STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COURTNEY LYNN GLENN, a minor, by and through GREGORY H. FISHER, as court appointed guardian of the property of COURTNEY LYNN GLENN, AND ANNA LENTINI, f/k/a ANNA GLENN AND CHRISTOPHER GLENN, individually,	)	
Petitioners,	)	
vs.	)	Case No. 01-3469N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
ALL CHILDREN'S HOSPITAL, INC.,	)	
Intervenor.	)	

FINAL ORDER ON COMPENSABILITY

This cause is before the Division of Administrative Hearings (DOAH) upon remand of the Second District Court of Appeal in All Children's Hospital, Inc., and Florida Birth-Related Neurological Injury Compensation Association v. Department of Administrative Hearings, 55 So. 3d 670 (Fla. 2d DCA 2011).

APPEARANCES

For Petitioners Anna Lentini, f/k/a Anna Glenn and Gregory H. Fisher, a court-appointed guardian of the property of Courtney Lynn Glenn:

Steven C. Ruth, Esquire
Chafica A. Singha, Esquire
Beltz & Ruth, P.A.
Post Office Box 16847
St. Petersburg, Florida 33733-6847

For Petitioner Christopher Glenn:

Timothy F. Prugh, Esquire
Prugh and Associate, P.A.
1009 West Platt Street
Tampa, Florida 33606-2115

For Respondent: Wilbur E. Brewton, Esquire
Tana Duden Story, Esquire
Brewton Plante, P.A.
225 South Adams Street, Suite 250
Tallahassee, Florida 32301

For Intervenor All Children's Hospital, Inc.:

C. Howard Hunter, Esquire
Hill, Ward & Henderson, P.A.
101 East Kennedy Boulevard, Suite 3700
Tampa, Florida 33602

STATEMENT OF THE ISSUE

Whether Petitioners are entitled to compensation under the Florida Birth-Related Neurological Injury Compensation Plan because Courtney Lynn Glenn suffered a birth-related neurological injury as defined in section 766.302 (2), Florida Statutes.[1/]

PRELIMINARY STATEMENT AND STATEMENT OF THE CASE

On August 30, 2001, Gregory H. Fisher, as court-appointed guardian of the property of Courtney Lynn Glenn, and Anna Lentini, f/k/a Anna Glenn, and Christopher Glenn, individually, filed their petition (claim) with the Division of Administrative Hearings (DOAH). The petition claimed:

* * *

> 4. It is alleged COURTNEY LYNN GLENN sustained an injury to the brain or spinal cord, after her birth and post resuscitative efforts, which aggravated a pre-existing condition and rendered the child permanently and substantially physically impaired. At the time of her birth, COURTNEY LYNN GLENN weighed over 2,500 grams.
>
> * * *
>
> 5. The claimed injury occurred on September 30, 1997, while being treated by employees of ALL CHILDREN'S HOSPITAL in the nursery in Bayfront Hospital and later at ALL CHILDREN'S HOSPITAL. The claimed injury occurred after COURTNEY LYNN GLENN was transferred from the labor and delivery room to the newborn nursery.
>
> * * *
>
> 7. Petitioners acknowledge that they have received settlement funds from David J. Moreland, M.D., and Bayfront Hospital. However, this claim is limited to claims of aggravation of a pre-existing injury resulting from the actions and/or omissions of agents and employees of ALL CHILDREN'S HOSPITAL as set forth herein.
>
> 8. Petitioners claim that ALL CHILDREN'S HOSPITAL did not provide them with any notice (pre-delivery or otherwise) of their participation in the NICA Plan, as required under Section 766.316, Florida Statutes. (emphasis added)

Subsequently, Petitioners averred that Bayfront Hospital, d/b/a Bayfront Medical Center (hereinafter "Bayfront Medical Center" or "Bayfront"), also failed to comply with the notice requirements of the Plan.[2/]

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on September 4, 2001, and on October 12, 2001, NICA gave notice that it had determined that the claim did not qualify as a "birth-related neurological injury" within the meaning of section 766.302(2). On November 5, 2001, All Children's Hospital moved to intervene, which motion was granted by an Order entered November 20, 2001. Pursuant to notice, a hearing was held on February 12, 2002, to address the issues of compensability and notice.

At the hearing on February 12, 2002, Petitioners Anna Lentini, f/k/a Anna Glenn, and Christopher Glenn, testified on their own behalf, and Petitioners' Exhibit 1 (the medical records of David Moreland, M.D., Bayfront Medical Center, and All Children's Hospital), Petitioners' Exhibit 2 (the deposition of Melody Couch), Petitioners' Exhibit 3 (the deposition of Jeanne McCarthy, M.D.), and Petitioners' Exhibit 4 (Circuit Court Order, dated June 26, 2001, abating the civil suit), were admitted in evidence. Respondent called no witnesses; however,

Respondent's Exhibit 1 (the deposition of Robert Yelverton, M.D.), Respondent's Exhibit 2 (the deposition of Richard Sheridan, M.D.), Respondent's Exhibit 3 (the deposition of Charles Kalstone, M.D., taken December 13, 2001), and Respondent's Exhibit 4, (the deposition of Charles Kalstone, M.D., taken January 30, 2002), were admitted in evidence. Intervenor presented the oral testimony of Richard Sheridan, M.D., and Robert Yelverton, M.D., and Intervenor's Exhibit 1 (a request for judicial notice [official recognition] of the first amended complaint, second amended complaint, and third amended complaint filed in the civil suit), and Intervenor's Exhibit 2 (amniocentesis needle) were admitted in evidence.

On April 16, 2002, Administrative Law Judge (ALJ) William J. Kendrick entered an Order in which he concluded that: (1) the participating physician complied with the notice requirements of section 766.316, but Bayfront Medical Center did not; (2) that if either the participating physician or the hospital failed to give the requisite notice, then neither the participating physician, the hospital, nor Intervenor All Children's Hospital was entitled to NICA Plan exclusivity; and (3) ordered Petitioners to elect to pursue NICA Plan benefits, eschewing their civil remedies, or to pursue their civil remedies, eschewing NICA Plan benefits.

