STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KIMBERLY MCMONIGLE, on behalf of and as parent and natural guardian of DEVLYN DIERING, a minor,	)	
Petitioner,	)	
vs.	)	Case No. 11-5270N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
ORLANDO HEALTH, INC., d/b/a WINNIE PALMER HOSPITAL FOR WOMEN & BABIES,	)	
Intervenor.	)	

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's Motion for Summary Final Order, filed November 28, 2011.

STATEMENT OF THE CASE

1. On October 11, 2011, Kimberly McMonigle, on behalf of and as parent and natural guardian of Devlyn Diering, a minor, born November 8, 2006, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation

Plan (Plan). The petition named only Oliver K. Bayouth, M.D., Norma Waite, M.D., and Winnie Palmer Hospital.

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on October 14, 2011, and served Oliver K. Bayouth, M.D., and Norma Lillia Polyn Waite, M.D., respectively, on October 17, 2011. No signed certified mail receipt has been received by DOAH from Winnie Palmer Hospital, but on November 14, 2011, Orlando Health, Inc., d/b/a Winnie Hospital for Women & Babies filed a Petition for Leave to Intervene, which was granted by an Order entered December 20, 2011. No other persons or entities have moved to intervene.

3. On November 28, 2011, NICA had filed a Motion for Summary Final Order, the predicate for which was its assertion that, indisputably, the only physicians (Oliver K. Bayouth, M.D., and Norma Waite, M.D.) named in the petition as having provided obstetrical services at the birth of Devlyn Diering were not "participating physicians," as defined by law, at the time of the birth. The motion further stated that NICA's search of the medical records submitted with the Petition/Claim had revealed the names of two additional physicians associated with Devlyn's birth, and that these physicians, Douglas Hardy, M.D., and James R. Lawrence, M.D., also were not "participating

physicians." Attached to the motion was an affidavit of NICA's Custodian of Records, Tim Daughtry, attesting to the fact that

> The "NICA CARES" physician payment history/report attached hereto for Dr. Norma Waite and Dr. Oliver Bayouth indicate that in the year 2006, the year in which Drs. Waite and Bayouth participated in the delivery of Devlin [sic] Diering, as indicated in the Petitioner's Petition for Benefits, Drs. Waite and Bayouth did not pay the Five Thousand Dollar ($5,000) assessment required for participation in the Florida Birth-Related Neurological Injury Compensation Plan. Additionally provided records indicate that Dr. Douglas Hardy and Dr. James S. Lawrence participated in the delivery of Devlin [sic] Diering and also did not pay the Five Thousand Dollar ($5,000) assessment required for participation in the Florida Birth-Related Neurological Injury Compensation Plan
>
> * * *
>
> NICA has no record with respect to Drs. Waite, Bayouth, Hardy, and Lawrence in relation to an exempt status for the year 2006. To the contrary, the attached "NICA CARES physician payment history/report," shows that in 2006, Drs. Waite, Bayouth, Hardy, and Lawrence paid the Two Hundred and Fifty Dollar ($250) assessment required by Section 766.314(4)(b)1., Florida Statutes, for non-participating non-exempt licensed physicians.

4. The attached records are in accord with the affidavit's representations.

5. Petitioner did not timely respond to NICA's Motion for Summary Final Order. Consequently, an Order to Show Cause was entered on December 16, 2011, which provided:

> On November 28, 2011, Respondent served a Motion for Summary Final Order. To date, Petitioner has not responded to the motion. Fla. Admin. Code R. 28-106.103 and 28-106.204(4). Nevertheless, and notwithstanding that she has been accorded the opportunity to do so, it is
>
> ORDERED that by December 30, 2011, Petitioner shall file with the Division good cause in writing, if any she can, why the relief requested by Respondent should not be granted, thereby disposing the case against Petitioner.

6. As previously noted in paragraph 2, Orlando Health, Inc., d/b/a Winnie Palmer Hospital for Women & Babies was permitted to intervene by a December 20, 2011, Order. Therefore, in an abundance of caution, a Corrected Order to Show Cause was entered on December 20, 2011, which provided:

> Upon consideration of Orlando Health Inc., d/b/a Winnie Palmer Hospital for Women & Babies' Petition for Leave to Intervene and the Order of today's date granting same, it is
>
> ORDERED that:
>
> By January 5, 2012, Petitioner and Intervenor shall file with the Division good cause, in writing, if any they can, why the Respondent's Motion for Summary Final Order served November 28, 2011, shall not be granted, thereby disposing the case against Petitioner.

7. No timely response in opposition to Respondent's November 28, 2011, Motion for Summary Final Order or the December 20, 2011, Order has been filed. More specifically, no

party has offered affidavits or any evidence to cast doubt on NICA's showing that the physicians named in the Petition and those otherwise named in the medical records submitted with the Petition were not participating physicians in the Plan at the time of Devlyn's birth. Also, neither Petitioner nor Intervenor has requested additional discovery time, and Petitioner has not moved for leave to amend the petition to name any additional physician as rendering obstetrical services in connection with Devlyn's birth.

8. Therefore, it is concluded that the Motion for Summary Final Order, with its supporting documentation, is undisputed, and that NICA has affirmatively demonstrated that there were no participating physicians at Devlyn's birth.

9. Given the record, there is no dispute that those who provided obstetrical services connected with Devlyn's birth were not "participating physician[s]" as the term is defined by section 766.302(7). Consequently, NICA's Motion for Summary Final Order is, for reasons appearing more fully in the Conclusions of Law, well-founded.[1/]

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), 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.

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(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.

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 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.

15. 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 . . . .

16. Here, indisputably, all those shown to have provided obstetrical services during Devlyn'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, Devlyn does not qualify for coverage under the Plan.

17. 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 Motion for Summary Final Order is granted, and the petition for compensation filed by Kimberly McMonigle, on behalf of and as parent and natural guardian of Devlyn Diering, a minor, is dismissed with prejudice.

DONE AND ORDERED this 9th day of January, 2012, 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 9th day of January, 2012.

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).

COPIES FURNISHED:
(Via Certified Mail)

Kimberly McMonigle
950 Irma Way
St. Augustine, Florida 32086
(Certified Mail No. 7010 3090 0000 0717 2380)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(Certified Mail No. 7010 3090 0000 0717 2397)

Bradley Paul Blystone, Esquire
Marshall, Dennehey, Warner,
Coleman and Goggin
315 East Robinson Street, Suite 550
Orlando, Florida 32801
(Certified Mail No. 7010 3090 0000 0717 2403)

Oliver K. Bayouth, M.D.
94 Underwood Street
Orlando, Florida 32806-1110
(Certified Mail No. 7010 3090 0000 0717 2410)

Norma Lillia Polyn Waite, M.D.
6000 Turkey Lake Road, Suite 112
Orlando, Florida 32819
(Certified Mail No. 7010 3090 0000 0717 2427)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7010 3090 0000 0717 2434)

Elizabeth Dudek, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(Certified Mail No. 7010 3090 0000 0717 2441)

NOTICE OF RIGHT TO JUDICIAL REVIEW

Review of a final order of an administrative law judge shall be by appeal to the District Court of Appeal pursuant to section 766.311(1), Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal. See § 766.311(1), Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992).