STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

YULEXI EXPOSITO, on behalf of and as parent and natural guardian of STEPHANIE GONZALEZ, a minor,	)	
Petitioner,	)	
vs.	)	Case No. 10-10320N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
LESLIE CAROLINE MCLEOD, M.D., NATHALIE DAUPHIN MCKENZIE, M.D., MARION FREDERIC COLAS-LACOMBE, M.D., JERRY M. GILLES, M.D., PUBLIC HEALTH TRUST OF MIAMI-DADE COUNTY, d/b/a JACKSON MEMORIAL HOSPITAL; UNIVERSITY OF MIAMI, d/b/a UNIVERSITY OF MIAMI SCHOOL OF MEDICINE; AND HUGO GONZALEZ-QUINTERO, M.D.,	)	
Intervenors.	)	

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Petitioner's Renewed Motion for Summary Final Order, served April 18, 2011.

STATEMENT OF THE CASE

1. On November 22, 2010, a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. (Petition/Claim), styled "Yulexi Exposito, on behalf of and as Parent and Natural Guardian of Stephanie Gonzalez, a Minor v. Florida Birth-Related Neurological Injury Compensation Association," 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 Stephanie Gonzalez's birth on July 11, 2005.

2. The petition alleged that Stephanie Gonzalez was born at Jackson Memorial Hospital[1/] and that Dr. Victor Gonzalez-Quintero was the physician delivering obstetrical services at Stephanie's birth. The petition made no allegations with regard to notice, or lack thereof, and did not recite any information with regard to a circuit court civil action concerning the same or other persons or entities associated with Stephanie's birth.[2/]

3. Pertinent to the pending motion, however, is the allegation of the petition that:

> 7. I was not aware of the injury until years later. Stephanie was part of a twin gestation and weighed only 665 grams at the time of her birth so she does not meet the NICA requirement of 2,000 grams for a twin gestation.

4. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on November 29, 2010; served Jackson Memorial Hospital on December 29, 2010; and served Victor Gonzalez-Quintero, M.D., on January 20, 2011. DOAH's case file contains signed certified mail receipts from each of these persons or entities.

5. Upon appropriate motion and order, the following persons and entities have been granted Intervenor status: Leslie Caroline McLeod, M.D.; Nathalie Dauphin McKenzie, M.D.; Marion Frederic Colas-Lacombe, M.D.; Jerry M. Gilles, M.D.; Public Health Trust of Miami-Dade County, d/b/a Jackson Memorial Hospital; University of Miami, d/b/a University of Miami School of Medicine; and Hugo Gonzalez-Quintero, M.D.

6. On January 26, 2011, Petitioner served a Motion for Summary Final Order, asserting that "Stephanie was part of a twin gestation and weighed only 665 grams at the time of her birth so she does not meet the NICA requirement of 2,000 grams for a twin gestation." In support thereof, Petitioner offered only an unattested medical record. On January 28, 2011, Respondent NICA served a Notice of Non-Compensability and Request for Evidentiary Hearing on Compensability (the Response required by section 766.305(4)). Therein, NICA peripherally suggested that if appropriate medical records were obtained,

NICA might support a finding of noncompensability on the basis of insufficient birth weight.

7. On January 28, 2011, NICA served its own Motion for Summary Final Order based upon two theories: first, insufficient birth weight; and second, upon the five years' statute of limitations set forth in section 766.313. NICA stated further that, ". . . the Respondent has no objection to the Petitioner's Motion for Summary Final Order, subject to verification that the birth weight of the child was, in fact, 665 grams, or more specifically, that the birth weight of the child was less than 2000 grams." On February 4, 2011, Petitioner served a response to NICA's Motion for Summary Final Order ("Petitioner's Objection to Respondent's Motion for Summary Final Order Insofar as the Statute of Limitations is Concerned"). This response opposed NICA's Motion for Summary Final Order as stated and sought to have the claim dismissed as not compensable due to low birth weight.