On May 10, 2002, the ALJ entered a Final Order which incorporated the April 16, 2002, Order, which determined that because Petitioners had elected, on April 26, 2002, and May 2, 2002, to pursue their civil remedies in lieu of a claim for NICA Plan benefits, it was no longer necessary for a DOAH order to address the claim for NICA benefits (i.e., compensability of the claim), and closed the case.[3/]

This case underwent years of appeals to both the Second District Court of Appeal and the Florida Supreme Court. In All Children's Hospital, Inc. v. Department of Administrative Hearings, 863 So. 2d 450 (Fla. 2d DCA 2004), the Second District Court of Appeal reversed the May 10, 2002, Final Order, and held that the ALJ had no jurisdiction over the issue of notice under section 766.316. The Florida Supreme Court in Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 948 So. 2d 705 (Fla. 2007), quashed the Second District's opinion, holding that the ALJ did have jurisdiction over the issue of notice under section 766.316, and remanding the case back to the Second District Court of Appeal for further proceedings consistent with such holding.

Upon remand, the Second District Court of Appeal issued its opinion in All Children's Hospital, Inc. v. Department of Administrative Hearings, 989 So. 2d 2 (Fla. 2d DCA 2008), in

which it held that the physician's predelivery notice to the expectant mother of the physician's participation in the NICA Plan satisfied the statutory notice requirement pertaining to the hospital and certifying the notice question to the Florida Supreme Court.

On review of the foregoing decision, the Florida Supreme Court again quashed the Second District Court of Appeal's decision, holding, in All Children's Hospital, Inc. v. Department of Administrative Hearings, 29 So. 3d 992 (Fla. 2010), that:

> [T]he statute [s. 766.316, F.S.] requires that both participating physicians and hospitals with participating physicians on staff to provide obstetrical patients with notice of their rights and limitations under the plan. Id. at 998.
>
> * * *
>
> . . . the notice provision is severable with regard to defendant liability. Consequently, under our holding today, if either the participating physician or the hospital with participating physicians on its staff fails to give notice, then the claimant can either (1) accept NICA remedies and forego any civil suit against any other person or entity involved in labor or delivery; or (2) pursue a civil remedy only against the person or entity who failed to give notice and forego any remedies under NICA. Id. at 999.
>
> * * *
>
> As to All Children's, it is undisputed that it was exempt from the notice requirement

> because All Children's is a pediatric hospital that does not offer obstetrical services; therefore, it did not have any participating physicians on staff. Id. at 999-1000.

The Supreme Court remanded the case to the Second District Court of Appeal to address issues regarding All Children's Hospital's potential immunity under NICA (the "imputed notice" of All Children's and the "compensability" of the Glenns' claim against NICA), which had been raised by Petitioners on appeal to the Florida Supreme Court, but which had not been previously addressed by the Second District Court of Appeal.

On June 10, 2010, the Florida Supreme Court issued its Mandate to the Second District Court of Appeal, requiring that further proceedings be had in accordance with its opinion. Thereafter, on February 18, 2011, the Second District Court of Appeal entered its opinion (see Preliminary Statement) reversing the May 10, 2002, Final Order of the ALJ, but expressing no opinion on either issue remanded to it by the Florida Supreme Court, stating:

* * *

> Neither of the remanded issues had been presented to us theretofore. As mentioned, the administrative law judge did not decide whether the injuries at issue are compensable under NICA. Therefore, we have had no occasion to review any such decisions, and of course, the fact-finding necessary to resolve the issue is beyond our purview.

> The other matter remanded for our consideration--the Glenns' contention that Bayfront's failure to give notice must be imputed to All Children's because they were in an agency relationship--also is entirely new to us. It has never been briefed in this court. Indeed, All Children's maintains that the Glenns never advanced this position in the proceedings below. Our examination of the record on appeal confirms this.
>
> We are confident that, when remanding the agency issue to us, the supreme court was mindful that we may base our decision only on arguments that were preserved in the lower tribunal. See Aills v. Boemi, 29 So. 3d 1105 (Fla. 2010). For this reason, we may not affirm the administrative law judge's order on the basis of the agency theory advanced for the first time in the supreme court. Thus, we limit our consideration of the matter to the observations made above and as regards this issue we leave the parties to their own devices on remand.
>
> The order of the administrative law judge under review is reversed. We express no opinion on either issue remanded to us in Florida Birth-Related Neurological Injury Compensation Ass'n. v. Department of Administrative Hearings, 29 So. 3d 992 (Fla. 2010) and we remand for further proceedings consistent with that decision. (emphasis added).

The Second District Court of Appeal's Mandate was issued March 8, 2011.

On March 14, 2011, the undersigned successor ALJ sent a letter to all parties requesting that they confer and schedule a telephonic case management conference convenient to all of them.

On March 16, 2011, Petitioners (child, mother, and guardian of the property) filed a Motion for Hearing on Determination of Compensability of the Instant Claim. On March 21, 2011, NICA filed a Response to Petitioners' Motion for Hearing on Determination of Compensability of the Instant Claim. On March 22, 2011, Respondent NICA served a Notice of Status Conference for May 11, 2011. On March 23, 2011, the Motion of Intervenor All Children's Hospital, Inc., for Determination of Compensability was filed. On April 4, 2011, NICA filed a response to Intervenor All Children's Hospital, Inc.'s, Motion for Determination of Compensability. On April 7, 2011, All Children's Hospital, Inc., filed its Reply to NICA's Response to Petitioners' Motion for Hearing on Determination of Compensability. On April 18, 2011, Petitioner Christopher Glenn (father) filed a Notice of Adoption of Motion filed by Courtney Lynn Glenn for Hearing on Determination of Compensability of Instant Claim.

On May 11, 2011, a motion hearing was held by telephonic conference call. On May 13, 2011, the undersigned sent a letter to all counsel, reading in pertinent part,

> Having reviewed my notes of the telephonic hearing on May 11, 2011, it seems prudent to review the record when it arrives from the Second District Court of Appeal before ruling on Petitioners' Motion for Hearing on Determination of Compensability of Instant

> Claim and Intervenor's Motion for Determination of Compensability.
>
> I will advise you of when the record arrives at DOAH, and an order will be entered thereafter as to whether or not an evidentiary hearing will be necessary, and the scope of such hearing, if any. Provision will be made for either the submittal of additional evidence and oral argument or just oral argument on the previously agreed dates of November 17-18, 2011, with proposed final orders to be submitted thereafter.

