

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SANDRA SHOAF and JAMES SHOAF,)	
as parents and natural)	
guardians of RAVEN SHOAF, a)	
minor,)	
)	
Petitioners,)	
)	
vs.)	Case No. 01-1657N
)	
FLORIDA BIRTH-RELATED)	
NEUROLOGICAL INJURY)	
COMPENSATION ASSOCIATION,)	
)	
Respondent,)	
)	
and)	
)	
MICHAEL GEILING, D.O.; JUAN)	
RAVELO, M.D.; and ADVENTIST)	
HEALTH SYSTEM/SUNBELT, INC.,)	
d/b/a FLORIDA HOSPITAL-)	
ALTAMONTE,)	
)	
Intervenors.)	
_____)	

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 20 and 21, 2001, by video teleconference, with sites in Tallahassee and Orlando, Florida.

APPEARANCES

For Petitioners: John Elliott Leighton, Esquire
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For Intervenor Adventist Health System/Sunbelt, Inc., d/b/a
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STATEMENT OF THE ISSUES

1. Whether the notice provisions of the Florida Birth-Related Neurological Injury Compensation Plan (Plan) were satisfied.

2. If so, whether Raven Shoaf, a minor, qualifies for coverage under the Plan.

PRELIMINARY STATEMENT

On April 30, 2001, Petitioners, Sandra Shoaf and James Shoaf, as parents and natural guardians of Raven Shoaf (Raven), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) to resolve whether Raven qualified for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). Pertinent to this case, the petition averred:

4. Statement of the case and Description of disability: The Petitioners herein seek a determination by this tribunal as to the compensability of any claims under Fla.Stat. Section 766.305. It is alleged by the Petitioners herein that RAVEN SHOAF did not sustain a compensable injury under the statute as she does not meet the criteria enumerated in Fla. Statutes Sec. 766.302(2) insofar as she has not sustained a permanent and substantial mental impairment. A civil action for medical negligence against the physicians and hospital has been instituted in Seminole County (Case No. 2000-CA-201-09-K). Pursuant to an Order by the Circuit Court of Seminole County, the case in Circuit Court has been abated and Petitioners are mandated to have the compensability of this claim determined herein The filing of this Petition shall in no manner be construed as an election of remedies or a waiver of any rights the Petitioners may have to pursue the civil action.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association, as well as the physician (Michael

Geiling, D.O.) and the hospital (Adventist Health System/Sunbelt, Inc., d/b/a Florida Hospital-Altamonte) named in the petition, with a copy of the claim on May 3, 2001. By motions filed May 21, 2001, Michael Geiling, D.O., Juan Ravelo, M.D., and Adventist Health System/Sunbelt, Inc., d/b/a Florida Hospital-Altamonte requested leave to intervene, and by order of June 6, 2001, their requests were granted.

Subsequently, Petitioners requested and by order of August 31, 2001, were granted, leave to amend their petition. That amendment placed the following additional matter at issue:

In addition, Petitioners allege that the Florida Birth-Related Neurological Injury Compensation Plan is inapplicable to the claims on behalf of RAVEN SHOAF because Adventist Health System/Sunbelt, Inc., d/b/a Florida Hospital-Altamonte failed to provide pre-delivery notice to SANDRA SHOAF as mandated by Fla. Stat. §766.316.

NICA filed its response to the amended petition on September 13, 2001. In that response, NICA averred that upon review of the claim it had determined that Raven had suffered a "birth-related neurological injury" within the meaning of Section 766.302(2), Florida Statutes; however, since Petitioners contended that Raven's condition was not compensable and that Florida Hospital-Altamonte failed to comply with the notice provisions of the Plan, NICA requested that a hearing be scheduled to resolve whether the claim was compensable and

whether notice was given. Such a hearing was duly held on December 20 and 21, 2001.

At hearing, Petitioners Sandra Shoaf and James Shoaf testified on their own behalf, and called as witnesses Janice E. Brunstrom, M.D.; Patricia H. Smith; Donna L. Hoffberg; Libah Castrillo; Bernard L. Maria, M.D.; Eileen B. Fennall, Ph.D; and Barbara S. Buwalda. Petitioners' Exhibits 1A-1F, 2A and 2B, 3A and 3B, 4A and 4B, and 5-26 were received into evidence.¹ Respondent called Mary Waters, Ph.D., as a witness, and Respondent's Exhibits 1-5 were received into evidence.² Intervenors called Michael S. Duchowny, M.D., and Laura Aldridge as witnesses, and Intervenors' Exhibits (collectively identified in the record as Florida Hospital Exhibits) 1A and 1B, 2-6, 7A, 7B, and 8-11 were received into evidence.³

The transcript of the hearing was filed January 10, 2002, and the parties were initially accorded 10 days from that date to file proposed final orders; however, at Respondent's and Intervenors' request they were accorded until January 31, 2002, to request leave to supplement the record.⁴ Moreover, given the granting of Petitioners' Motion to Enlarge Page Limit for Proposed Findings of Fact and Conclusions of Law, Respondent and Intervenors were, by order of February 8, 2002, accorded leave through February 18, 2002, to file supplemental findings of fact

and conclusions of law.⁵ The proposals filed by the parties have been duly considered.

FINDINGS OF FACT

Fundamental findings

1. Petitioners, Sandra Shoaf and James Shoaf, are the parents and natural guardians of Raven Shoaf, a minor. Raven was born a live infant on November 28, 1997, at Adventist Health System/Sunbelt, Inc., d/b/a Florida Hospital-Altamonte, a hospital located in Altamonte Springs, Seminole County, Florida, and her birth weight exceeded 2,500 grams.

2. The physicians providing obstetrical services at Raven's birth were Michael Geiling, D.O., and Juan Ravelo, M.D., who, at all times material hereto, were "participating physician[s]" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.

The dispute regarding notice

3. Normally, the presence or absence of notice is not relevant to the resolution of a claim for benefits under the Plan. However, it is relevant when, as here, the claimants have attempted to invoke a civil remedy and the healthcare provider asserted Plan exclusivity as an affirmative defense. Braniff v. Galen of Florida, Inc., 669 So. 2d 1051, 1053 (Fla. 1st DCA 1995) ("The presence or absence of notice will neither advance nor defeat the claim of an eligible NICA claimant who has decided to

invoke the NICA remedy Notice is only relevant to the defendants' assertion of NICA exclusivity where the individual attempts to invoke a civil remedy.") Under such circumstances, the administrative law judge must resolve whether the notice provisions of the Plan have been satisfied. O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, 757 So. 2d 624 (Fla. 5th DCA 2000).

4. Pertinent to the notice issue, Section 766.316, Florida Statutes (1997), provided:

Each hospital with a participating physician on its staff and each participating physician . . . shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan.

5. Here, the parties have stipulated that Mrs. Shoaf's obstetricians provided her timely notice as required by the Plan.⁶ Consequently, it is not subject to debate that her obstetricians (the participating physicians) provided Mrs. Shoaf "notice . . . as to the limited no-fault alternative for birth-related neurological injuries" by providing her with a "form[] furnished by the association . . . [that] include[d] a clear and concise explanation of a patient's rights and limitations under the Plan." What remains for resolution is whether Florida

Hospital-Altamonte complied with the notice provisions of the Plan. Section 766.316, Florida Statutes.

