

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BLANE EARL PEARSON and JANET)
PEARSON, as parents and natural)
guardians of BLANE EARL)
PEARSON, JR., a minor,)
)
Petitioners,)
)
vs.) Case No. 00-5133N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a final hearing in the above-styled case on December 6, 2001, in Gainesville, Florida.

APPEARANCES

For Petitioners: Samuel Hankin, Esquire
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For Respondent: B. Forest Hamilton, Esquire
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STATEMENT OF THE ISSUE

At issue in this proceeding is whether Blane Earl Pearson, Jr., a minor, suffered an injury for which compensation should be

awarded under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On December 22, 2000, Blane Earl Pearson and Janet Pearson, as parents and natural guardians of Blane Earl Pearson, Jr. (Blane), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on December 28, 2000. NICA reviewed the claim and on March 15, 2001, gave notice that it had "determined that such claim is not a 'birth-related neurological injury' within the meaning of Section 766.302(2), Florida Statutes," and requested that "an order [be entered] setting a hearing in this cause on the issue of compensability." Such a hearing was held on December 6, 2001.

At hearing, the parties stipulated to the factual matters set forth in paragraphs 1, 2 and 4 of the Findings of Fact. Petitioners presented the testimony of Janet Pearson and Janet Luna, and Petitioners' Exhibit 1 (the medical records filed with DOAH on December 22, 2000), and Petitioners' Exhibit 2 (fetal heart monitor strips filed with DOAH September 10, 2001), Petitioners' Exhibit 3 (the deposition of Lynn Larson), Petitioners' Exhibit 4 (remuneration records for Doctors

Michael Duchowny and Charles Kalstone, filed with DOAH December 6, 2001) and Petitioners' Exhibit 5 (the deposition of Laura Law, filed with DOAH January 23, 2002)¹, were received into evidence. Respondent's Exhibit 1 (the deposition of Michael Duchowny, M.D.) and Respondent's Exhibit 2 (the deposition of Charles Kalstone, M.D.)² were received into evidence. No other witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed January 2, 2002, and the parties were accorded until February 15, 2002, to file proposed final orders. Consequently, the requirement that a final order be rendered within 30 days after the transcript has been filed was waived. Rule 28-106.216(2), Florida Administrative Code. The parties elected to file such proposals, and they have been duly considered.

FINDINGS OF FACT

Fundamental findings

1. Petitioners, Blane Earl Pearson and Janet Pearson, are the parents and natural guardians of Blane Earl Pearson, Jr., a minor. Blane was born a live infant on October 5, 1998, at Shands at AHG (Alachua General Hospital), a hospital located in Gainesville, Florida, and his birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Blane's birth was Bradley Williams, M.D., who, at all times material

hereto, was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.

Coverage under the Plan

3. Pertinent to this case, coverage is afforded under the Plan for infants who suffer a "birth-related neurological injury," defined as an "injury to the brain . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired." Sections 766.302(2) and 766.301(1)(a), Florida Statutes.

4. Here, the parties have stipulated, and the proof otherwise demonstrates, that Blane is permanently and substantially mentally and physically impaired. What remains to resolve is whether Blane's impairment is related to an injury to the brain caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the hospital.

Blane's birth

5. At or about 6:30 a.m., October 5, 1998, Mrs. Pearson (with an estimated date of delivery of October 10, 1998, and the fetus at 39+ weeks gestation) presented to Alachua General Hospital for induction of labor. At the time, Mrs. Pearson's

membranes were noted as intact, and no contractions or vaginal bleeding were observed. External fetal monitoring, which began at 6:41 a.m., revealed a reassuring fetal heart rate.