By agreement of the parties, on May 13, 2011, a Notice of Hearing by Video Teleconference for November 17-18, 2011, was issued.

On May 16, 2011, the record was returned to DOAH by the Second District Court of Appeal, and two days later, a letter from the undersigned notified the parties of the record's arrival at DOAH.

On July 12, 2011, an Order for Clarification was entered which provided in pertinent part:

> 1. Petitioners are granted to and until August 12, 2011, in which to file a memorandum pointing out where, in the history of this cause, the issue of imputed notice was raised and citing to any evidence in the record that supports an imputed notice theory. If not raised, the memorandum shall specify by what legal authority the undersigned may address the issue of imputed notice/agency upon remand when it has never previously been raised at DOAH.

> 2. All other parties are granted to and until August 22, 2011, in which to file rebuttal memoranda.
>
> 3. Petitioners' Motion for Hearing on Determination of Compensability of Instant Claim and Intervenor's Motion for Determination of Compensability (scope of final hearing) will be addressed in an order after August 22, 2011.

After an extension of time in which to do so, Petitioners (mother, child, guardian of the property, and father) filed, on September 9, 2011, a Memorandum in Response to ALJ's Order of July 12, 2011. Petitioners' Memorandum acknowledged that "the record reveals no indication that the issue of 'imputed notice' was raised before DOAH in the past," and that father, mother, child, and guardian of the property "can advance no legal authority whereby DOAH may address the issue of imputed notice/agency on remand when it has never previously been raised;" and asserted that "Petitioners accordingly waive the issue of notice and ask that the cause proceed to a determination of compensability." Respondent filed, on September 21, 2011, Respondent's Response to ALJ's Order of July 12, 2011.

After consideration of all pleadings and positions, an October 4, 2011, Order was entered, which provided, in pertinent part, as follows:

* * *

Administrative Law Judge (ALJ) Kendrick's ruling on the notice issue prompted years of appellate review, resolved most recently in the Second District Court's remand, and by Petitioners' waiver of the "imputed notice" issue before DOAH.

The November 20, 2001, Notice of Hearing, and the transcript and exhibits of the February 12, 2002, hearing, clearly show that the issues/evidence presented at that time included testimony and physical evidence on the issue of whether Courtney Glenn's injuries occurred during labor, delivery or resuscitation in the immediate postdelivery period in a hospital (the statutory period for compensability).

* * *

. . . until compensability vel non is determined, that is, until a determination is made of whether or not the injury claimed is a "birth-related neurological injury" and whether or not "obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital," it would be premature to address the effect, if any, on Petitioners' entitlement to Plan benefits of Petitioners' several recoveries, one or more of which may have occurred while this case [the NICA case] was on appeal.

Therefore, it is clear that, the issue of "imputed notice" having been waived, the only issue before the undersigned at this time is the issue of "compensability," and that any issues regarding recoveries outside of the Birth-Related Neurological Injury Compensation Plan should be addressed only after compensability or lack of compensability under that Plan has been decided.[2/]

That leaves the question of whether or not the undersigned, as the successor to ALJ Kendrick, now retired, may decide the issue of compensability upon the existing record, or whether the case must be tried anew. Only Petitioners suggest that a new hearing or new evidence is necessary and that a successor ALJ cannot decide the case as to compensability upon the existing record. In support of their position, Petitioners cite Bradford v. Foundation & Marine Construction, Co., 182 So. 2d 447, 449 (Fla. 2d DCA 1996). NICA and All Children's submit that compensability must be decided upon the existing record alone.

The better line of cases distinguishes between circuit court proceedings and those before DOAH. DOAH has specific statutory authority to pass a case to a successor ALJ.[3/] Upon review of the statute and case law, it is concluded that the undersigned may determine the remanded issue of "compensability" upon the existing record, including the evidence submitted at the hearing on February 12, 2002. This procedure comports with fundamental notions of judicial economy and fairness, since it is uncontested that the original hearing in 2002, was to be the final hearing to determine compensability. (See the Notice of Hearing quoted supra).

* * *

Therefore, this cause having already been scheduled by agreement of the parties for hearing on November 17-18, 2011, it is further ORDERED:

* * *

[1.a.] The issue of compensability will be resolved upon the existing record without further evidence, that issue being:

Compensability, to wit: whether the injury claimed is a birth-related neurological injury and whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital

* * *

ENDNOTES

* * *

2/ Petitioners and Respondent NICA agree that the claim is not compensable. Intervenor All Children's asserts that the claim is compensable. If the claim is found not to be compensable, any issues related to other recoveries is rendered moot.

3/ See section 120.57(1)(a), which provides, in pertinent part:

> . . . If the administrative law judge assigned to a hearing becomes unavailable, the division shall assign another administrative law judge who shall use any existing record and receive any additional evidence or argument, if any, which the new administrative law judge finds necessary.

The following cases address a similar statute: Collier Development Corp. v. Dep't of Envtl. Protection, 685 So. 2d 1328 (Fla. 2d DCA 1996)("We likewise conclude that the plain meaning of the statute allows the substitute hearing officer [herein, the successor ALJ] the discretion to conduct a new hearing or decide the case from the record"); University Comm. Hosp. v. Dep't of Health & Rehabilitative Servs, 555 So. 2d 922 (Fla. 1st DCA 1990)(noting the inapplicability of Bradford v. Foundation &

Marine Const. Co., 182 So. 2d 447, 449 (Fla. 2d DCA 1996)).

On October 5, 2011, Petitioners filed Petitioners' Reply to Respondent's Response to ALJ's Order of July 12, 2011, and an Amended Election Pursuant to Order Entered April 16, 2002.