6. As for Florida Hospital-Altamonte and the notice issue, the proof demonstrates that prior to November 1997, Florida Hospital-Altamonte established a practice whereby the registration representative from patient financial services, who already met with every expectant mother on admission, would give the patient a copy of the NICA brochure, titled "Peace of Mind for an Unexpected Problem," during their meeting. In practice, when an expectant mother presented to the maternity floor, the business office would be notified. Thereafter, a registration representative would come to the patient's room to obtain a signed consent to treatment form, and to discuss billing and other financial matters. During that meeting, the NICA brochure would be given to the patient, with the patient's copy of the consent form folded and placed inside it.

7. Here, with regard to Mrs. Shoaf's admission to Florida Hospital-Altamonte on November 26, 1997, for induction of labor, the proof demonstrates that, consistent with the hospital's established routine, Laura Aldridge (then known as Laura Lynds), the registration representative on duty at the time, met with Mrs. Shoaf and secured her signature to the consent to treatment forms. While Ms. Aldridge has no independent recollection of having done so, it is reasonable to infer, given the routine

established by the hospital and Ms. Aldridge's training, and there being no compelling proof to the contrary, that Ms. Aldridge gave Mrs. Shoaf a copy of the NICA brochure (as she was trained to do), with the patient's copy of the consent form folded and placed inside it.⁷

The dispute regarding compensability

8. A claim is compensable under the Plan when it can be shown, more likely than not, 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. See also Section 766.309(1), Florida Statutes.

9. Pertinent to this case, the Plan defines "birth-related neurological injury" to mean an "injury to the brain . . . caused by oxygen deprivation . . . 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." Section 766.302(2), Florida Statutes.

10. Here, there is no dispute that obstetrical services were delivered by a participating physician at birth. There is likewise no dispute, and the proof is otherwise compelling, that Raven suffered an injury to the brain caused by oxygen deprivation occurring in the course of labor, delivery, or

resuscitation in the immediate post delivery period in the hospital, which rendered her permanently and substantially physically impaired. What is disputed is whether the injury Raven received also rendered her permanently and substantially mentally impaired. As to that issue, Petitioners are of the view that Raven is not permanently and substantially mentally impaired, while Respondent and Intervenors are of a contrary opinion.

11. To address the character of Raven's brain injury, and the statistical probability that she would present with physical and mental impairment, Intervenors offered the testimony of Allen Elster, M.D., a physician board-certified in diagnostic radiology with special qualifications in neuroradiology. As for the character of Raven's brain injury, Dr. Elster reviewed a series of imaging studies (CTs and MRIs of the head) which revealed evidence of bilateral perinatal hypoxic-ischemic encephalopathy, with, inter alia, damage in both basal ganglia (caudate nuclei, globus pallidi, and putamina), both halves of the thalamus, both hippocampi, the midportion of the corpus callosum, and both frontal and parietal lobes.

12. Given the nature of Raven's injury, Dr. Elster opined that, based on existent studies, one could calculate the statistical probability that Raven would present with physical and mental impairment. As for physical impairment, Dr. Elster

calculated that there was a 99 percent probability of that, and that for mental impairment "when this type of problem exists . . . 51 percent will have some degree of cognitive impairment[, . . . at least . . . of a moderate degree." (Florida Hospital Exhibit 1A, at page 77.) However, as Dr. Elster and Petitioners' expert (Dr. Thomas Naidich⁸) noted, statistical probability is not diagnostic, and an accurate assessment of Raven's cognitive function requires clinical correlation (evaluation).

13. Considering the disparity in severity which frequently exists between physical and mental impairment following hypoxic-ischemic insult, Dr. Elster's observations, as well as those of Petitioners' expert, are clearly consistent with current understanding. Indeed, statistically, a little less than one-half the children who present with cerebral palsy, as Raven does, are not cognitively impaired. With regard to the others, the degree of impairment may vary considerably from infant to infant. Consequently, absent clinical correlation, it cannot be resolved, based solely on imaging studies, whether Raven is permanently and substantially mentally impaired.

14. To further demonstrate that Raven was permanently and substantially mentally impaired, Intervenors offered the testimony of Michael Duchowny, M.D., a physician board-certified in pediatrics, neurology with special qualifications in child neurology, and clinical neurophysiology, and Respondent offered

the testimony of Mary Waters, Ph.D., a licensed psychologist, with experience in evaluating infants at risk for developmental disorders.

15. As for Dr. Duchowny's observations, the proof demonstrates that on February 22, 2001, for approximately 1/2 hour, Dr. Duchowny examined Raven (then 3 1/4 years of age) in his office at Miami Children's Hospital, Miami, Florida. Pertinent to this case, Dr. Duchowny fairly reported the results of that neurologic examination as follows:

I evaluated Raven Shoaf on February 22, 2001. Raven was accompanied by both parents who supplied historical information. The evaluation was video recorded.

Mr. and Mrs. Shoaf began by explaining that Raven is a 3 year old girl with significant motor disabilities. She has a stiffness of all limbs and easily becomes tense. When this occurs, she can become fully incapacitated. In contrast, when relaxed, Raven is capable of much greater mobility. The parents noted that Raven moves her fingers well when relaxed and generally has good head and truncal mobility. Raven is wheelchair bound and her only motor milestone is being able to rollover. She cannot sit or stand independently. Raven attends the Kid's Medical Club where she receives physical, occupational and speech therapy on a 5 to 6 times weekly basis. She has not developed meaningful speech.

In contrast, the parents believe that Raven's cognitive abilities are good. They suggested that she is aware and follows people. She smiles and is socially interactive. The parents believe that Raven knows body parts and can distinguish[] a variety of objects,

indicating a reasonable verbal comprehension. Raven is working with a word board and points to body parts on a doll. She sing[s] songs and recognizes many objects. She often vocalizes and "talks to the T.V."

* * *

NEUROLOGIC EXAMINATION reveals Raven to be alert with full visual fixation and following. She smiles frequently, but her smile has a reflex pseudobulbar quality. I was unable to document a clear visual fixation in response to verbal commands, although she does move her eyes conjugately. The pupils are 3 mm and react briskly to direct and consensually presented light. There are no fundoscopic abnormalities. Raven did not speak at anytime during the evaluation. The tongue is moist and papillated, and there is good dentition. The extremities are small. There is double hemiparesis, decorticate posturing of the upper extremities with stiffening and scissoring of the lowers. Raven has poor head control and an obligate tonic neck response while supine. She has no adventitious movements, but slight provocation increases her spasticity significantly and she displays fisting of her thumbs with a very strong grip bilaterally. There are bilateral AFO's; her ankles can just be dorsiflexed to neutrality without orthotic devices. Deep tendon reflexes are 3+ bilaterally with the exception of the ankle jerks which are 4+ with sustained clonus. There are bilateral Hoffman responses and a jaw jerk. She has sucking and rooting response. There is scissoring in vertical suspension and crossed abductor responses at the pelvic and pectoral girdles. She remains vertical with scissoring, but cannot bear weight and has poorly developed axial tone. Babinski responses and attitudes are noted. There is triple flexion withdrawal with repeated stimulation of the bottoms of the feet. Sensory examination is

intact to withdrawal of all extremities to touch. Cerebellar testing is deferred. The neurovascular examination reveals no cervical, cranial or ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Raven's neurological examination is significant for small statute, microcephaly and spastic tetraparesis with double hemiparetic and decorticate postures, along with hyperreflexia and pathologic reflexes. She has no evidence of expressive language⁹ and her knowledge of her surroundings is unclear despite her parents impression that she relates well to her environment. They apparently believe they are able to detect responses that are not evident on examination

16. Following his examination, and prior to hearing, Dr. Duchowny reviewed Raven's medical records; MRIs and CT scans; various reports of healthcare providers, including Dr. Fennell, Dr. Maria, Dr. Brunstrom, Ms. Buwalda, Sheila Hostetler, and Patty Smith; video footage of Raven's speech therapy sessions; and the video tape of his February 22, 2001, evaluation. Given those materials, as well as his clinical findings, Dr. Duchowny concluded that Raven was not only permanently and substantially physically impaired, but also permanently and substantially mentally impaired.