6. Pitocin drip was started at 7:59 a.m., and by 9:19 a.m., Mrs. Pearson was experiencing irregular contractions. In the interim, external fetal monitoring revealed a reassuring fetal heart rate (in the 130 beat per minute range), with good reactivity and variability.³

7. Mrs. Pearson's labor progressed steadily, and at or about 11:50 a.m., vaginal examination revealed the cervix at 3 centimeters dilation, effacement at 80 percent, and the fetus at station -1. At that time, the membranes were artificially ruptured, with clear fluid noted, and Dr. Williams authorized an epidural anesthesia.⁴

8. Mrs. Pearson's labor continued to progress steadily, and at 1:04 p.m., with the cervix at 10 centimeters dilation, effacement at 100 percent, and the fetus at station +1, Dr. Williams was called and advised that Mrs. Pearson was "complete and wanting to push." Dr. Williams announced he was "on his way," arrived in the labor and delivery room at 1:18 p.m., and at 1:20 p.m., Blane was delivered spontaneously, without incident.

9. On delivery, Blane was bulb-suctioned, accorded blowby oxygen, dried, and moved to a radiant warmer. Initial newborn

assessment noted no apparent abnormalities. Apgar scores were recorded as 8 at one minute and 9 at five minutes.

10. The Apgar scores assigned to Blane are a numeric expression of the condition of a newborn infant, and reflect the sum points gained on assessment of heart rate, respiratory effort, muscle tone, reflex irritability, and color, with each category being assigned a score ranging from the lowest score of 0 through a maximum score of 2. As noted, at one minute, Blane's Apgar score totaled 8, with heart rate, respiratory effort, muscle tone, and reflex irritability being graded at 2 each, and color being graded at 0. At five minutes, Blane's Apgar score totaled 9, with heart rate, respiratory effort, muscle tone, and reflex irritability again being graded at 2 each, and color now being graded at 1. Such score is considered good, and inconsistent with recent hypoxic insult or trauma.

11. Following the initial newborn assessment, Blane was examined by Karen Dees, an advanced registered nurse practitioner (ARNP). On examination, Ms. Dees noted Blane as "active," and her physical examination as "unremarkable" or stated otherwise, within normal limits (WNL). Ms. Dees completed her examination at or about 1:45 p.m., and executed the standard orders for Blane's admission to the newborn nursery.

12. Blane transitioned for a brief period with his mother in the labor and delivery room and was then transferred to the

newborn nursery, where he apparently did well until 5:20 p.m., when he was noted with tachypnea (at a respiratory rate of 68), slight nasal flaring, and respirations that appeared irregular. Questionable circumoral cyanosis was noted, with quick return to pink.

13. Blane was transported to the neonatal intensive care unit (NICU) for evaluation by NICU staff. At the time, he again evidenced circumoral cyanosis, as well as an apneic episode, and was provided blowby oxygen and stimulation, with quick return to pink.

14. Blane was admitted to NICU (for further management and observation), and placed on monitors and under an oxyhood. Labs were ordered (BC, ABG, and CBC with differential), and antibiotics (ampicillen and gentamicin) were prescribed for suspected sepsis.

15. During the late afternoon and early evening, Blane was noted with several more apneic episodes, followed by tachypnea. And, at 8:00 p.m., Blane was noted to exhibit extensioned extremities, hypotonia, weak grasp, and deep to shallow irregular non-labored respirations.

16. At 9:00 p.m., Blane experienced a long apneic spell requiring stimulation. No obvious seizure activity was noted, but his eyes deviated to the left. The impression was apnea of unknown etiology, respiratory distress of unknown etiology, and

possibly intraventricular hemorrhage (IVH), seizures, and hypocalcemia. The Plan was to continue antibiotics and to perform a cranial ultrasound (to rule out a bleed).

17. The cranial ultrasound was done at 11:00 p.m., and read as follows:

HISTORY: Apneic spells and possible seizure activity. Evaluation for intracranial hemorrhage in a full term, newborn infant.

FINDINGS: The intracranial, supratentorial structures are well delineated and exhibit no apparent hemorrhage or mass effect. The ventricles are not enlarged. The posterior fossa structures are seen best sagittally and appear unremarkable.

IMPRESSION: NO HEMORRHAGE IDENTIFIED

During the ultrasound, Blane had another apneic episode, requiring ambu bagging.

