffe, M.D.
2180 Northeast 186 Terrace
North Miami Beach, Florida 33179
(Certified Mail No. 7010 0290 0001 2352 0734)

John Peter Lindenthal, M.D.
1555 Indian River Boulevard, B-120
Vero Beach, Florida 32960
(Certified Mail No. 7010 0290 0001 2352 0741)

Phillip Alex Nye, M.D.
1555 Indian River Boulevard, B-120
Vero Beach, Florida 32960
(Certified Mail No. 7010 0290 0001 2352 0758)

Amy Rice, Acting Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7010 0290 0001 2352 0765)

Elizabeth Dudek, Deputy Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(Certified Mail No. 7010 0290 0001 2352 0772)

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.