STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARLENA ROBERTS, on behalf of and as parent and natural guardian of AMEL MATTHEWS-WALKER, a minor,	)	
Petitioner,	)	
vs.	)	Case No. 10-10319N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
DAVID CHOI, M.D., AND OB/GYN SPECIALISTS OF THE PALM BEACHES, P.A.,	)	
Intervenors.	)	

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's Motion for Summary Final Order, served by U.S. Mail on February 8, 2011, and filed with the Division of Administrative Hearings (DOAH) on February 14, 2011.

STATEMENT OF THE CASE

1. On November 22, 2010, Marlena Roberts, on behalf of and as parent and natural guardian of Amel Matthews-Walker, a minor, filed a petition (claim) with DOAH.

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on November 29, 2010; served David Choi, M.D., on November 29, 2010; and received a return of service by certified mail for St. Mary's Medical Center on or about December 3, 2010. Only Dr. Choi and OB/GYN Specialists of the Palm Beaches, P.A., have moved to intervene, and their intervention was granted by an Order entered December 22, 2010.

3. Following an extension of time in which to do so, Respondent NICA served its response to the petition, which response was filed January 26, 2011, and gave notice that it was of the view that Amel had not suffered a "birth-related neurological injury" as defined in section 766.302(2), Florida Statutes, which renders an infant "permanently and substantially mentally and physically impaired," per section 766.302(2). NICA's response requested that a hearing be scheduled to resolve the issue of compensability.

4. The parties submitted possible hearing dates, but on February 14, 2011, NICA filed its Motion for Summary Final Order. The predicate for NICA's motion was two-fold: first, that although Amel had suffered an injury at birth, that injury had not been caused by oxygen deprivation or mechanical injury and did not affect her brain or spinal cord; and second, that

although Amel has physical disabilities, she is not permanently and substantially mentally impaired.

5. In support of its motion, NICA attached the affidavit of Michael Duchowny, M.D., a pediatric neurologist, and the affidavit of Donald Willis, M.D., a board-certified obstetrician with special competence in maternal-fetal medicine.[1/]

6. Dr. Duchowny's affidavit opined, in pertinent part:

* * *

> . . . The opinions delivered in this Affidavit are all within a reasonable degree of medical probability.
>
> . . . The Florida Birth-Related Neurological Injury Compensation Association retained me as its expert in pediatric neurology . . . to examine the minor child, AMEL MATTHEWS-WALKER, and review the medical records from both AMEL MATTHEWS-WALKER and her mother, MARLENA ROBERTS. . . .
>
> . . . I evaluated AMEL MATTHEWS-WALKER on January 19, 2011. A true and accurate copy of my neurology evaluation is attached hereto as Exhibit 1. All of the statements and opinions expressed therein are true and correct based upon my review of the records, the history taken, and my opinions from the evaluation of the minor child.
>
> . . . In summary, Amel's neurologic examination is consistent with a complete brachial plexus palsy involving both upper and lower segments from C5 through T1. This combined Erb's and Klumpke's paralysis is severe and persistent despite two rehabilitative surgeries. In contrast, <u>there is no evidence of mental impairment as Amel is functioning cognitively at age level</u>.

> . . . The records confirm the mother's recollections regarding Amel's birth and are consistent with the acquisition of a brachial plexus injury n [sic] the course of delivery. Despite the severity of Amel's right upper extremity neurological findings, there is no evidence of involvement of the brain or spinal cord. The injury to the brachial plexus lies within the peripheral nervous system and there is no evidence of involvement of the brain or spinal cord. I therefore believe that despite the magnitude of her neurological findings, Amel is not compensable under the NICA Statute.
>
> . . . As such, it is my opinion that AMEL MATTHEWS-WALKER is not permanently and substantially mentally impaired due to oxygen deprivation or mechanical injury occurring during the course of labor, delivery, or the immediate post-delivery period in the hospital during the birth of AMEL MATTHEWS-WALKER. (emphasis added)

7. Dr. Duchowny's incorporated medical report also provides the following assessment, among other views, " . . . Her cognitive development is excellent and she has talked since age 10 months. Amel is described as very sociable. . . . there is no evidence of mental impairment as Amel is functioning cognitively at age level."

8. Dr. Willis' affidavit reads, in pertinent part, as follows:

> . . . I am a [sic] Obstetrician, specializing in maternal-fetal medicine, . . .

> . . . The opinions delivered in this Affidavit are all within a reasonable degree of medical probability.
>
> . . . The purpose of my review of the medical records of AMEL MATTHEWS-WALKER and MARLENA ROBERTS was to determine whether an injury occurred in the course of labor, delivery or resuscitation in the immediate post-delivery period in the Hospital due to oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the Hospital.
>
> * * *
>
> . . . In summary, delivery was complicated by shoulder dystocia with resulting brachial plexus injury and Horner syndrome. The spine itself was not injured. Although there was avulsion of the seventh cervical nerve root, the MRI on DOL 3 stated that the "cervical cord is intact". There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord.
>
> . . . As such, it is my opinion that there was no oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery in the Hospital that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord. . . . (emphasis added)