Petitioners' Amended Election Pursuant to Order Entered April 16, 2002, signed by attorneys for all Petitioners, which was filed on October 5, 2011, represented that, contrary to Petitioners' position in their original 2001 claim and at final hearing in 2002, their position in their April 26, 2002, Election, their position in their May 2, 2002, Amended Petition, and their position up to October 5, 2011, Petitioners currently elected to pursue NICA benefits in lieu of pursuing their civil remedies, which new election had the effect of Petitioners' realigning themselves with Intervenor All Children's to currently claim that Courtney Lynn Glenn's situation complies with the definition of "compensable injury" found at section 766.302(2).

Respondent NICA filed its Proposed Amended Final Order on November 7, 2011. Petitioners also filed their Proposed Final Order on November 7, 2011, currently asserting that Petitioners are entitled to the rebuttable presumption of compensability enunciated at section 766.309(1)(a).[4/] On November 14, 2011, Intervenors notified DOAH that they were joining in Petitioners'

Proposed Final Order (with copy) but still wished to have oral argument at the appointed time.

Oral argument was held on November 17, 2011. A transcript of the oral argument was filed on December 5, 2011.

References to the February 12, 2002, evidentiary hearing transcript are (TR-#).

FINDINGS OF SUBSTANTIVE FACT

1. Anna Lentini, f/k/a Anna Glenn (the mother) and Christopher Glenn, are the natural parents of Courtney Lynn Glenn (Courtney), a minor. Gregory H. Fisher is the court-appointed guardian of Courtney's property. (TR-4).

2. Courtney was born a live infant on September 30, 1997, at Bayfront Medical Center, a hospital located in St. Petersburg, Florida, and her birth weight exceeded 2,500 grams. (TR-4).

3. The physician providing obstetrical services at Courtney's birth was David J. Moreland, M.D., who, at all times material was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by section 766.302(7). (TR-4,5).

4. Courtney is permanently and substantially mentally and physically impaired. (TR-5).

5. The cause of Courtney's impairment was an injury to her brain caused by oxygen deprivation. (TR-5).

6. All Children's Hospital is a pediatric institution that does not offer obstetric services, and has no "participating physicians" on its staff. However, at all times material, All Children's Hospital provided, under contract with Bayfront Medical Center, the services of advanced registered neonatal nurse practitioners who provided postdelivery care to infants at Bayfront Medical Center.

7. All Children's Hospital, as such, was not involved in the mother's labor or Courtney's delivery. Immediately following delivery, Dr. Moreland "handed off" Courtney to Melody Couch, ARNP (an employee of All Children's Hospital), who then provided resuscitative care in the immediate post-delivery period via a contract between the two hospitals.

8. All Children's Hospital, through Nurse Couch and other employees of All Children's Hospital, notably neonatologist Jeanne McCarthy, provided a continuum of neonatal care for Courtney at Bayfront Medical Center's newborn nursery, and, following Courtney's transfer, at All Children's Hospital.

9. It has been previously stipulated, and/or determined on appeal, that Dr. Moreland gave lawful NICA notice; that Bayfront did not give lawful NICA notice; that there was no proof that Bayfront's failure to give lawful notice was occasioned by a medical emergency or that Bayfront's giving of notice was otherwise not practicable; and that All Children's Hospital and

its neonatologist were not required to give NICA notice, pursuant to section 766.316 (see Preliminary Statement).

10. A compensable injury is defined by section 766.302(2) as:

> Birth-related neurological injury" means injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality. (emphasis added).

11. While it is undisputed that Courtney's brain was injured by oxygen deprivation which rendered her permanently and substantially mentally and physically impaired, it remains to be determined in this proceeding whether that injury by oxygen deprivation occurred during "labor, delivery or resuscitation in the immediate postdelivery period" (a/k/a "the statutory period").

12. By their 2001 petition, at the 2002 final hearing, and until 2011, Petitioners asserted that the brain injury which caused Courtney's permanent and substantial mental and physical

impairment occurred subsequent to the statutory period while she was in the care of All Children's Hospital.[5/]

13. Intervenor All Children's asserted at the 2002 final hearing that Courtney's injury occurred during the statutory period (TR-41, 42, 50), and has consistently continued to do so, joined in 2011, by Petitioners.

14. NICA has consistently asserted that the injury to Courtney's brain occurred prior to the commencement of the statutory period, that is, prior to the commencement of labor, at the time an amniocentesis[6/] was conducted in the office of the mother's obstetrician.

15. The statute requires that in order to be compensable by NICA, both the child's brain injury and the oxygen deprivation that renders the child permanently and substantially mentally and physically impaired must occur during the statutory period and must occur in a hospital. See § 766.302(2), Fla. Stat., and the Conclusions of Law, infra.

16. It is generally understood that labor commences with the onset of regular uterine contractions, with resulting progressive effacement and dilation of the cervix, culminating with the expulsion or delivery of the infant and placenta. See Dorland's Illustrated Medical Dictionary, 892 (28th ed. 1994). Herein, the parties are agreed that the mother's labor began

with the administration of Pitocin at 5:40 p.m., on September 29, 1997. (See Finding of Fact 32).

17. The respective expert witness testimony, live and/or by deposition, of Dr. Charles Kalstone, a board-certified obstetrician-gynecologist; of Dr. Richard Sheridan, a board-certified neonatologist; and of Dr. Robert Yelverton, a board-certified obstetrician-gynecologist, has been considered, compared, and weighed, in the context of the evidence as a whole. (See Findings of Fact infra).

18. On September 29, 1997, Courtney's mother was in her thirty-eighth week of pregnancy. She was suffering gestational diabetes, controlled by diet. Fetal movement had been essentially normal and one or more non-stress tests had been reassuring, but her obstetrician, Dr. Moreland, planned to deliver Courtney before term, due to the mother's elevated fasting blood sugars.

19. At 8:33 a.m., on September 29, 1997, with the aid of an ultrasound, Dr. Moreland performed an amniocentesis in his office to determine whether Courtney's lungs were mature enough for delivery. Prior to insertion of the needle, fetal movement was noted.

20. The placenta was in an anterior position on the front wall of the uterus. Using what was probably a 22-gauge needle, Dr. Moreland went through the placenta to obtain amniotic fluid.