17. As for the discrepancy between his conclusions and those drawn by the healthcare providers whose opinions were offered on behalf of Petitioners, Dr. Duchowny was of the belief that those healthcare providers misinterpreted Raven's responses

on examination or during therapy, and that her responses (whether on video tape or otherwise) do not support a conclusion that Raven relates to her environment or that she is capable of cognitive choice.

18. As for Dr. Waters, the proof demonstrates that Dr. Waters examined Raven on August 24, 2001, for nearly 2 hours. The results of that examination, which occurred in Raven's home, were addressed by Dr. Waters at hearing, and are fairly summarized in her report (Respondent's Exhibit 3), as follows:

OBSERVATIONS: The evaluation was conducted at Raven's home. Present were Raven's mother, her sister, the attorney representing the family, a videographer, Raven's speech therapist and the director of NICA. Raven's speech therapist assisted at various times during the evaluation by holding Raven in her lap and by holding test items. With the exception of the speech therapist and the videographer, the other people present attempted to remain out of Raven's line of vision in order to decrease distractibility. Raven presented as a very sociable little girl. She smiled readily and displayed an interest in the activities of people in the room and the test materials. Raven's position was varied during the testing in an effort to decrease fatigue. Testing was conducted with Raven sitting in her speech therapist's lap, seated in her wheelchair and seated in a molded chair on the floor A break was taken a little more than midway through the testing in order for a feeding to be provided to her Raven was observed following simple directions. She was particularly successful when prompts were provided. At times, directions had to be repeated prior to her following them. Raven occasionally made vocalizations but has

limited oral motor skills and does not speak. Raven made brief eye contact with the examiner when spoken to. She often displayed what appeared to be random or scanning eye movements but at times, was able to display what appeared to be purposeful gazes to indicate responses to questions or directions. Such eye movements were often quick glances rather than sustained eye gazing. Questions or directions were sometimes repeated in an effort to clarify a response. This sometimes resulted in negating what had previously appeared to be a correct response, but after the item was reintroduced, seemed to have been a random rather than deliberate choice of the correct answer. Raven was observed more frequently turning her head to the left and gazing to the upper right. She more often achieved a correct response when the desired stimulus was in the upper right quadrant of the board. Raven appeared to enjoy the attention the session afforded her and was responsive to speech and touch.

TESTS ADMINISTERED: Standardized scores could not be obtained due to Raven's limited motor and vocalization skills. Tests available for a child her age would be apt to reflect Raven's physical limitations rather than her capabilities if the entire tests were to be administered. Portions of the Bayley Scales of Infant Development-2nd Edition, Stanford-Binet Test of Intelligence-Fourth Edition, and Weschsler Preschool and Primary Scales of Intelligence-III were used to assess Raven.

TEST RESULTS: When directed to do so, particularly when prompts were provided, Raven gazed at each of four stimuli pictures prior to making a requested choice. She appeared to correctly identify by eye gaze pictures of a number of items on the Bayley and Stanford-Binet. She was able to identify two of three objects by eye gaze when they were placed in front of her. Raven

identified several pictures of action verbs and correctly chose a picture of an object described by function. She did not match pictures of like items. She matched one color but did not do so when the item was repeated. Using the "yes/no" on her wheelchair board, Raven appeared to display an understanding of one preposition but did not do so when the test item was repeated. She did not display an understanding of the concept of more. Raven attended to a story read to her. She did not immediately find a like picture when the stimuli card was removed from sight. Raven did not discriminate patterns or classify objects. Raven was able on occasion to choose the correct container when sorting colors but did not do so consistently. She did not display an understanding of social inconsistencies. She appeared to display an understanding of the concept of "smaller," but not of other size related concepts.

The Bayley Scales of Infant Development-2nd Edition are normed for children up to 42 months of age. The items used from this test and from the other two tests involve concepts that fall within the range of expectancy for children Raven's age and younger.

SUMMARY AND RECOMMENDATIONS: Although no standardized scores could be obtained due to Raven's motor and speech limitations, information regarding Raven's cognitive functioning could be obtained. Raven does appear to be able to consistently identify objects by name and by function when she is familiar with them. Object identification appears to be a relative strength for Raven. In this area, she appears to be functioning on an age appropriate level. However, in other areas, she appears to be functioning more on a nineteen to twenty-three month level. Short-term memory appears to be a relative weakness for her. She did not learn concepts that were demonstrated during testing. She appears to require much

repetition in order to make associations part of her repertoire. Tasks involving more abstract thinking or complex reasoning appear to be difficult for Raven. Certainly her motor limitations have interfered with sensory input and her having a ready access to some experiential information available in the environment. Despite this, in her daily living situation, exposure to certain concepts would most likely occur but have not to date become part of her general knowledge. Raven is very responsive to attention and touch but her responses may be somewhat indiscriminant. She responds to sounds and sights but may have some problems attaching meaning to what she sees and hears. Although she seems to have been able to pair objects and words and objects and function, her problem solving skills appear to be limited. The prognosis is guarded in regard to Raven making steady gains in terms of skill acquisition and a concern is that she may plateau. Raven does present with cognitive delays, which appear to be significantly large. Raven can be expected to acquire additional skills but the rate of such acquisition is apt to be slow. As a result, the lag between Raven and her peers may well increase, with Raven continuing to display cognitive delays.

As for the magnitude of Raven's deficit, Dr. Waters described Raven's cognitive deficit as "significantly large," or substantial. (Transcript, page 219)

19. To address Raven's neurologic presentation, Petitioners offered the testimony of a number of physicians who had examined her, including Dr. Janice E. Brunstrom, the current director of the Pediatric Neurology Cerebral Palsy Center at St. Louis Children's Hospital, and an assistant professor of neurology and

cell biology at Washington University School of Medicine, St. Louis, Missouri. Dr. Brunstrom is board-certified in pediatrics, as well as neurology with special qualifications in child neurology, and is Raven's current treating pediatric neurologist. Dr. Brunstrom examined Raven on three occasions: February 2, 2001, for nearly 3 hours; March 29, 2001, for nearly 3 hours; and August 14, 2001, for nearly 2 hours.

20. Dr. Brunstrom's neurologic evaluations of February 2, 2001, and March 29, 2001, were addressed by her at hearing, and are fairly summarized in her report (Petitioners' Exhibit 6), as follows:

Raven is a 3 year old girl with mixed athetoid-spastic quadriplegic cerebral palsy. I have examined her on two occasions:

1) On February 2nd, 2001, I spent nearly 3 hours with Raven and her parents at the Pediatric Neurology Cerebral Palsy Center at Saint Louis Children's Hospital.

2) On March 29th, 2001, I traveled to Orlando to see Raven at the Kids Medical Club and evaluated her in the company of her speech therapist, Barbara Buwalda, along with her physical therapist and occupational therapist. I spent nearly three hours with her at that visit and observed her in therapies and interacting with people in that setting.