8. On February 3, 2011, Intervenor University of Miami, d/b/a University of Miami School of Medicine, served and filed its "Motion for Summary Final Order and Response to Petitioner's and Florida Birth-Related Neurological Injury Compensation Association's Motions for Summary Final Order." The University of Miami proposed a finding/ruling that the claim is barred by the five years' statute of limitations, and requested that any

ruling be limited to that issue; objected to any determination of compensability or notice; and further stated that the movant was not raising any defense as to compensability or notice in this proceeding. An identical "Motion for Summary Final Order and Response to Petitioner's and Florida Birth-Related Neurological Injury Compensation Association's Motion [sic] for Summary Final Order" was served and filed on February 8, 2011, by Intervenors Leslie Caroline McLeod, M.D.; Nathalie Dauphin McKenzie, M.D.; Marion Frederic Colas-Lacombe, M.D.; Jerry M. Gilles, M.D.; Hugo Gonzalez-Quintero, M.D.; and Public Health Trust of Miami-Dade County, d/b/a Jackson Memorial Hospital. No response to either the February 3, or February 8, motion was filed.

9. By a March 3, 2011, Order on all Pending Motions, the following pertinent rulings were made:

> 1. Notice or lack thereof has not been raised by any party and therefore need not be determined by the undersigned. See § 766.309(1)(d), Fla. Stat.
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> 2. Stephanie's birth having occurred on July 11, 2005, and the claim having not been filed with DOAH until November 22, 2010, Petitioner's claim as against NICA is barred, and Petitioner may not pursue or recover an award of benefits from NICA. This ruling will be incorporated in the Final Order herein when it is entered.
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> 3. Notwithstanding that Petitioner may not pursue or recover an award of benefits from NICA, the claim may be compensable. Since

> Plan immunity is a viable defense to a civil suit, and the Administrative Law Judge has exclusive jurisdiction to resolve whether Stephanie's claim is compensable, it is still necessary to resolve whether the claim is compensable. §§ 766.301(1)(d), 766.303(2), and 766.304; O'Leary v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 757 So. 2d 624 (Fla. 5th DCA 2000); Green v. Fla. Birth-Related Neurological Injury Comp. Ass'n, DOAH Case No. 02-2213 (Fla. DOAH Apr. 24, 2003), per curiam aff'd at Green v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 871 So. 2d 223 (Fla. 2d DCA 2004). A ruling on compensability will be incorporated in the final order herein, when it is entered.
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> 4. Petitioner's Motion for Summary Final Order is based on an unattested medical record. Absent testimony, a deposition, or an affidavit upon personal knowledge of a records custodian or other person with appropriate knowledge, such a motion is unsupported. The Motion is denied without prejudice.
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> 5. NICA's Motion for Summary Final Order, and Intervenor's [sic] Motions/Responses are denied in part and granted in part, as set forth in paragraphs 1-4.

10. Subsequent motions and amended motions for reconsideration were denied by an Order entered March 22, 2011, which Order also struck an Amended Motion for Summary Final Order upon procedural grounds.

11. Following an unsuccessful attempt by Intervenors to invoke the jurisdiction of the Third District Court of Appeal by Petition for Writ of Mandamus or Alternative Petition for Writ of Prohibition, Petitioner filed and served on April 18, 2011, a

Renewed Motion for Summary Final Order,[3/] supported by the deposition of the records custodian of the birth hospital, authenticating a birth record for twin ("baby B, Exposito") of 665 grams birth weight on July 11, 2005.[4/]

12. On April 21, 2011, Intervenor University of Miami, d/b/a University of Miami School of Medicine, filed its Response in Opposition to Petitioner's Renewed Motion for Summary Final Order. This response opposes the granting of the Renewed Motion for Summary Final Order, alleging lack of jurisdiction of the Administrative Law Judge (ALJ) to make any determinations as to compensability of a NICA claim barred by section 766.313, the statute of limitations for NICA claims. This response to the motion does not challenge Petitioner's factual allegation that the injured child, Stephanie, never met the statutory threshold birth weight for NICA compensability. It merely opposes any ruling on the issue of compensability.

