STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERTO PUELLO AND ANOA SANTANA-LOHOZ, on behalf of and as parents and natural guardians of ROBERT PUELLO, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 10-8217N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY, d/b/a JACKSON SOUTH COMMUNITY HOSPITAL,	)	
Intervenor.	)	

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's Motion for Summary Final Order, filed September 29, 2010, and Renewed Motion for Summary Final Order, filed November 1, 2010.

STATEMENT OF THE CASE

1. On August 23, 2010, Roberto Puello and Anoa Santana-Lohoz, on behalf of and as parents and natural guardians of Robert Puello, a minor, born January 19, 2009, 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 August 25, 2010, and on August 26, 2010, served Earl Gabb, M.D., and Jackson South Community Hospital, respectively and separately.

3. On September 29, 2010, 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, the only physician (Earl Gabb, M.D.) named in the petition as having provided obstetrical services at the minor, Robert Puello's birth, was not a "participating physician," as defined by law, because Dr. Gabb had neither paid the assessment required for participation nor was he exempt from payment of the assessment. § 766.302(7), Fla. Stat. See also § 766.314(4)(c), Fla. Stat. Attached to the motion was an affidavit of the Custodian of Records for NICA attesting to the fact that Dr. Earl Gabb had not paid the assessment required for participation in the year 2009, the year in which the subject child, Robert, was born, and that Dr. Gabb was not exempt from payment of the assessment.

4. Petitioners did not timely respond to NICA's Motion for Summary Final Order. Consequently, an Order to Show Cause was entered on October 13, 2010, which provided:

> On September 29, 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 not withstanding that they have been accorded the opportunity to do so, it is
>
> ORDERED that by October 25, 2010, Petitioners shall show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

5. Petitioners filed a Response to the Motion for Summary Final Order on October 22, 2010. Therein, Petitioners did not dispute NICA's showing that Dr. Earl Gabb, the only physician named in the Petition as involved in the birth, was not a participating NICA physician at the time of the minor child's birth but did assert that two individuals, perhaps employees of Jackson South Hospital, namely CNM Caree George and Nurse Usha Kumari, were involved in this birth. Petitioners requested additional discovery.

6. On October 25, 2010, a Petition to Intervene was filed by Public Health Trust of Miami-Dade County, d/b/a Jackson South Community Hospital, and no timely response in opposition having been filed, an Order was entered on November 10, 2010, permitting intervention.

7. On November 1, 2010, Respondent filed a Renewed Motion for Summary Final Order providing therewith an affidavit of NICA's Records Custodian showing that the "NICA CARES physician payment history/report" does not exist for Caree George, CNM, or Nurse Usha Kumari, and that neither George nor Kumari had paid any assessments for NICA participation.

8. The thrust of the Renewed Motion for Summary Final Order was the same as before, that unless obstetrical services are delivered by a NICA participating physician during labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, in connection with the child's (Robert's) birth, his claim is not compensable.

9. Neither Petitioners nor Intervenor filed a response in opposition to the Renewed Motion for Summary Final Order within the time provided by Florida Administrative Code Rules 28-106.109 and 28-106.204. Therefore, in an abundance of caution, on November 15, 2010, an Order to Show Cause was entered, which provided:

> On November 1, 2010, Respondent served a Renewed Motion for Summary Final Order. To date, neither Petitioners nor Intervenor have 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 November 30, 2010, Petitioners and Intervenor shall show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

10. No responses to the Renewed Motion were filed, and on December 1, 2010, another Order was entered which provided:

> This cause came on for consideration upon the passage of November 30, 2010, without the filing of any response in opposition to Respondent's Renewed Motion for Summary Final Order.
>
> Accordingly, in an abundance of caution, Petitioners and Intervenor are granted to and until December 15, 2010, to show cause, in writing, filed with the Division of Administrative Hearings, why the Motion for Summary Final Order, with supporting documentation, and the Renewed Motion for Summary Final Order, with supporting documentation should not be considered together, and to show cause why a summary final order should not be entered resolving the case against Petitioner [sic].

11. By letter of January 5, 2011, the undersigned solicited a request by January 18, 2010 [sic] for further discovery, if any party deemed such a request to be appropriate. There has been no response to that letter. Due to the date error in the letter, another Order was entered January 24, 2011, which read in pertinent part:

> ORDERED: Petitioners and Intervenor are granted to and until February 7, 2011, in which to move for additional time for discovery and/or to respond in opposition to the Order to Show Cause entered December 1, 2010.

12. Neither Petitioners nor Intervenor has filed any response to the December 1, 2010, Order to Show Cause. Neither Petitioners nor Intervenor has offered affidavits or any evidence to cast doubt on NICA's showing that neither the physician named in the Petition (Dr. Gabb) nor either of the healthcare professionals (CNM George; Nurse Kumari), named by Petitioners in their response to the Motion for Summary Final Order as present at Robert's birth, were not participating physicians in the Plan. Neither Petitioners nor Intervenor has requested additional discovery time since the filing of the Renewed Motion for Summary Final Order, and Petitioners have not moved for leave to amend the petition to add CNM George, Nurse Kumari, or any other person as an alleged "participating physician."

13. Therefore, it is concluded that the Motion for Summary Final Order, with supporting documentation, and the Renewed Motion for Summary Final Order, with supporting documentation, may be considered together and that it is undisputed that NICA has affirmatively shown that there were no participating physicians at Robert's birth.

14. Given the record, there is no dispute that those who provided obstetrical services during Robert's birth were not "participating physician[s]," as that term is defined by section 766.302(7). Consequently, NICA's Renewed Motion for Summary

Final Order (encompassing its Motion for Summary Final Order) is, for reasons appearing more fully in the Conclusions of Law, well-founded.[1]

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), and 766.305(1), 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(4), 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(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.

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 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.

20. Pertinent to this case, "participating physician" is defined by section 766.302(7), 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 exempt 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 . . . .

21. Here, indisputably, all those shown to have provided obstetrical services during Robert's birth were not "participating physician[s]," as that term is defined by section 766.302(7), and as that term is used in sections 766.301 through 766.316. Consequently, Robert does not qualify for coverage under the Plan.

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

ORDERED that Respondent's Renewed Motion for Summary Final Order encompassing its Motion for Summary Final Order is granted, and the petition for compensation filed by Roberto Puello and Anoa Santana-Lohoz, on behalf of and as parents and natural guardians of Robert Puello, a minor, is dismissed with prejudice.

DONE AND ORDERED this 17th day of February, 2011, 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 17th day of February, 2011.

ENDNOTE

1/ 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 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).

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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.