21. Courtney's mother testified, without refutation, that prior to the amniocentesis, the baby was moving around "like she did every day," but when Dr. Moreland removed the needle, the baby "jumped" as if startled, and that was the last movement she ever felt from the baby in utero.

22. Shortly after the amniocentesis, Dr. Moreland noticed on the ultrasound that, during or shortly after the amniocentesis, the fetal heart rate decelerated into the 60's, before returning to a normal range. The 60's are low for a fetal heart rate and represent a showing of bradycardia,[7/] which is generally associated with hypoxia (deprivation of oxygen).[8/]

23. After the amniocentesis, Dr. Moreland placed the mother on a fetal monitor. Labor had not begun, and this procedure at this point in time is called a "non-stress test," because the mother was not yet in labor. The fetal heart rate (FHR) did not go up to 10 to 15 beats per minute for 10 to 15 seconds, and there were no fetal movements perceived by the test. Therefore, as explained by all three medical experts, this non-stress test was considered to be "non-reactive" or an abnormal test result.

24. Thereafter, there was concern for Courtney's well-being.

25. From approximately 10:41 a.m., until 2:00 p.m., the fetal heart monitor strip remained "non-reactive."

26. Due to the non-reactive, non-stress test and the non-reactive fetal heart monitor results over several hours, Dr. Moreland had the mother moved to Bayfront Radiology for a fetal biophysical profile. A fetal biophysical profile is conducted by ultrasound and external fetal monitoring to determine the fetus' status. A total score of ten points on the biophysical profile is possible. Two points each are assigned for amniotic fluid, fetal breathing, fetal movement, and fetal tone. Two additional points are assigned for the external fetal monitoring (i.e., a reactive non-stress test).

27. Out of a possible ten points, Courtney scored only two points on the biophysical profile. Those two points were for normal amniotic fluid. Courtney achieved zero for each of the following categories: fetal breathing, gross body movement, fetal tone, and the non-reactive non-stress test. All three physicians who provided expert testimony (Drs. Kalstone, Sheridan, and Yelverton) concurred that this biophysical profile was abnormal.

28. Given the abnormal biophysical profile, Dr. Moreland decided to induce labor.

29. At 5:13 p.m., on September 29, 1997, the mother's membranes were artificially ruptured. Mr. Glenn, Courtney's father, was present when the membranes were artificially ruptured and testified that red blood issued from his wife's

vagina at that time and that the amount of blood was so copious that the white towels beneath her had to be changed at least twice, because they were saturated by the blood. Nurse Couch characterized the vaginal liquid as "a clear-to-bloody fluid" (probably blood and water) and considered it evidence of some bleeding occurring inside the mother, but she had no opinion as to whether it was the baby's or the mother's blood. This bloody discharge was noted in the medical records.

30. Drs. Kalstone, Sheridan, and Yelverton agree that the abnormal loss of blood prior to labor was due to the amniocentesis, but Drs. Yelverton and Sheridan opined that after the acute bleed at the amniocentesis, a sub-acute bleed continued and only became damaging to the child in the last two hours of labor. Dr. Kalstone concluded that the brain injury occurred at, or within minutes of, the amniocentesis.

31. When the membranes were artificially ruptured, an internal fetal heart rate monitor was placed.

32. The physicians testified, and the parties are agreed, that labor did not commence until Dr. Moreland first administered Pitocin to induce labor at approximately 5:40 p.m., September 29, 1997, and that labor continued thereafter for five to six hours, with gradually increasing amounts of Pitocin.

33. The beat-to-beat variability of Courtney's fetal heartbeat remained relatively stable for roughly six hours. At

about midnight, September 29, 1997, the variability of the fetal heartbeat changed. By 12:50 a.m., September 30, 1997, the beat-to-beat variability evidenced late decelerations with each uterine contraction. Around 1:52 a.m., Dr. Moreland decided to perform a caesarian section (C-section).

34. Labor stresses any fetus. Uterine contractions compress the entire fetal body and briefly cut off the fetus' supply of oxygen. As labor progresses and uterine contractions become more intense, prolonged, and frequent, the stresses on any fetus increase. Fetal heart monitoring recognizes this sequelae of events so that a caesarian may be performed if necessary. According to Dr. Kalstone, such decelerations may signal that any baby, compromised or not, just can no longer stand the stress of labor. According to the other medical experts, late decelerations can mean new damage is occurring to the already compromised fetus.

35. At approximately 2:10 a.m., the fetal heart monitors were removed, and the mother was sent to the operating room. In preparation for the C-section, oxygen was administered to the mother at 2:15 a.m. Without the Pitocin, uterine contractions tapered off and almost ceased, as did fetal tachycardia, and late decelerations.

36. Courtney was delivered by C-section at 2:46 a.m., September 30, 1997. She was immediately handed-off to Nurse

Melody Couch. At birth, Courtney was hypotensive[9/] and in hypovolemic shock.[10/] Her hematocrit[11/] was 22 percent, which is low. A newborn's hematocrit's normal range is 45 to 50.

37. Ultimately, Courtney lost approximately one-third of her red blood cell mass due to bleeding that occurred in utero.

38. Umbilical cord blood gases were taken at 2:47 a.m. The pH was 7.27 and the base excess was minus 3.4, bicarbonate 23. Doctors Kalstone, Sheridan, and Yelverton agree the cord blood gases were normal, but disagree as to the reason. (See Findings of Fact 51-52).

39. Courtney's Apgars[12/] were one, eight, and eight at one minute, five minutes, and ten minutes, respectively. Between the one-minute and five-minute Apgars, Nurse Couch had removed Courtney to the radiant warmer, bagged her for oxygen, and provided continuous manual stimulation, thus 45-60 seconds of oxygen via positive pressure ventilation (PPV). Following these immediate postdelivery resuscitative measures, Courtney began to have spontaneous respirations and pinked up, although she remained pale. Courtney's initial respiratory rate was in the normal range.

40. The immediate postdelivery resuscitation in the delivery room addressed problems with Courtney's immature lungs, and it is probable that but for the immediate postdelivery resuscitation in the delivery room, Courtney would have died.