I have reviewed extensive records detailing Raven's prenatal history, post-delivery hospital course, follow up examinations by Raven's pediatrician and pediatric neurologist, and numerous notes and evaluations from various therapists,

including Barbara Buwalda's evaluations. I reviewed Raven's brain-imaging studies (CT and MRI films). I also watched 2 video recordings of Raven during speech therapy with Barbara Buwalda (each for 30 minutes) and a videotaped recording of a neurological examination performed by Michael Duchowny M.D., a pediatric neurologist (approximately 25 minutes).

Development:¹⁰ The parents report that Raven has been attempting to reach out and grab objects for the past 8-12 months. She tries to point but has a lot of difficulty bringing her hands to midline due to her tone. She used to fist her hands but is learning to open them up, especially when people aren't "looking" at her. She cannot sit without support. She rolled over at age 2. She babbles and makes noises. She hollers or cries when she wants something. She looks at things she wants and uses her expressions to verify.

Raven uses a board on her wheelchair tray and looks to Yes or No. She identifies pictures. Her parents feel she is learning some colors and that she knows her body parts. She recognizes the people at her school. She has favorite Movies that she likes to watch including Tarzan, Mulan, Toy Story and Barney. She is able to make choices. The parents feel that she understands everything that is going on around her.

Raven continues to learn new things and has had no evidence of regression (loss of skills).

EXAMINATIONS:

Feb 2nd, 2001, St. Louis Children's Hospital. I performed a general physical examination and detailed neurological examination including a lengthy period of observation and interaction with Raven to understand her ability to comprehend and follow directions:

* * *

NEUROLOGICAL TESTING:

Mentation: Raven was alert and very engaging. She regarded me and followed me with her eyes as I moved around the room. She smiled responsively. She tried very hard to follow commands but was very limited by her motor difficulties. I had to wait a minute or more as she tried to move her arm when I asked her to reach for an object placed in front of her. She tried with her right hand but immediately stiffened at the elbow and fisted the hand, which stopped her from reaching the target. At rest she was able to relax and open her hand. When she tried to move anything, she concentrated very hard and moved her entire body in the effort, including opening her mouth.

When I asked her to "Give mommy a kiss" she turned in her mother's direction and tried to open her mouth. (The parents confirmed that this is how Raven gives kisses). Raven was able to quickly identify where her mother or father were by looking at them when I asked "where is mommy" or "where is daddy?" With the parent's help, I held up 4 different objects and asked Raven to look at specific ones. She did so with 100% accuracy if given time to turn her head towards the objects. (NOTE: Raven had significant difficulty turning towards her right due to an abnormal tonic neck reflex). When I used this same method to ask Raven about colors, she was able to identify the correct colored object every time.

Cranial nerve testing: Raven had symmetrical pupils, normal papillary size and reactivity. She was able to track objects in all directions. Her face was symmetrical but weak. She vocalized. She had a hyperactive gag reflex. She did drool.

Motor: She had diffusely increased tone throughout in all four extremities. This

included spasticity that was more elicitable in her legs. She tended to scissor with her legs when held vertically. Without her orthotics, she would not bear much weight on her legs. In her arms she had rigidity and dystonia that occurred with any attempt at effort on her part. She had marked truncal weakness and a minimal head lag. She was able to support her head briefly before toppling forward. She had an obligate tonic neck reflex to the right that she had to overcome. She was markedly weak in all extremities but did have better than antigravity strength.

Sensation- she withdrew appropriately to touch. Detailed sensory testing was not possible.

Deep tendon reflexes/ Plantar responses:
Diffusely brisk (3+) except at the ankles (4+) where there was spontaneous clonus. Plantar responses were extensor bilaterally.

Coordination: no tremor at rest. Reach severely limited by motor difficulties noted above.

March 29, 2001, Kids Medical Club. At the medical club, when I met Raven, she had just finished taking a nap. She was happy and smiling and appeared to recognize familiar faces. Most of this evaluation was focused on Raven's communication and cognitive abilities.

Raven was very alert and inquisitive. She clearly recognized all of her different caretakers and was able to identify them by looking at them when asked. She was able to use eye gaze to look at a yes or no card to confirm which person was sitting in which position around the room. For much of the exam she was seated on the physical therapist's lap while the speech therapist, Barbara Buwalda, worked with her and I interjected and asked Raven many questions.

Raven's ability to control her body movements was severely limited. She had an oblique tonic neck reflex to the left and had to try to relax and overcome this to look midline or to the right. Despite full ocular motility, it was particularly difficult for her to avert her gaze to the right for more than a second or two or to turn and maintain her head position or eye gaze to the right. She had markedly increased tone in all extremities with rigidity at the elbows and fistings of both hands. This precluded her ability to reach out to point at objects. She was not able to sit without support. She had to be reminded to hold her head up at times. She did not say any words but vocalized sounds.

She was able to make choices based on eye gaze using hand held cards with pictures or with "yes" and "no" printed on them. In addition to looking at the correct object when asked, she also answered questions about the pictures, correctly. For example, when asked "which of these things do you use when you are drinking?" She looked at the cup. She was also able to use eye gaze to let Barbara know that she wanted a drink of water or something to eat. She insisted several times that she wanted chocolate pudding (not applesauce) even though Barbara moved the choices around and required Raven to turn to the right (against her tendency to turn to the left).

Raven was very aware of changes in her surroundings. She looked up when she heard people walk by the open door to see who was there. She appeared to understand that we wanted her to answer questions, but preferred to look at me instead of her speech therapist. (I was someone new). At one point, I explained to Raven that I would need to cover my eyes and not look at her until she did what she was asked. She immediately

answered the questions (correctly) after I prompted her.

Her speech therapist held up two cards, one of which had socks. When Raven was asked which picture is something that belongs with shoes, Raven looked at the socks. After that, I asked Raven whether her speech therapist was wearing shoes. Raven correctly looked at the "no" card. Then, I asked Raven "Where are Barbara's shoes?" and Raven looked towards the speech therapists shoes on the floor. Then I asked Raven whether one of the other people in the room she knew was wearing shoes. This adult was sitting on the far side of the room, and in order to answer the question, Raven had to turn her head to the far right (against her obligate reflex that causes her to turn to the left), she had to fix her gaze to the right and look down at his feet. (She was not given specific instructions about how to figure out the answer). Raven looked over at this person's feet and then turned back and looked at the card that said "yes" (the correct answer).

It was an obvious effort for Raven to move her head and hold still to answer questions with eye gaze or head turning. She was not able to reach out with her arms to activate a simple 4 choice device. Despite the fact that she seemed to get a little tired, she paid attention for more than 2 hours and worked to do the things that I asked of her.

Raven also got upset when her therapist tried to put her orthotics (DAFOs) on her feet. I explained to Raven that the braces would help her be able to stand and that she needed to wear them. After I spoke to her, Raven let the therapist put them on Raven's feet.

At the end of the interview, Raven was placed in her wheelchair and taken out of the room. She became very upset and then used the picture boards on her wheel chair tray to let the staff know that she wanted to go back in

the room where I was. Once she was back in the examining room, she immediately calmed down.

* * *

IMPRESSION: Raven has a mixed form of quadriplegic cerebral palsy that includes both spastic and athetoid/dystonic components. She is motorically very limited. She will need aggressive (medical and therapeutic) intervention and assistive technology to allow her to function in the world despite her motor limitations.

