STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOUGLAS STALLEY, as Guardian Ad Litem and Trustee for BRIANNA ROSE LUMLEY, individually,	)	
Petitioner,	)	
vs.	)	Case No. 10-8929N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
UNIVERSITY COMMUNITY HOSPITAL, INC.,	)	
Intervenor.	)	

SUMMARY FINAL ORDER

This cause came on for consideration upon the Unopposed Motion for Summary Final Order filed on October 14, 2011, by Respondent.

STATEMENT OF THE CASE

1. On September 7, 2010, Douglas Stalley as Guardian Ad Litem and Trustee for Brianna Lumley, individually, filed, with the Division of Administrative Hearings (DOAH), a Petition for Determination of Jurisdiction of NICA Plan, and in the Alternative, Petition for Benefits. This pleading constituted a

petition for benefits (claim) pursuant to sections 766.301-766.316, Florida Statutes.

2. DOAH Served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on September 10, 2010; served Teena Hughes, M.D., on September 13, 2010; served William F. Meadows, III, M.D., on September 13, 2010; and served University Community Hospital on or about September 15, 2011.

3. Upon proper motion, an Order was entered on October 20, 2010, granting University Community Hospital intervenor status.

4. On December 20, 2010, NICA filed its response to Petition for Benefits setting forth its determination that the instant claim was "not compensable as the injury does not meet the definition of a birth-related neurological injury as defined in section 766.302(2), which requires that the injury render the child permanently and substantially mentally and physically impaired."

5. Thereafter, the case was scheduled for final hearing on multiple occasions and continued upon the parties' motions.

6. On October 14, 2011, Respondent NICA filed its Unopposed Motion for Summary Final Order, reciting therein that Petitioners' counsel and Intervenor's counsel had been contacted and had no objection to the entry of a Final Summary Order determining the claim is not compensable.[1/] The predicate for

the motion is that the claim is not compensable because Brianna Rose Lumley is not permanently and substantially mentally and physically impaired.

7. In support of its motion, NICA attached the affidavits of Donald Willis, M.D., an obstetrician with special competence in maternal fetal medicine and Michael S. Duchowny, M.D., a board-certified pediatric neurologist.[2/]

8. Dr. Willis's affidavit rendered an opinion in terms of "reasonable medical probability," as follows:

* * *

> There was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain. Oxygen deprivation may have occurred during labor and delivery, but this can not be determined since there was no fetal heart rate monitoring during labor and delivery was not observed. It is clear that oxygen deprivation occurred in the immediate post delivery period and resulted in brain injury. I cannot comment about the degree of brain injury.

9. Dr. Duchowny's affidavit also couched his opinion in terms of "reasonable medical probability" based upon the medical records and a December 8, 2010, "hands on" examination of Brianna Rose. He opined:

* * *

> In SUMMARY, Brianna's neurological examination is significant only for expressive language delay and dysarthia. In other respects, she is functioning at age level. She displays no specific focal or

> lateralizing findings on neurological examination.
> I fully reviewed medical records on Brianna that were sent to me on October 6, 2010. They provide full descriptive detail to compliment the mother's history. My review of these medical records together with today's findings on examination lead me to conclude that Brianna does not suffer from either a substantial mental or motor impairment and therefore she is not eligible for compensation under the NICA statute. I believe that Brianna's neurological findings are developmentally based and are not the result of either mechanical injury or oxygen deprivation in the course of labor or delivery. (emphasis added).

10. Given the record, there is no dispute of material fact that, regardless of whether or not the child suffered mechanical injury or oxygen deprivation in the statutory period, and although she suffers some disabilities, she does not suffer from either a substantial mental or motor impairment.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 766.301-766.316, Fla. Stat.

12. 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.

13. 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(4), Fla. Stat.

14. 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.

15. 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.

16. 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).

17. Here, indisputably, Brianna Rose Lumley suffers from some type of disability, probably developmental, but she is not permanently and substantially both physically and mentally impaired. Given the provisions of section 766.302(2), Brianna Rose does not qualify for coverage under the Plan. See also 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.); 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).

CONCLUSION

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED:

1. NICA's Unopposed Motion for Summary Final Order is granted.

2. The Petition filed by Douglas Stalley, as Guardian Ad Litem and Trustee for Brianna Rose Lumley individually, is dismissed with prejudice.

DONE AND ORDERED this 16th day of November, 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 16th day of November, 2011.

ENDNOTES

1/ 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).

2/ See, e.g., Vero Beach Care Ctr 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.").

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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 § 766.311, Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n 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.