The immediate postdelivery resuscitation in the delivery room was considered successful, although the baby continued to need oxygen and was immediately moved to Bayfront's newborn nursery at 3:05 a.m., where she was placed on hood oxygen. Her blood oxygen saturation then increased from 78 to 94, with blood saturations of 85 or higher being the norm.

41. In the newborn nursery, it was concluded that Courtney was stable. However, the baby remained pale, and was grunting, with intercostal retractions and nasal flaring, which are signs of respiratory distress.

42. Due to Courtney's very low blood pressure, and her being symptomatic of hypovolemia, Nurse Couch gave the baby 15 cc of albumin at 3:35 a.m., and 15 cc of albumin at 3:40 a.m.

43. Around 4:35 a.m., just prior to transfer to All Children's Hospital, Courtney was intubated, due to respiratory distress.

44. A transfer team took Courtney to All Children's about 5:00 a.m., where, after typing and cross-matching, she received a blood transfusion due to her low hematocrit. She subsequently suffered seizures and was diagnosed with perinatal depression; developed acute tubular necrosis of the kidney; and was diagnosed with hypoxic encephalopathy.

45. Obstetrician Kalstone, Neonatologist Sheridan, and Obstetrician Yelverton agree that the amniocentesis caused a

significant intrauterine bleed, and that there were signs of hypoxia prior to the compensable statutory period (labor, delivery, and resuscitation in the immediate postdelivery period in a hospital).

46. Drs. Kalstone, Sheridan, and Yelverton further agreed that the fetus was compromised at the time of, or shortly after, the amniocentesis, but before labor was induced.

47. Although the post-birth pathology report showed no evidence of placental injury, Dr. Kalstone testified that absence of placental injury is not inconsistent with the placenta having been lacerated at the amniocentesis. Dr. Yelverton agreed that because the placenta was removed with the C-section, subsequent to the amniocentesis, it had to be disrupted from the uterine wall, and therefore, one would not necessarily see a needle puncture.

48. Dr. Kalstone testified on behalf of NICA. He is an obstetrician and his testimony was the clearest of the three testifying physicians. He testified that Courtney suffered a neurological brain injury as the result of an acute intrauterine bleed at the approximate time of the amniocentesis, and that she was significantly compromised by hypoxic brain impairment (brain impairment from oxygen deprivation) before labor began.

49. Although Obstetrician Yelverton and Neonatologist Sheridan, testifying for Intervenor, were of the opinion that

Courtney likely suffered hypoxic insult to her brain as a result of placental bleeding following amniocentesis (a short, acute bleed), they also opined that her disabling neurological injury occurred in the last two hours of labor. Their opinions are based almost exclusively upon the late decelerations in the two hours immediately preceding the C-section.

50. Dr. Yelverton and Dr. Sheridan concurred that if a baby, evidencing Courtney's biophysical profile shortly after amniocentesis, were immediately delivered by C-section, that baby had a good chance, despite an intrauterine bleed, of complete recovery, but this information was anecdotal, at best, and Dr. Yelverton also stated that Courtney's never moving after the amniocentesis was unusual, if not unique, in his experience.

51. Drs. Yelverton and Sheridan discounted Courtney's normal cord gases, testifying that their normalcy resulted from the discontinuation of Pitocin and administration of oxygen to the mother just before delivery when the baby resuscitated in utero for 30-45 minutes. They also opined that although there was evidence of compromise to Courtney after the amniocentesis, as evidenced by the results of the biophysical profile and the fetal monitoring strips in Dr. Moreland's office, the hypoxic injury to Courtney's brain, which rendered her permanently and substantially impaired, occurred within the last two hours of

labor when the fetal monitoring strips showed the baby's heart rate changed and the baby experienced late decelerations.

52. Contrariwise, Dr. Kalstone testified that the normal blood gases from the umbilical cord, in fact, established that there was no evidence that metabolic acidosis had been produced as a result of the labor process, even though there were late decelerations, and even though the late decelerations indicated some degree of uteroplacental insufficiency. Also, in his opinion, due to the insult at the amniocentesis, the baby already was not able to tolerate the stresses of labor before labor began, and no new or subsequent hypoxic event occurred in the last two hours of labor, when the baby's heart rate changed and the baby experienced late decelerations. In his opinion, the cord blood gas did not show signs of metabolic acidosis, as might be expected if there had been progressively worsening asphyxia or stresses from the last two hours of contractions.

53. Dr. Kalstone testified, on behalf of NICA, via a deposition taken on December 13, 2001, and by a second deposition taken on January 30, 2002. His testimony is not discredited just because, prior to his testimony in this case, he had regularly reviewed claims for NICA, or because he had frequently testified at NICA's behest in contested cases. NICA's standard procedure is to have physicians (as opposed to legal or administrative personnel) provide guidance in medical

matters, such as accepting or rejecting a claim, and it was not shown that Dr. Kalstone had, prior to this case, predominantly testified either for, or against, compensating NICA claims, nor is it reasonable to assume he did not thoroughly study the necessary medical records.

54. Admittedly, in the instant case, NICA initially provided Dr. Kalstone only limited portions of the medical records and those records initially provided to Dr. Kalstone did not include the Bayfront fetal heart rate strips relied-on so heavily by Drs. Yelverton and Sheridan. However, at his own insistence, Dr. Kalstone was provided with those fetal heart strips and did not, in his second deposition, significantly alter the opinion he had given initially, that Courtney sustained injury to her brain by oxygen deprivation occurring before the onset of labor, and thus, outside the statutory period.

55. Similarly, in assessing bias or predisposition to an opinion, it is noted that Dr. Yelverton admitted that he has never testified in support of any claim against any medical personnel. It also is noted that his testimony became more heavily weighted toward non-compensability between his deposition and his testimony at hearing.

56. In assessing the weight to be given the respective expert opinions, it also is noted that Dr. Sheridan did not

consider himself an expert in fetal monitoring strips and that he deferred to the obstetricians in analyzing them. Also, in his opinion, more likely than not, without the occurrence of the acute bleed due to the pre-labor amniocentesis, Courtney would not have sustained any brain injury.