18. At 1:00 a.m., October 6, 1998, Blane was given phenobarbital for suspected seizure activity, and at 1:30 a.m., he was intubated and placed on a ventilator because of multiple apneic episodes. Later that morning, at or about 9:00 a.m., Blane was transferred to Shands Hospital at the University of Florida (Shands Hospital), a level 3 neonatal intensive care facility, where he remained until October 17, 1998, when he was discharged to his mother's care.

19. While admitted to Shands Hospital, Blane underwent a number of studies to identify the cause of his difficulties

(seizures/apnea). Among those studies was an EEG, as well as CT of the head, done on October 6, 1998. The EEG was read, as follows:

IMPRESSION: This is an abnormal EEG because of the presence of sharp waves seen over the frontocentral and temporal regions. This is consistent with but not diagnostic of a seizure disorder. In addition, positive sharp waves are also noted over both temporal regions. This is consistent with a diagnosis of intraventricular hemorrhage or periventricular leukomalacia.

The CT of the head was reported, as follows:

The peripheral cortical areas in the ACA and MCA distributions bilaterally have markedly decreased attenuation and loss of cortical sulci. These changes are most pronounced on the right. There is no evidence for intracranial hemorrhage. There is no evidence of herniation at this time. The basal ganglia, thalamus, and cerebellum are intact.

IMPRESSION: The peripheral cortical territories in the ACA and MCA artery distributions bilaterally have decreased attenuation and loss of cortical sulci. These changes are most pronounced on the right and are compatible with an anoxic brain injury.

20. A head UMR study was obtained on October 7, 1998, and compared with the CT exam of October 6, 1998. The results were reported, as follows:

FINDINGS: Cerebral M.R. study was obtained 10/7/98 and compared to the 10/6/98 CT exam. There is diffuse cytogenic edema which is comparable on the two studies and is not evolved. The edema corresponds to lateral

cortical areas on the right side in the middle cerebral artery zone and involves the anterior suprasylvian, the anterior infrasyllvian and basal ganglion region on the left side. This also appears to be involving much of the middle cerebral artery zone on the left side. The remainder of the brain has less edema or no edema. The T1-weighted images are hyperintense in the basal ganglion region on the right side, indicative of coagulative necrosis in blood products, but not distinct hematoma. The findings are compatible with perfusion defects in the middle cerebral artery zones bilaterally. They do not appear to correspond to areas of cortex to suggest trauma since the patient is recently delivered. The remainder of the examination is unremarkable. There is no midline shift or downward herniation.

IMPRESSION: Evidence of diffuse cytogenic edema in the middle cerebral artery zones bilaterally as described above. Etiology is not apparent.

Regarding the results of the scan, the attending neonatologist noted "CT scan . . . grossly abnormal -- [consistent with] . . . diffuse hypoxic/ischemic insult, of recent timing, although it is not possible to pin down the exact timing."

21. Finally, at 7:57 a.m., October 15, 1998, Blane had a final CT of the head to reassess his cerebral edema. That exam was reported, as follows:

COMPARISON: Continuous axial CT images were obtained of the brain. Those dated 10/15/98 are directly compared to prior dated 10/6/98.

FINDINGS: Again seen is ischemic encephalopathy. Multiple vascular territories show areas of ischemia/infarct. The ischemic core now contains blood products

and radiographic appearance consistent with coagulative necrosis. No hematoma is seen. When compared to prior images there is decreased edema with now visualization of the lateral ventricles. Decreased mass effect when compared to prior images is seen.

IMPRESSION: Known ischemic encephalopathy with blood products now seen in the ischemic core. Decreased edema. Less mass effect.

The cause and timing of Blane's brain injury

22. To address the issue of whether Blane's brain injury was "caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital," as required for coverage under the Plan, Petitioners offered medical records relating to Mrs. Pearson's antepartum and intrapartum course, as well as Blane's birth and subsequent development. (Petitioners' Exhibits 1 and 2). Portions of those records have been addressed supra, and other salient portions of those records will be addressed infra. Additionally, Petitioner Janet Pearson testified on her own behalf, and offered the testimony of Janet Luna (Mrs. Pearson's mother) and the deposition testimony of Laura Law (Mrs. Pearson's sister). Respondent offered the deposition testimony of Dr. Michael Duchowny, a physician board-certified in pediatric neurology, and Dr. Charles Kalstone, a physician board-certified in obstetrics and gynecology.