13. On May 3, 2011, an Order to Show Cause was entered, providing, in pertinent part:

> On April 18, 2011, Petitioner served a Renewed Motion for Summary Final Order. To date, neither Respondent nor some Intervenors 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
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> ORDERED that by May 16, 2011, Respondent and Intervenors not yet

> responding may show good cause in writing, if any they can, why the relief requested by Petitioner should not be granted.

14. On May 16, 2011, Intervenors Caroline McLeod, M.D.; Nathalie Dauphin McKenzie, M.D.; Marion Frederic Colas-Lacombe, M.D., Jerry M. Gilles, M.D.; Hugo Gonzalez-Quintero, M.D.; and Public Health Trust of Miami-Dade County, d/b/a Jackson Memorial Hospital filed their Response to Order to Show Cause and Response in Opposition to Petitioner's Renewed Motion for Summary Final Order. Like Intervenor University of Miami's response, this response opposed the granting of the Renewed Motion for Summary Final Order, alleging lack of jurisdiction of the ALJ to make any determination as to compensability of a NICA claim barred by section 766.313, but does not challenge Petitioner's factual allegation that the injured child, Stephanie, never met the threshold birth weight for NICA compensability. It simply opposes any ruling on compensability.

15. Respondent NICA has filed no response to Petitioner's Renewed Motion for Summary Final Order.

16. Despite Intervenors' opposition, upon the issue of the ALJ's jurisdiction to enter a summary final order regarding birth weight and compensability where the statute of limitations for the filing of a NICA claim has run, Respondent and Intervenors have posed no challenge concerning the sufficiency of Petitioner's Renewed Motion for Summary Final Order's factual

allegations or supporting materials; the accuracy of the supporting birth weight record and records custodian's deposition; or the birth weight record's relevance to Stephanie, the child in whose name the instant claim was filed. Therefore, any potential issues of authenticity or relevance of the birth record filed, are deemed waived, and it is determined that there is no, and can be no, legitimate dispute that the child, Stephanie, did, in fact, weigh, at birth, less than the 2,000 grams specified by section 766.302(2), for a multiple birth.

17. Given the record, there is no genuine issue as to any material fact. Indeed, there is no dispute of material fact. Specifically, there is no dispute that Stephanie Gonzalez, the child named in the petition, never met the threshold statutory weight requirement for either a single or multiple gestation in order to qualify for compensability, and thus, recovery from NICA. Accordingly, Petitioner's Renewed Motion for Summary Final Order is, for reasons appearing more fully in the Conclusions of Law, well-founded.[5/]

CONCLUSIONS OF LAW

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

19. However, as a threshold jurisdictional issue, this cause, as against NICA, is barred by section 766.313. Section

766.313, provides that: "[a]ny claim for compensation under ss. 766.301-766.316 that is filed more than 5 years after the birth of an infant alleged to have a birth-related neurological injury shall be barred."

20. It is an undisputed fact that Stephanie was born July 11, 2005, and that the claim/petition was filed at DOAH on November 22, 2010. The claim is barred, and Respondent NICA is entitled to a final order which resolves that issue, notwithstanding that the claim may be compensable, Petitioner may not pursue or recover an award of benefits under the Plan.

21. However, since Plan immunity may be a viable defense to a civil suit and the ALJ has exclusive jurisdiction to resolve whether a claim is compensable, it is necessary in the posture of this case to resolve whether the claim is compensable. See §§ 766.301(1)(d), 766.303(2), and 766.304, Fla. Stat., and O'Leary v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 757 So. 2d 624 (Fla. 5th DCA 2000).