57. Based on the medical records as a whole; the bradycardia at, or closely following, the amniocentesis; the "jump" given by the baby at the amniocentesis, the baby's never moving in utero after the amniocentesis (even quite late in events when the mother was repositioned and given oxygen just before the C-section); the early abnormal biophysical profile; the bloody discharge when Dr. Moreland artificially ruptured the membranes; the probability that any nick to the placenta from the amniocentesis needle was unintentionally camouflaged by the C-section; the fetal monitoring strips demonstrating no accelerations before labor began; and little or no FHR variability before labor began, Dr. Kalstone's testimony that Courtney suffered a significant and impairing hypoxic event to her brain prior to the initiation of labor is the more persuasive medical opinion.

58. Dr. Kalstone's opinion that the hypoxic injury occurred at the time of the amniocentesis was adequately supported and coherent. After explaining the significance of Dr. Moreland's first ultrasound picking up a decelerated FHR,

and his fetal monitor's non-reactive stress test, Dr. Kalstone described the implications of the early biophysical profile and other key points supporting his opinion as follows:

> In addition, because the test [nonreactive nonstress test] was abnormal, he [Dr. Moreland] requested biophysical profile be done by ultrasound, which was done at the Bayfront Medical Center and that was very abnormal. There were -- they gave two points out of eight and that is definitely an ominous or low biophysical profile.
>
> The total biophysical profile includes the ultrasound plus the external fetal monitoring. So you give zero points for a nonreactive strip. So, really, that is two out of ten, and the only positive, where they give the two points was that the amniotic fluid volume was estimated to be normal.
>
> So what this means is, in my opinion, that something happened after the amniocentesis or during and after that compromised the baby and that was manifest in various ways that were measured by certain parameters.
>
> For example, the fetal heart rate is regulated, the rate and the variability is regulated by the brain and the test was nonreactive. So that suggested that the brain was not regulating the fetal heart rate as it usually does. In a normal way, it wasn't.
>
> And then the other parameters indicated an acute asphyxial episode for the most part. In other words, the tone and the movement and breathing movements in the baby, those three things were diminished or absent. All of those things are controlled by the central nervous system, the autoregulation part of the central nervous system.

> So that made four things that were abnormal that suggested that the brain was to one extent or another affected by hypoxia. That is usually the mechanism that would cause that kind of situation or result. Therefore, the brain wasn't regulating these various parameters like it usually does.
>
> So that was apparent with the biophysical profile of two over ten. So to me, it seemed clear that the amniocentesis, the bloody tap and the trauma caused bleeding from the placenta, fetal bleeding, and that compromised the baby before the patient was even admitted.
>
> * * *
>
> Q: What is the significance, if any, of the fact that there was zero awarded for fetal breathing, zero awarded for gross body movement, zero awarded for fetal tone, and zero awarded for reactive nonstress test.
>
> A: That indicates that the fetus is severely compromised because those are all tests that indicate or try to confirm that the brain is being oxygenated normally. Fetal tone and fetal breathing and the nonstress test and fetal movement are all controlled by the central nervous system and when none of those parameters is normal and you get zero for all of these four things, then that is a very ominous biophysical profile test.

59. Whereas Drs. Yelverton and Sheridan testified that the fetal heart monitoring strips were relatively normal up until midnight, despite a tachycardia and a decrease in beat-to-beat variability, Dr. Kalstone testified:

> . . . there were no accelerations of the fetal heart, which is a response to fetal movement and that indicated over a long

period of time this was a case that the baby wasn't--the baby's brain wasn't being oxygenated normally.

So when the patient was put on the monitor at 10:58 on 9/29/97 after the patient was sent over following the amniocentesis to the labor and delivery area, the following things were present in the fetal heart monitor strip.

Number one, there were no accelerations the whole time, which is very abnormal. At the most, a normal baby may not have any accelerations for 45 to 90 minutes at the most for a fetal sleep cycle. So hours and hours of no accelerations is ominous. That is number one.

Number two, the monitoring at first was external and then after the membranes were ruptured, after 17:00 and the internal fetal monitor applied, there was really minimal or no variability on the fetal heart on either the external or the internal monitor tracings throughout the whole time you just stated, up until the monitor was disconnected within an hour of delivery.

So basically, so far those are two things that are abnormal. No accelerations, no variability. Both extremely ominous findings indicating that the brain was not oxygenated or had been damaged by hypoxia so it was unable to autoregulate the fetal heart and make variability or make accelerations.

The next thing that was abnormal was the fetal heart rate was slightly elevated 160 to 170, which part of the time of the tracing, that is fetal tachycardia and that is probably due to the hypovolemia of the fetus. It can be a sign of hypoxia, but, alone, fetal tachycardia isn't necessarily a sign of the fetal hypoxia. At any right

> [sic], the fetal heart was elevated some, not markedly so.
>
> * * *
>
> And what I wanted to point out on the monitoring that was done before she was admitted, because that is important also, were these blunted decelerations.
>
> For example, on page 00219, if you turn to that page, that was around 11:28 a.m., there is this deceleration of the fetal heart to around 110, but the shape of it is abnormal deceleration, and some people call those blunted decelerations of the fetal heart, and that can go along with lack of accelerations and no variability in a previous brain insult.
>
> * * *
>
> I don't want to dwell on it too much, but I was just giving that as an example that there were other things on this strip that occurred before the patient was admitted that weren't normal either, and this was one of them.

60. Although Dr. Kalstone's opinion also differed significantly from Dr. Sheridan's and Dr. Yelverton's opinions with regard to the late "decels" closer in time to delivery (from approximately midnight to 2:40 a.m.), Dr. Yelverton admitted that, "[t]he late decelerations are simply a manifestation of hypoxia. It's not doing the damage. It's a suggestion that this baby cannot tolerate this degree of labor based on the amount of oxygen it is getting to the heart and brain."

61. Dr. Kalstone, testified that, ". . . the late decelerations are a reflection of a baby that was already significantly compromised in regard to its central nervous system function, which then created a decrease in reserve that manifest[ed] itself with this fetal heart rate pattern shortly before 1:00 a.m.," and that, ". . . the late decelerations indicated uteroplacental insufficiency of some degree. In other words, the baby wasn't in a condition to tolerate the stresses of the contractions or the labor."