23. As for the cause and timing of Blane's brain injury, it was Dr. Duchowny's opinion that the injury Blane suffered was, more likely than not, intrauterine acquired, and attributable to events which occurred prior to labor and delivery. In so concluding, Dr. Duchowny observed that contrary to what one would expect if Blane had suffered a recent neurological injury, his Apgar scores were good, his arterial blood gases were normal, and he required no assistance other than blowby oxygen. It was also Dr. Duchowny's opinion that Blane's brain injury was not caused by oxygen deprivation or mechanical injury. (Respondent's Exhibit 1, pages 25 and 26). As for the cause of Blane's injury, it was Dr. Duchowny's opinion that it was most likely associated with a stroke or series of strokes suffered late in term. (Respondent's Exhibit 1, pages 23 and 24). For similar reasons, Dr. Kalstone, like Dr. Duchowny, was of the opinion, based on his review of the medical records, including the fetal monitor strips, that Blane's presentation (during labor and delivery) was not consistent with a brain injury caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation. As for the cause, as well as the timing of Blane's injury, Dr. Kalstone deferred to others, such as a pediatric neurologist, who were more suited to address that issue. (Respondent's Exhibit 2, page 14).

24. Petitioners did not offer any expert testimony to support their view that Blane's brain injury was occasioned by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital. Petitioners did, however, offer the testimony of Petitioner Janet Pearson, Janet Luna and Laura Law on two matters: the actions of the nursing staff, which they perceived to be an effort to forestall Blane's delivery; and their opinions regarding Blane's condition on delivery. These matters, Petitioners believe, were not considered by Respondent's experts (because they were not contained within the medical records), and they contend such matters compel the conclusion that Blane's injury was occasioned by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period.

25. With regard to the first matter, Petitioner Janet Pearson and her witnesses testified that a nurse gloved-up, placed her hand inside Mrs. Pearson's vagina, and placed her hand on Blane's head to forestall delivery until the doctor could arrive. Petitioners suggest the nurse's act was improper and may have resulted in injury to Blane; however, they offered no competent proof to support such contention. Indeed, the only testimony on the matter was given by Doctors Kalstone and

Duchowny who observed that, under the circumstances of this case, the nurse's action was unlikely to have caused any injury to Blane. In this regard, Dr. Kalstone, responding to questions by counsel for Petitioners observed:

Q. Let me ask you, Doctor, hypothetically, assuming that at sometime during the labor that Blane was manipulated by one or more nurses in such a fashion as to push his head back into or farther up the birth canal, assuming that type of manipulation, is that the type of motor force that could cause an injury?

* * *

A. If the nurses were trying to hold the baby in, so to speak, then I wouldn't expect it would cause significant damage like this baby has. The kinds of damage that that thing, that that kind of action can cause, although I've never seen it, would be if there was like intracranial hemorrhage that caused the problem, that is actual trauma, and its hard to traumatize a baby's head by pushing it back up, but that would be one mechanism, that if you caused an intracranial hemorrhage, so to speak, and I didn't see any evidence of that in the record, in the CT scan. There was nothing suspicious in the baby's records that I could tell that that was a brain hemorrhage, but that would be one possible mechanism that one at least would look for.

And the other would be if that in some way can cause an oxygen deprivation, which I've never seen it . . . [do] that, again, I haven't seen this done that often, sometimes we intentionally push a baby's head up when the cord prolapses to keep them off the cord.

There's a decrease in the fetal heart sometimes by reflex when you push on the

baby's head, but it usually wouldn't cause brain damage or significant problem, and if it did, I would expect it, that the baby would come out in poor condition if this occurred right before the doctor arrived, but this baby was born with an APGAR of 8 and 9 at one and five minutes, which were normal, so I would think that if there was anything that the nurses did that caused the oxygen deprivation, that, first of all, I would think that would be unlikely that it would cause that, just what they could be able to do with their hands. And second of all, I would think it wouldn't have been the kind of thing that would have damaged the baby and then the baby came out without showing signs of being asphyxiated. [Respondent's Exhibit 2, pages 15-17].