Raven's motoric difficulties are NOT indicative of a cognitive impairment. In fact, Raven appears to be quite bright and most likely has at least normal and probably "above normal" intellect. This is supported by her lengthy attention span despite the effort required on her part to perform, and by her preference for interacting with adults and her ability to remain engaged by them. She listens to adult conversations. She displays an understanding for object recognition and concepts consistent with her age or above age level and is demonstrating age appropriate cognitive skills including the emergence of color recognition. It is my expectation, that with appropriate intervention, Raven will be able to complete in a regular classroom--beginning with Kindergarten and beyond

Based on her evaluation, Dr. Brunstrom recommended that, due to the limitations on her expressive language skills occasioned by her motor impairment,¹¹ Raven have an augmentative communication evaluation to ascertain whether she could utilize current technology to augment her expressive language skills.¹²

Dr. Brunstrom also recommended that Raven continue to receive

aggressive therapies to address gross motor function, feeding skills and communication (including access to her augmentative communication device once she receive it).

21. As noted in her reports, as well as her testimony at hearing, it was Dr. Brunstrom's opinion that, while Raven's brain injury did result in permanent and substantial motor (physical) impairment, Raven is cognitively intact. It was further Dr. Brunstrom's opinion that Raven is educable, and that she can function in a school environment with adaptive technology and assistance.

22. Apart from the opinions offered by Dr. Brunstrom, Petitioners also offered the opinions of two other physicians who performed a neurologic evaluation of Raven. Those physicians were Dr. Bernard Maria, a physician board-certified in pediatrics, as well as neurology with special qualifications in child neurology, who devoted approximately 2 hours examining Raven on December 12, 2000, and Dr. Warren Cohen, another physician board-certified in pediatrics, as well as neurology with special qualifications in child neurology, who devoted approximately 2 hours examining Raven in March 2001. The opinions expressed by Doctors Maria and Cohen were consistent with those expressed by Dr. Brunstrom, and no useful purpose would be served by addressing their testimony further.

23. On November 30, 2001, Raven was examined by Eileen Fennell, Ph.D., a board-certified clinical neuropsychologist, at the Psychology Clinic of the Shands Hospital, University of Florida, to ascertain her level of cognitive functioning.¹³ That examination, which lasted approximately 2 hours, was addressed by Dr. Fennell at hearing, and the results of that examination are fairly summarized in her report of December 18, 2001 (Petitioners' Exhibit 19), as follows:

Behavioral Observations: Raven arrived seated in her adaptive chair and was bright and happy that morning. She separated easily from her parents and was interested when we moved to the testing room, accompanied by Barbara Buwalda. She had obviously grown physically since her last visit and looked her chronological age. She was positioned in her chair in front of the examiner so that I might present test objects to her at a distance of between 18 and 24 inches and at midline of her visual field. This was done to minimize the degree of visual movement needed to indicate a clear response to each question. When there was a response that was unclear, the question would be repeated and Ms. Buwalda was asked to opine about the position of Raven's eyes. If a disagreement occurred between myself and Ms. Buwalda, the answer was counted as wrong. Raven worked from 9:30 AM until 11:30 AM with one short break to drink water. She was actively interested in the procedures but by 11:30, she became fatigued and began to have difficulty responding to test items. Evidence of her fatigue included difficulty holding her head up, sweating, increased spasticity and difficulty focusing on the test items. At that point, the formal

examination was discontinued. Based upon the degree of interest and cooperation she displayed, results of this evaluation were judged to provide a fairly accurate assessment of a variety of her cognitive functioning. Assessment results are affected by the limits of the response options available to Raven and the modifications in standardized techniques necessitated by her severe motor difficulties.

Test and Procedures Employed: Components of the examination included the following

1. Tests of color recognition;
2. Tests of size discrimination;
3. Tests of Same vs. Different (colors, shapes, sizes);
4. Modified Multiple Choice version of the Berry Buktenica Test of Visual Motor Integration;
5. Peabody Picture Vocabulary Test-III;
6. Selected items from Bracken Basic Concept Scale-Revised;
7. Test of Verbal Absurdities; and,
8. Tests of Anticipation and Responsive Vocalizing.

* * *

Test Results and Interpretation:

The examination began with presentation of a series of colored large plastic lego-type blocks in six colors (red, yellow, blue, white, black, green). [Raven] . . . was asked to look at a specified color of block (e.g., where is the red block). This was performed with 100% accuracy. She was then asked to look at which block was larger or smaller when presented with blocks that differed either in color or the number of raised conical tops. She was given a total of six trials and performed with 100% accuracy. She was then asked whether two blocks (of the same color but with same or

different conical tops) was the same or different. She answered with 80% accuracy.

Raven was then presented with a multiple choice version of the 24 designs of the Beery Buktenic Test of Visual Motor Integration. She was shown a design for five seconds. The page was then flipped to a following page that had three designs on it, one of which was the target design. She was asked to look at the design that matched the one she had been shown. Raven correctly identified 20 of the 24 designs. The four errors that were committed were ones in which she chose the correct design presented in the wrong orientation (e.g., drawn at a rotated 45 degree orientation). Thus, this test assessed both her immediate memory for designs as well as her ability to make perceptual matches to sample. Notably, Raven loved doing this test and became very excited and laughed a great deal with each successful answer.

I then tested her ability to recognize verbal absurdities by asking her questions of improbable events. For example, "Raven, did you drink your hamburger this morning?" She would respond to each type of inquiry by laughing in response indicating that the idea being presented was "funny" rather than responding with a yes or no response. Another example of this type of question was "Raven, did you put your shoes on your ears today?".

I then assessed her responsiveness to music and to voicing. For example, I sang the Rainbow song to her and she sat very still looking at me, smiling. I repeated the song and she began to vocalize with me. I then examined her ability to respond to changes in the quality of my voice by slowing and quieting my speech to which she consistently responded by slowing her movements down and visibly relaxing. This latter observation suggested to me that she might have some

relief from her spasticity when excited by use of training in relaxation techniques. She clearly would try to relax to reduce her spastic movements and stiffening when told to do so by her speech therapist or myself during portions of the exam.

I then switched to selected subtests from the Bracken. Specifically, she correctly responded to items (now detailed pictures rather than plastic legos) asking about comparisons on which she scored 6 out of 7 correct. She was also able to correctly identify selected shape items (concepts "in a line" and "in a row"[]). Items relating to counting (enumeration) were unsuccessfully attempted (0/2 correct).

At this time, we took a break from testing so that Raven could drink some water. After she drank the water, I recited a different verse to her (i.e., The Crawly Mousy). The verse describes a mouse crawling to the child's house. While reciting the verse, the examiner walks his/her fingers up the child's arm heading either to under the chin or the stomach. Upon arrival on this site, the child realizes the connection between the verse and the tickle that follows the mouse's arrival. After one exposure, Raven caught on to the game and began to show anticipatory excitement. This was repeated several times and again at the end of the day as a game that I now played on her. Each time, it was evident that she expected some tickling from me at the end of the verse and seemed to enjoy the game thoroughly (as evidenced by smiles and laughter and even some motor activity such as trying to stretch out her arm to me).

In the last portion of the exam, I administered the Peabody Picture Vocabulary Test to Raven. At this point, she had been working with me for over an hour and one half and had begun to fatigue yet she remained interested and cooperative. Beginning with

the training items, Raven was shown a total of 44 test items before I discontinued testing due to her obvious fatigue. The test was scored in a non-standard fashion according to the number of items correctly identified rather than according to the basal and ceiling rules. In this modified version on a discontinued test, she obtained an Age equivalent score of 2 years-4 months. Had this been the only testing attempted, I am confident that she would have achieved a higher score. The items passed involved names of objects, body parts, action verbs and concepts suggesting that her receptive vocabulary is broader than simple object identification.