9. Neither Petitioner nor Intervenor filed a timely response to the Motion for Summary Final Order[2/] alleging any facts in opposition to NICA's motion for summary final order of dismissal, but Petitioner Marlena Roberts, did file a letter on March 11, 2011, alleging medical negligence in Amel's birth and

expressing distress with NICA for asserting noncompensability. Accordingly, a telephonic conference call was convened on April 7, 2011, with all parties present, wherein it was agreed that additional time would be granted for Ms. Roberts to consult lawyers and medical personnel and to file a response in opposition to the motion, if she chose to do so. Following that April 7, 2011, hearing, an Order was entered the same day, which provided, in pertinent part:

> This cause came on for consideration by telephonic conference call on April 7, 2011, with Petitioner Marlena Roberts and all counsel present.
>
> Upon consideration of all parties' representations, concerns, and oral agreements, it is
>
> ORDERED that Petitioner and Intervenor are granted to and until May 9, 2011, in which to file a response in opposition to Respondent NICA's pending Motion for Summary Final Order and to show cause why the motion should not be granted, finding no compensability, so as to dispose the case in this forum against Petitioner.

10. No timely response to the April 7, 2011 Order, nor to the Motion for Summary Final Order has been filed. Accordingly, nothing has been provided to refute the expert medical opinions tendered by affidavits filed concurrent with the motion.

11. Given the record, there is no dispute of material fact. Specifically, there is no dispute that although Amel Matthews-Walker suffered an injury at birth, that injury was not

caused by oxygen deprivation or mechanical injury and did not affect her brain or spinal cord, and further, that although Amel has physical disabilities, she is not permanently and substantially mentally impaired, because she is functioning at age level.[3/]

CONCLUSIONS OF LAW

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

13. 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.

14. 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.

15. 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.

16. 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.

17. 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 supplied).

18. Here, indisputably, Amel Matthews-Walker has suffered an injury at birth, but that injury was not caused by oxygen deprivation or mechanical injury, and it did not affect her brain or spinal cord. Further, although Amel has physical disabilities, she is not permanently and substantially mentally

impaired. Given the provisions of section 766.302(2), Amel does not qualify for coverage under the Plan. See also Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hear., 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 Motion for Summary Final Order is granted.

2. The Petition for Benefits Pursuant to Florida Statute Section 766.301, et seq., filed by Marlena Roberts, on behalf of and as parent and natural guardian of Amel Matthews-Walker, a minor, be, and the same, is dismissed with prejudice.

DONE AND ORDERED this 18th day of May, 2011, 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 18th day of May, 2011.

ENDNOTES

1/ 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.").

2/ Rule 28-106.103 provides:

> In computing any period of time allowed by this chapter, by order of a presiding officer, or by any applicable statute, the day of the act from which the period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period shall run

until the end of the next day which is not a Saturday, Sunday, or legal holiday. When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in these rules, legal holiday means those days designated in Section 110.117, F.S. Except as provided in Rule 28-106.217, F.A.C., five days shall be added to the time limits when service has been made by regular U.S. mail. One business day shall be added when service is made by overnight courier. No additional time shall be added if service is made by hand, facsimile transmission, or electronic mail or when the period of time begins pursuant to a type of notice described in Rule 28-106.111, F.A.C.

Rule 28-106.204 provides:

(1) All requests for relief shall be by motion. All motions shall be in writing unless made on the record during a hearing, and shall fully state the action requested and the grounds relied upon. The original written motion shall be filed with the presiding officer. When time allows, the other parties may, within 7 days of service of a written motion, file a response in opposition. Written motions will normally be disposed of after the response period has expired, based on the motion, together with any supporting or opposing memoranda. The presiding officer shall conduct such proceedings and enter such orders as are deemed necessary to dispose of issues raised by the motion.

(2) Unless otherwise provided by law, motions to dismiss the petition or request for hearing shall be filed no later than 20 days after service.

(3) Motions, other than a motion to dismiss, shall include a statement that the movant has conferred with all other parties

of record and shall state as to each party whether the party has any objection to the motion.

(4) In cases in which the Division of Administrative Hearings has final order authority, any party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits. A party moving for summary final order later than twelve days before the final hearing waives any objection to the continuance of the final hearing.

(5) In cases in which the Division of Administrative Hearings has recommended order authority, a party may file a motion to relinquish jurisdiction whenever there is no genuine issue as to material fact.

(6) Motions for extension of time shall be filed prior to the expiration of the deadline sought to be extended and shall state good cause for the request.

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)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
  Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(Certified Mail No. 7010 1670 0000 3097 1628)

Marlena Roberts
1591 West 14th Street
Riviera Beach, Florida 33404
(Certified Mail No. 7010 1670 0000 3097 1635)

Steven Lubell, Esquire
Lubell & Rosen
Museum Plaza, Suite 602
200 South Andrews Avenue
Fort Lauderdale, Florida 33301
(Certified Mail No. 7010 1670 0000 3097 1642)

David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest Sixth Court
Plantation, Florida 33324
(Certified Mail No. 7010 1670 0000 3097 1659)

St. Mary's Medical Center
901 45th Street
West Palm Beach, Florida 33407
(Certified Mail No. 7010 1670 0000 3097 1666)

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 1670 0000 3097 1673)

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 1670 0000 3097 1680)

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.