Dr. Duchowny's opinions on the matter were strikingly similar to those of Dr. Kalstone. (Respondent's Exhibit 1, pages 20-22, 24, and 32).

26. With regard to the second matter, Mrs. Pearson and her witnesses testified as to their observations regarding Blane's condition on delivery, which they contend supports an Apgar score substantially lower than the score recorded at birth.⁵

Petitioners also suggest that the Apgar scores recorded by the nurse were most likely inflated because of a "certain self-interest motive . . . , if, and in the event, that they indeed were pushing him back in, holding him, . . . to wait for the doctor to get there." (Petitioners' proposed final order, paragraph 28). Consequently, since Respondent's experts relied on the Apgar scores of record in rendering their opinions,

Petitioners suggest their opinions should be rejected, and a conclusion drawn that Blane's injury was caused by oxygen deprivation that occurred during the course of labor, delivery, or resuscitation. Petitioners' contention is rejected.

27. In rejecting Petitioners' contention, it is initially observed that, where, as here, there was no showing that the nursing staff acted improperly, or that their actions could reasonably cause injury to the infant, there was no compelling reason for fabrication. Moreover, following delivery, Blane was also examined by Ms. Dees, who discerned no apparent abnormality, and Blane's course in the newborn nursery did not raise any concern until approximately 4 hours of age. Under such circumstances, it is doubtful that Blane's initial Apgar scores were inflated by the nursing staff at delivery. Additionally, it is observed that, while Petitioners offered testimony which, if credited, might warrant a reassessment of Blane's Apgar scores, they failed to offer any expert testimony or other competent proof as to what that score would be. Consequently, any reassessment of Blane's Apgar scores would be founded on speculation. Finally, it is observed that the opinions of Doctors Duchowny and Kalstone were not predicted simply on Blane's Apgar scores. Rather, their opinion that Blane's injury was not caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation, was

also premised on evidence which demonstrated that Blane's arterial blood gases were normal, he required no assistance at birth other than blowby oxygen, and the fetal monitor strips failed to reveal any event consistent with fetal compromise.

28. Accordingly, it must be concluded that the proof failed to demonstrate that Blane suffered a "birth-related neurological injury" since the proof failed to demonstrate that, more likely than not, his impairments were associated with a brain or spinal cord injury caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Section 766.301, et seq., Florida Statutes.

30. 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. Section 766.303(1), Florida Statutes.

31. The injured "infant, 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. Sections 766.302(3), 766.303(2), 766.305(1), and 766.313, Florida Statutes. 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." Section 766.305(3), Florida Statutes.

32. 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. Section 766.305(6), Florida Statutes. 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. Sections 766.304, 766.307, 766.309, and 766.31, Florida Statutes.

33. 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 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.

Section 766.309(1), Florida Statutes. 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." Section 766.31(1), Florida Statutes.

34. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes, to mean:

. . . injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery 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.

35. As the claimants, the burden rested on Petitioners to demonstrate entitlement to compensation. Section 766.309(1)(a), Florida Statutes. See also Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977), ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal").

36. Here, the proof failed to support the conclusion that, more likely than not, the brain injury Blane suffered was caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital. Consequently, the record developed in this case failed to demonstrate that Blane suffered a "birth-related neurological injury," within the meaning of Section 766.302(2), Florida Statutes, and the subject claim is not compensable under the Plan.⁶ Sections 766.302(2), 766.309(1), and 766.31(1), Florida Statutes. See also Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla. 1997), and Nagy v. Florida Birth-Related Neurological Injury Compensation Association, 27 Fla.L.Weekly D591a (Fla. 4th DCA March 13, 2002).