22. In Green v. Fla. Birth-Related Neurological Injury Comp. Ass'n and Henricks et al., Case No. 02-2213N (Fla. DOAH Apr. 24, 2003), per curiam aff'd, Green v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 871 So. 2d 223 (Fla. 2d DCA 2004), the ALJ ruled that he was obligated to determine compensability even though the statute of limitations barred Petitioner's NICA claim so that Petitioner could not pursue or

recover an award of benefits from NICA. To the same effect, see Bautista v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 10-3208N (Fla. DOAH Dec. 17, 2010); Romero v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 05-1901N (Fla. DOAH Aug. 31, 2005); and Foott v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 02-4344N (Fla. DOAH Aug. 11, 2003).

23. The ruling in Green was based, in part, upon the participation in that NICA case of intervenors seeking to determine the "notice" issue. No party herein has raised the issue of notice, and accordingly, any issue of notice is deemed waived. The undersigned is not required to determine the notice issue unless it is raised by one or more parties before DOAH in the same proceeding which addresses compensability. § 766.309(1)(d), Fla. Stat.[6/]

24. Moreover, where, as here, it is concluded, as a matter of law, that the child's injury is not compensable under the Plan because it is not a "birth-related neurological injury," the notice issue is rendered moot. See Orlando Reg'l Healthcare Sys. v. Gwyn, 53 So. 3d 385 (Fla. 5th DCA 2011), holding " . . . NICA cannot be found to afford the [parents] their exclusive remedy for the simple reason that, as a matter of law, the [parents] do not have a compensable claim under NICA."

25. 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.

26. 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 DOAH. §§ 766.302(3), 766.303(2), 766.305(1), and 766.313, 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.

27. 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 ALJ 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 ALJ in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

28. In discharging this responsibility, the ALJ 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 ALJ 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.

29. Pertinent to this case, "birth-related neurological injury" is defined by section 766.302(2), to mean:

> injury to the brain or spinal cord <u>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</u> 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).

30. Here, indisputably, Stephanie Gonzalez's birth weight was 665 grams. Consequently, given the provisions of section 766.302(2), she does not qualify for coverage under the Plan. 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).

31. Where, as here, the ALJ 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.

32. The claim herein has been determined to be non-compensable. Therefore, and for the reasons aforesaid, it is not necessary for this Summary Final Order to address any issue of notice.

CONCLUSION

Based on the foregoing Statement of the Case and Conclusions of Law, it is

ORDERED that:

1. This cause, as against Respondent Florida Birth-Related Neurological Injury Compensation Association is barred by section 766.313.

2. Petitioner's Renewed Motion for Summary Final Order is granted, the claim is determined to be noncompensable, and the Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq., filed herein by Yulee Exposito on behalf of and as parent and natural guardian of Stephanie Gonzalez, a minor, be and the same is dismissed with prejudice.

3. The final hearing now scheduled for June 7, 2011, is cancelled.

DONE AND ORDERED this 20th day of May, 2011, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of May, 2011.

ENDNOTES

1/ This is the "hospital" as contemplated by sections 766.302(2) and (6), Florida Statutes.

2/ That there is such a pending circuit court case was divulged later in the pleadings and proceedings.

3/ 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.

4/ Petitioner also provided an affidavit of a medical physician which refers to a medical record and makes conclusory assessments with regard to NICA coverage, lack of notice, etc. This affidavit has not been considered because notice or lack thereof has not been raised by any party and because the birth record, authenticated by the records custodian, speaks for itself.

5/ 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).

6/ If raised by the claimant or other party, the undersigned may determine notice or lack thereof. Herein, NICA has remained neutral on the notice issue, but all other parties have agreed the notice issue has not been raised by any party and should not be addressed by the ALJ.

While the ALJ is required [if the issue is raised by any party] to resolve whether the notice requirements of section 766.316, have been satisfied, he or she does not have jurisdiction to resolve whether any person or entity is entitled to invoke the immunity from tort liability provided-for in subsection 766.303(2). Depart v. Macri, 902 So. 2d 271 (Fla. 1st DCA 2005); Gugelmin v. Div. of Admin. Hearings, 815 So. 2d 764 (Fla. 4th DCA 2002). All issues of immunity from civil suit are for the circuit court to decide.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Summary Final Order of Dismissal 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.