Summary Clinical Impressions:

Raven Shoaf is a 4 year-2 day old child with a diagnosis of Spastic/Athetoid Cerebral Palsy who has been receiving Speech Occupational and Physical Therapy for the past two years. In that time period, her receptive vocabulary has been estimated by her Speech Therapist to have grown to approximately 500 words. Prior assessments of her gross and fine motor skills, including oral motor skills, document her severe physical disabilities. These motor disabilities require that assessing her cognitive abilities, of necessity, requires modification of testing techniques and response requirements. The only avenue by which she can express her knowledge is through eye movements and facial and emotional gestures. Testing also requires that the examiner must give her sufficient time to respond and be sensitive to the effects of fatigue on her ability to sustain effort and respond. The exam must also be conducted in such a manner so as not to bias the responses to her preferred left-sided gaze. As there are no standardized tests of cognitive abilities that specifically deal with each of these limitations, this exam was adapted to get around the limitations imposed

by her physical difficulties. Results suggest that her receptive vocabulary is, at worst, mildly delayed and she has shown dramatic acquisition of word and concept knowledge in the two years that she has received Speech and Language therapy. Her rate acquisition of language knowledge attests to her ability to learn. Her ability to accurately remember and discriminate visuoperceptual material (designs) also appears to be intact when tested in a multiple choice format over a short delay. Long term recognition was not tested in this exam. Raven clearly understands verbal absurdities when stated to her although she could not respond to a visual adaptation of a similar test of absurdities from the Stanford Binet when seen by Dr. Waters. She also evidenced anticipatory responding indicating the ability to formulate a concept of a future event. She also spontaneously vocalized when sung to and was easily guided by verbal directions and voicing quality changes that suggest an ability to initiate cognitive activities, to attempt to imitate another and to comprehend complex directions about her muscular state. All of these behaviors are indicators that she is not able only to understand a "yes/no" response format and that there is a working and developing brain guiding these aspects of her behavior. As she becomes more proficient in communicating with the Dynavox and as her strength improves, she is likely to become more able to be tested to the limits of her knowledge. At this time, results from the present examination do not indicate that she is functioning in the Severely Impaired range of cognition. She is, however, severely motorically impaired. This discrepancy between her cognitive attainments and the severity of her motor limitations is the basis for continuing her therapies, providing her with assistive/augmentative communicative devices and working with the family to enhance communication approaches in the home environment.

24. As noted in her report, as well as her testimony at hearing, Dr. Fennell is of the opinion that, at worst, Raven's receptive language is mildly delayed. Dr. Fennell, like Dr. Brunstrom was also of the opinion that Raven is educable, and can function in a school environment with adaptive technology and assistance.

25. Finally, to further support their contention that Raven was not cognitively impaired, Petitioners offered the testimony of Raven's speech-language therapist, Barbara Buwalda, and occupational therapist, Donna Hoffberg.¹⁴ Notably, until Raven enrolled in the public school system, and entered Durrance Elementary School's Handicapped Center, these professionals had provided therapy for Raven for almost 2 years, at a rate of 4 to 5 sessions a week, and therefore, were in a position to garner insight into Raven's progress and status.

26. In the opinion of these therapists, Raven has demonstrated that she is cognitively intact by demonstrated normal or above normal receptive language development. In this regard, Ms. Buwalda notes that at less than four years of age Raven has consistently demonstrated, by eye gaze and eye scanning, that she can identify some letters of the alphabet, that she can identify some words (her name, cat and dog), that she has mastered her colors (all her primary colors, as well as orange, purple, black and white), and that she can identify

shapes (circle, square, and diamond). Ms. Buwalda also notes that Raven can identify words by function, that she can make inferences, that she knows plurals, that she can make size comparisons (big/little), that she knows spacial concepts (top, below, beside), and that she knows her body parts (eyes, ears, nose, hair, hands, feet, legs, and arm). As with Ms. Buwalda, Ms. Hoffberg notes, as evidence of Raven's cognitive status, Raven's consistency of choice. Ms. Hoffberg further notes that Raven is focused and attentive, that she demonstrates preferences for people and things, that she demonstrates appropriate social skills for her age, and that she responds to verbal commands. In all, these therapists are of the opinion that Raven demonstrates an awareness of her surroundings, as well as an understanding of her environment, and does not present with any evidence of mental impairment.

27. The medical records and other proof, including the testimony of the various healthcare providers and the videos offered by the parties have been carefully considered. So considered, it must be resolved that the proof does not permit a conclusion to be drawn, with any sense of confidence, that, more likely than not, Raven is permanently and substantially mentally impaired.

28. In reaching such conclusion, it is noted that the physicians and other healthcare providers who testified on behalf

of Petitioners were well qualified and positioned to offer compelling proof as to Raven's cognitive status. In contrast, while also well qualified, the physician (Dr. Duchowny) and psychologist (Dr. Waters) who testified on behalf of Respondent and Intervenors were not so well positioned (with limited personal contact, as well as numerous distractions during the course of their contact with Raven). Moreover, the difference in perspective aside, there is no compelling reason to prefer their testimony over that offered by Petitioners' experts.

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. The notice issue

30. Pertinent to the notice issue, Section 766.316, Florida Statutes (1997), provided:

Each hospital with a participating physician on its staff and each participating physician . . . shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan.

31. In Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 309 (Fla. 1997), the Florida Supreme Court described the

legislative intent and purpose of the notice requirement as follows:

. . . the only logical reading of the statute is that before an obstetrical patient's remedy is limited by the NICA plan, the patient must be given pre-delivery notice of the health care provider's participation in the plan. Section 766.316 requires that obstetrical patients be given notice "as to the limited no-fault alternative for birth-related neurological injuries." That notice must "include a clear and concise explanation of a patient's rights and limitations under the plan." Section 766.316. This language makes clear that the purpose of the notice is to give an obstetrical patient an opportunity to make an informed choice between using a health care provider participating in the NICA plan or using a provider who is not a participant and thereby preserving her civil remedies. Turner v. Hubrich, 656 So. 2d 970, 971 (Fla. 5th DCA 1995). In order to effectuate this purpose a NICA participant must give a patient notice of the "no-fault alternative for birth-related neurological injuries" a reasonable time prior to delivery, when practicable.

Consequently, the court concluded:

. . . as a condition precedent to invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan a reasonable time prior to delivery.

32. Given the Florida Supreme Court's holding in Galen, it has been resolved that where, as here, Petitioners have sought to avoid a healthcare provider's attempt to invoke the Plan as their exclusive remedy in a civil action (by responding that the

healthcare provider failed to comply with the notice provisions of the Plan) it is necessary for the administrative law judge to resolve whether, as alleged by the healthcare providers, appropriate notice was given. Braniff v. Galen of Florida, Inc., 669 So. 2d 1051, 1053 (Fla. 1st DCA 1995)("The presence or absence of notice will neither advance nor defeat the claim of an eligible NICA claimant who has decided to invoke the NICA remedy Notice is only relevant to the defendant's assertion of NICA exclusivity where the individual attempts to invoke a civil remedy."), and O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, 757 So. 2d 624, 627 (Fla. 5th DCA 2000)("All questions of compensability, including those which arise regarding the adequacy of notice, are properly decided in the administrative forum"). As the proponent of such issue, the burden rested on the healthcare providers to demonstrate, more likely than not, that the notice provisions of the Plan were satisfied. Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1997)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.") See also Galen of Florida, Inc. v. Braniff, supra, at 311 ("[T]he assertion of NICA exclusivity is an affirmative defense.")