37. Where, as here, the administrative law judge determines that ". . . the injury alleged is not a birth-related neurological injury . . . he [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." Section 766.309(2), Florida Statutes. Such an order constitutes final agency action subject to appellate court review. Section 766.311(1), Florida Statutes.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the petition for compensation filed by Blane Earl Pearson and Janet Pearson, as parents and natural guardians of Blane Earl Pearson, Jr., a minor, be and the same is hereby denied with prejudice.

DONE AND ORDERED this 21st day of March, 2002, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of March, 2002.

ENDNOTES

1/ At hearing, the parties agreed that Petitioners be allowed to take the deposition of Laura Law post-hearing, and to submit the deposition as Petitioners' next numbered exhibit. As noted, that deposition has been received as Petitioners' Exhibit 5.

2/ At the time of the taking of Dr. Kalstone's deposition, he had not had the opportunity to review the fetal monitor strips. Thereafter, he reviewed the strips and on August 13, 2001, executed an affidavit, which was filed of record September 7, 2001, wherein he averred:

3. The opinions delivered in this affidavit are all within a reasonable degree of medical probability.

4. I gave deposition testimony in the case of Blane Earl Pearson on June 11th, 2001 at 6:00 p.m.

5. Subsequent to giving said testimony I have reviewed Fetal Heart Rate Monitor strips from the birth of Blane Earl Pearson.

6. The opinions I gave during my deposition have not changed after reviewing said strips. It is still my opinion that Blane Earl Pearson did not suffer a birth-related injury.

At hearing, the parties stipulated that, if called to testify, Dr. Kalstone would testify that he:

. . . reviewed the fetal monitor strips from the birth of Blane and that the opinions he gave during the course of his deposition have not changed after viewing the strips, and it is still his opinion that Blane did not suffer a birth-related neurological injury.
(Transcript, page 5)

3/ Between 7:58 a.m. and 9:19 a.m., there were five instances when tachycardia was noted (at 7:58 a.m., 8:03 a.m., 8:09 a.m., 8:44 a.m., and 8:50 a.m.); however, between each episode the fetal heart rate was reassuring, with good reactivity and variability. A last episode of tachycardia was noted at 10:12 a.m., which was also followed by a reassuring fetal heart rate, with good reactivity and variability. Dr. Charles Kalstone, a physician board-certified in obstetrics and gynecology, examined the medical records related to Blane's birth at Alachua General Hospital, including the fetal monitor strips, as well as the records related to Blane's subsequent admission to Shands Hospital at the University of Florida, and concluded that the episodes of tachycardia noted during labor were not significant or, stated otherwise, were not a reflection of fetal compromise. Dr. Michael Duchowny, a physician board-certified in pediatric neurology, was of a similar opinion. Notably, Petitioners offered no proof to the contrary.

4/ At 11:48 a.m., Mrs. Pearson was moved to a sitting position for the epidural, and at 12:04 p.m., the epidural was administered. In the interim, two incidents of bradycardia were detected (one at 11:58 a.m., and another at 12:01 p.m.), and following the epidural another episode was detected (at 12:06 p.m.). As for those episodes, Dr. Kalstone was of the opinion that they were not a reflection of fetal compromise because they were isolated, and the infant's heart rate recovered to normal and continued normal throughout the rest of labor. Again, Petitioners offered no proof to the contrary.

5/ Interestingly, although not dispositive on the issue of Blane's condition on delivery, on October 6, 1998, at 10:30 a.m., staff at Shands's Hospital noted the following comment from Blane's father: "Dad stated he didn't understand what the other hospital did to his baby because he came out fine." (Petitioners' Exhibit 1, Nursing Intervention/Outcome notes, Shands Hospital).

6/ Petitioners complain that there was no medical advisory panel review of this claim and, consequently, no panel report, with a recommendation as to whether the injury for which the claim was filed was a birth-related neurological injury, as required by Section 766.308, Florida Statutes. However, that provision of the Plan was repealed, effective July 1, 2001. Laws of Florida, Chapter 2001-277, Section 151.

COPIES FURNISHED:
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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 one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 120.68(2), 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.