33. Here, the parties have stipulated that the participating physician who provided obstetrical services at

Raven's birth provided Mrs. Shoaf notice as required by the Plan. And, for reasons heretofore noted in the Findings of Fact, it has been resolved that the hospital likewise provided notice as required by the Plan. Consequently, the notice provisions of the Plan were satisfied.

The compensability issue

34. In resolving whether a claim is compensable under the Plan, 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. 766.302(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.

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.

35. 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.

Consequently, to obtain coverage, an infant must suffer both substantial mental and substantive physical impairments that are permanent in nature. Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla. 1977).

36. Here, the parties stipulated that obstetrical services were delivered by a participating physician at birth, that Raven was born a live infant weighing at least 2,500 grams at birth, and that Raven suffered an injury to the brain caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital, which rendered her permanently and substantially

physically impaired. The only dispute regarding coverage was whether the injury Raven suffered also rendered her permanently and substantially mentally impaired.¹⁵

37. As the proponents of coverage, the burden rested on the healthcare providers and NICA to demonstrate that Raven was permanently and substantially mentally impaired. Balino v. Department of Health and Rehabilitative Services, supra. Here, for reasons stated in the Findings of Fact, the healthcare providers and NICA failed to sustain such burden. Accordingly, the proof failed to demonstrate that Raven suffered a "birth-related neurological injury," within the meaning of Section 766.302(2), Florida Statutes, and the claim is not compensable. Sections 766.302(2), 766.309(1), and 766.31(1), Florida Statutes.

38. 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.

DONE AND ORDERED this 11th 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 11th day of March, 2002.

ENDNOTES

1/ Petitioners' Exhibits are identified as follows:
Petitioners' Exhibit 1A-F (the medical records filed with DOAH on
April 30, 2001), Exhibits 2A and 2B (the transcript and video of
the deposition of Warren Cohen, M.D.), Exhibits 3A and 3B (the
transcript and video of the deposition of Michael Johnston,
M.D.), Exhibits 4A and 4B (the transcript and video of the
deposition of Thomas Naidich, M.D.), Exhibit 5 (the Curriculum
Vitae (CV) of Dr. Brunstrom), Exhibits 6 (report of
Dr. Brunstrom's neurology evaluations of 2/2/01 and 3/29/01),
Exhibit 7 (report dated 8/16/01 of Dr. Brunstrom's neurology
evaluation of 8/14/01), Exhibit 8 (Speech-Language Pathology
Occupational Therapy Augmentative Communication Evaluation of
8/13/01), Exhibit 9 (video of neurological examination by
Dr. Michael Duchowny on 2/22/01), Exhibit 10 (CV of Patricia
Smith), Exhibit 11 (report dated 12/9/01 of Patricia Smith's
evaluation of 12/5/01), Exhibit 12 (CV of Donna L. Hoffberg),
Exhibit 13 (video of 11/8/01 therapy session at Kids Medical
Club), Exhibit 14 (CV of Libah G. Castrillo), Exhibit 15 (CV of
Bernard L. Maria, M.D.), Exhibit 16 (report of Dr. Maria dated
12/12/00), Exhibit 17 (CV of Eileen Fennell, Ph.D.), Exhibit 18
(report of Dr. Fennell dated 2/28/01), Exhibit 19 (report of Dr.
Fennell dated 12/18/01), Exhibit 20 (CV of Barbara S. Buwalda),
Exhibit 21 (Speech Language Evaluation by Ms. Buwalda dated
10/1/01, Speech-Language Progress Summary by Ms. Buwalda dated
6/21/01, a two-page undated Summary by Ms. Buwalda, Speech-

Language Evaluation by Ms. Buwalda dated 2/5/01, Receptive/Expressive Language Summary by Ms. Buwalda dated 12/12/00, and an Integrated Therapy Evaluation and Therapy Care Plan dated 8/30/00 by Ms. Buwalda and others), Exhibit 22 (video of 2/1/01, and 11/8/01 speech therapy sessions), Exhibit 23 (Florida Hospital's Response to Petitioners' Request for Production, with attached redacted copy of OB/GYN Section Minutes of 6/3/97 and redacted copy of the L & D Unit Meeting Minutes of August 26, 1998), Exhibit 24 (Petitioners' Request for Admissions to Florida Hospital, served 11/9/01), Exhibit 25 (Florida Hospital's response to Petitioners' Request for Admissions served 11/29/01), and Exhibit 26 (Florida Hospital's response to Petitioners' Request for Admissions, served 12/6/01).

2/ Respondent's Exhibits are identified as follows: Respondent's Exhibit 1 (the CV of Dr. Waters), Exhibit 2 (Dr. Waters' report of an evaluation conducted on 8/24/01), Exhibit 3 (Dr. Waters' report of an evaluation conducted on 8/24/01), Exhibit 4 (video of a speech therapy session on 12/20/00) and Exhibit 5 (video of Dr. Waters' evaluation).

3/ Intervenors' Exhibits, collectively identified in the record as Florida Hospital Exhibits, are identified as follows: Florida Hospital's Exhibit 1A and 1B (the transcript and video of the deposition of Allen Elster, M.D.), Exhibit 2 (transcript of the deposition of James Shoaf), Exhibit 3 (transcript of the deposition of Sandra Shoaf), Exhibit 4 (CV of Dr. Duchowny), Exhibit 5 (report of 2/22/01 neurology evaluation by Dr. Duchowny), Exhibit 6 (composite of MRI and CT scans of Raven Shoaf), Exhibit 7A and 7B (hospital consent forms with beginning date of treatment noted as 11/25/97 and 11/26/97, respectively), Exhibit 8 (NICA brochure), Exhibit 9 (physician's receipt of NICA notice form), Exhibit 10 (transcript of the deposition of Bonnie Hache), and Exhibit 11 (transcript of the deposition of Sharon L. Paine).

4/ Neither Respondent nor Intervenor made such a request and, consistent with the order of January 23, 2002, the record was closed.

5/ Neither Respondent nor Intervenors availed themselves of the opportunity to file Supplemental Findings of Fact and Conclusion of Law.

6/ Consistent with that stipulation, the proof demonstrates that on October 21, 1997, when she presented at the offices of Mid-Florida Obstetrics & Gynecology Specialists, Mrs. Shoaf was

provided with a form (the acknowledgment form) which informed her that her physicians were participants in the Florida Birth-Related Neurological Injury Compensation Plan. Specifically, the acknowledgment form provided, as follows:

I have been furnished information by Mid-Florida Obstetrics & Gynecology Specialists prepared by the Florida Birth Related Neurological Injury Compensation Association, and have been advised that Drs. Ravelo, Mowere & Geiling are participating Physicians in that program, wherein certain limited compensation is available in the event certain neurological injury may occur during labor, delivery or resuscitation. For specifics on the program, I understand I can contact the Florida Birth Related Neurological Injury Compensation Association (NICA), Barnett Bank Building, 315 South Calhoun Street, Suite 312, Tallahassee, Florida 32301, (904) 488-8191. I further acknowledge that I have received a copy of the brochure prepared by NICA.

The brochure prepared by NICA, titled "Peace of Mind for an Unexpected Problem," contained (as Petitioners conceded) a clear and concise explanation of a patient's rights and limitations under the Plan. Mrs. Shoaf acknowledged her understanding of the acknowledgment form, as well as receipt of the brochure, by dating and signing the form.

7/ In reaching such conclusion, the testimony of Mr. and Mrs. Shoaf regarding notice, and their denial of having received a copy of the brochure at the hospital, has not been overlooked. Their testimony regarding this issue was not, however, persuasive.

As one would expect given the passage of time, Mrs. Shoaf evidenced very little recall regarding the events surrounding her admission to Florida Hospital-Altamonte. She did not recall meeting with the registration representative, did not remember seeing or signing the consent form, and did not remember if she received a copy of any documents. As explained by Mrs. Shoaf, "it was a long, long time ago." (Florida Hospital Exhibit 3, page 8) As for Mr. Shoaf, he also evidenced very little recall regarding the events surrounding his wife's admission. He likewise did not recall meeting with the registration

representative, and did not recall his wife signing any documents.

Nevertheless, and notwithstanding their lack of recall regarding the events surrounding Mrs. Shoaf's admission, Mr. and Mrs. Shoaf testified they were sure they did not receive the NICA brochure. Mrs. Shoaf explained the basis for her certainty, as follows:

. . . I'm completely sure at Florida Hospital they did not give me a paper like this.

* * *

Q. Why are you so sure?

A. Because I would have remembered it?

Q. Why would you have remembered it?

A. Because it's an important document, and I would have tried to find out through my husband about that document, because I would have tried to find out exactly what the document was about.

[Florida Hospital Exhibit 3, page 11]

As for Mr. Shoaf, he explained the basis for his certainty, as follows:

Q. Mr. Shoaf, when I took your deposition the first time -- which was on September 27th a year ago, 2000 -- on page 26, line 9, I asked you the following question: "Did you receive any NICA information at Florida Hospital when your wife was admitted?" And your answer was, "I don't recall."

A. Right.

Q. Now, was that your answer back then?

A. Yeah.

Q. All right. Now, today you seem to be saying that you're absolutely, positively certain that you didn't receive it.

A. Well, if I had receive it, I would have read it. And since I didn't know about the program until after she was born, I can assume that I didn't receive it. That's, you know, my line of thinking.

[Florida Hospital Exhibit 2, page 16)

The rationale advanced by Mrs. Shoaf and Mr. Shoaf to support their conclusion that they did not receive the NICA brochure at the hospital is not compelling. A more compelling explanation for their lack of recall is that they did not read the brochure or did not place any importance on its content. Indeed, a NICA brochure was provided by Mrs. Shoaf's physicians, and Mrs. Shoaf even executed the acknowledgment form without any apparent concern for its import or notable impact on Mr. and Mrs. Shoaf's memory. Given such circumstances, there is no reason to credit their testimony that they were not provided notice by the hospital.

8/ Dr. Naidich, like Dr. Elster, is board-certified in diagnostic radiology with special qualifications in neuroradiology.

9/ At hearing, Dr. Duchowny explained that, by lack of expressive language, he meant that Raven didn't speak in words. (Transcript, page 119)

10/ As reflected by Dr. Brunstrom's report, Raven's developmental history was obtained from her parents. Mr. Shoaf offered similar testimony at hearing, and Raven's developmental history was corroborated by, among others, Barbara Buwalda, Raven's speech-language therapist, Donna Hoffberg, Raven's occupational therapist, and Dr. Eileen Fennell, a board-certified clinical neuropsychologist, who evaluated Raven's cognitive status.

11/ Raven is unable to speak, and therefore severely impaired in her ability to communicate verbally.

12/ As recommended by Dr. Brunstrom, Raven did have an augmentative communication evaluation at St. Louis Children's Hospital, and a DynaVox 3100 (an electronic speech output device, that can be accessed with a switch or head tracker, which will communicate verbally for Raven) and the Madentec Tracker 2000 bundle were recommended. Apparently, Raven received a DynaVox

and her head tracker in or about early December 2001, and met with Patricia Smith, a speech-language pathologist specializing in augmentation communication on December 5, 2001, to assess the best access method for Raven. As of the date of hearing, Raven was in the early stage of familiarizing herself with the equipment.

13/ Raven was also examined by Dr. Fennell in December 2000, but that effort was apparently unsuccessful. (Transcript, page 387 and 388)

14/ Petitioners also offered the testimony of Raven's physical therapist, Libah Castrillo, but her observations were less insightful.

15/ Permanent and substantial are not defined by the Plan, however, the American Heritage Dictionary of the English Language, New College Edition, defines "permanent" as:

. . . 1. Fixed and changeless; lasting or meant to last indefinitely. 2. Not expected to change in status, condition, or place . . .

It further defines "substantial" as:

. . . 1. Of, pertaining to, or having substance; material. 2. Not imaginary; true; real. 3. Solidly built, strong. 4. Ample, sustaining . . . 5. Considerable in importance, value, degree, amount, or extent . . . --sub-stan'tial-ly adv.

When, as here, the Legislature has not defined the words used in a phrase, they should usually be given their plain and ordinary meaning. Southeastern Fisheries Association, Inc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984.) Where, however, the phrase contains a key word like "substantially," the phrase is plainly susceptible to more than one meaning. Under such circumstances, consideration must be accorded not only the literal or usual meaning of the word, but also to its meaning and effect in the context of the objectives and purposes of the statute's enactment. See Florida State Racing Commission v. McLaughlin, 102 So. 2d 574 (Fla. 1958.) Indeed, "[i]t is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided [in

construing enactments of the legislative]." State v. Webb, 398 So. 2d 820, 834 (Fla. 1981).

Turning to the provisions of the Plan, certain insights may be gleaned regarding the meaning the Legislature intended to ascribe to the word "substantially," and more particularly its use in the phrase "permanently and substantially mentally and physically impaired." First, the Legislature has expressed its intent in Section 766.301(2), Florida Statutes, as follows:

It is the intent of the Legislature to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodian care and rehabilitation. This plan shall apply only to birth-related neurological injuries. (Emphasis added)

"Catastrophic," an adjective of the noun "catastrophe," is defined by The American Heritage Dictionary of the English Language, New College Edition, as "a great and sudden calamity; disaster." (Emphasis added.)

It is further worthy of note that physicians commonly use terms such as "mild," "moderate," and "severe" to describe the scope of an infant's mental and physical injury.

Finally, as observed by the court in Humana of Florida, Inc. v. McKaughn, 652 So. 2d 852, 858 (Fla. 2d DCA 1995), the Florida Birth-Related Neurological Injury Compensation Plan, like the Worker's Compensation Act, is a "limited statutory substitute for common law rights and liabilities." Accordingly, "because 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 . . . [and] a legal representative of an infant should be free to pursue common law remedies for damages resulting in an injury not encompassed within the express provisions of the Plan." Humana of Florida, Inc. v. McKaughn, *supra*, at page 859. Accord, Carlile v. Game and Fresh Water Fish Commission, 354 So. 2d 362 (Fla. 1977)(A statute designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law was intended unless the statute is explicit in this regard.)

Given the Legislature's intent to restrict no-fault coverage under the Plan to "a limited class of catastrophic injuries," as

well as the common practice among physicians to use terms such as "mild," "moderate," or "severe" to describe the degree of an infant's injuries, it is concluded that the word "substantially," as used in the phrase "permanently and substantially mentally and physically impaired," denotes a "catastrophic" mental and physical injury, as opposed to one that might be described as "mild" or "moderate."

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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.