62. Dr. Kalstone further testified that, although there were late decelerations which began about 12:30 p.m., and which continued until the monitor was disconnected at 2:10 a.m., the late decelerations indicated that Courtney did not have much reserve to tolerate the stress of the contraction, but that the decreased variability and lack of accelerations throughout the entire fetal monitoring were the most important indicators of the fetus's well-being or lack thereof.

63. Therefore, although resuscitation in the immediate postdelivery period in the hospital was necessary to save Courtney's life, more likely than not, the qualifying insult and the permanent and substantial mental and physical impairment due to oxygen deprivation to her brain occurred in the obstetrician's office before the statutory period began in the hospital.

64. It must, therefore, be concluded that Courtney Lynn Glenn suffered a significant hypoxic event prior to the compensable statutory period of "labor, delivery, and resuscitation in the immediate postdelivery period in a hospital."

CONCLUSIONS OF LAW

65. For all the reasons and history set out in the Preliminary Statement, and pursuant to sections 766.301-766.316, the Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause.

66. 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 after January 1, 1989. § 766.303(1), Fla. Stat.

67. The injured infant, her or his personal representative, parents, dependents, and next of kin, may seek compensation under the plan by filing a claim for compensation with the Division of Administrative Hearings. §§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat. The Florida Birth-Related Neurological Injury Compensation Association, which administers the Plan, has "45 days from the date of service of a complete claim . . . in which to file a response to the petition and submit relevant written information relating to the issue of

whether the injury is a birth-related neurological injury." § 766.305(4), Fla. Stat.

68. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the Administrative Law Judge to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned Administrative Law Judge in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

69. In discharging this responsibility, the Administrative Law Judge must make the following determination based upon 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.

§ 766.309(1), Fla. Stat. An award may be sustained only if the Administrative Law Judge concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth." § 766.31(1), Fla. Stat.

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

> Injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders an 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.

71. Both the brain injury and the oxygen deprivation that renders the child permanently and substantially mentally and physically impaired must occur during the statutory period. See § 766.302(2), Fla. Stat. Bennett v. St. Vincent's Med. Ctr, Inc., 71 So. 3d 828 (Fla. 2011); Nagy v. Fla. Birth-Related

Neurological Injury Comp. Ass'n, 813 So. 2d 155 (Fla. 4th DCA 2002).

72. Section 766.309(1)(a), provides:

> (a) Whether the injury claimed in 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).

73. Throughout most of the tortured history of this administrative case, and presumably throughout their circuit court settlements with Dr. Moreland and Bayfront Medical Center, Petitioners have asserted that the NICA claim has been forced upon them by the circuit court and their NICA claim is not compensable.[13/] However, as of their October 5, 2011, Amended Election Pursuant to Order entered on April 16, 2002, they have expressed their intent to pursue NICA benefits in lieu of their civil remedies, and they have now asserted, for the first time, their reliance on the section 766.309(1)(a) presumption. This change of position was due to the clarification of the presumption expressed in Bennett, supra, which, for the first time, held that the presumption may be exercised exclusively by the petitioners/claimants, and that

the presumption is of the "bursting bubble" variety. See Bennett, supra and Dep't of Agric. & Consumer Servs. v. Bonanno, 568 So. 2d 24, 31 (Fla. 1990), to the effect that the presumption disappears when credible, contrary evidence is introduced to rebut the presumption, thereby returning the burden of proof to the claimants to prove that the claim is covered by the NICA Plan.

74. Petitioners, having elected against invoking the presumption at the evidentiary hearing in 2002, now seek to impose it, joined by Intervenor. Reason, as well as fundamental fairness, would suggest that Petitioners are estopped from invoking the presumption in favor of compensability this late in the proceedings, but that premise bears examination.

75. Although Bennett is silent as to when the presumption must be invoked by a NICA claimant/petitioner in order to be valid, it is more reasonable than not to conclude that a petitioner must invoke the presumption at least before the evidentiary hearing record has closed, because whether or not the presumption is invoked will necessarily affect how the other parties present their evidence. Indeed, here, the case is being decided upon the 2002 record. However, the Intervenor was permitted to invoke the presumption at the 2002 evidentiary hearing, and therefore, Respondent cannot be prejudiced by

applying the presumption to the evidence presented in 2002, now that Petitioner has joined Intervenor.

76. That said, in this case, the section 766.309(1)(a) presumptive bubble is burst. The greater weight of competent substantial evidence in this case demonstrates that Courtney Lynn Glenn sustained injury to her brain by oxygen deprivation which occurred many hours prior to the "statutory period" of "labor, delivery, or resuscitation in the immediate postdelivery period." Her brain injury and its resultant permanent and substantial mental and physical impairment occurred at, or shortly after, the amniocentesis outside the hospital, in the physician's office, and many hours before "the statutory period" began. The fact that resuscitation in the immediate postdelivery period was necessary to save Courtney's life, probably due to her immature lungs, does not alter the previous statement. The record supports a conclusion that Courtney's brain was already profoundly injured before labor began, so as to render her permanently and substantially mentally and physically impaired.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED:

(1) The claim for compensation herein is dismissed with prejudice.

(2) Inasmuch as the claim has been determined to be non-compensable it is not necessary to reserve jurisdiction to schedule a hearing concerning Petitioners' recoveries outside the NICA Plan upon any jurisdictional theory.

DONE AND ORDERED this 27th day of January, 2012, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of January, 2012.

ENDNOTES

1/ At oral argument on November 17, 2011, it was agreed that if the claim is found compensable, the issue of the effect of prior settlements with Dr. Moreland and Bayfront would be the subject of a subsequent hearing which would, among other issues, determine whether DOAH has jurisdiction to address the issue.

2/ This language appears in the April 16, 2002, Final Order.

3/ In light of subsequent changes of position by Petitioners, it is noted that on April 26, 2002, Petitioners filed Petitioners' Election Pursuant to Order Entered on April 16, 2002, stating:

> Petitioners, COURTNEY LYNN GLENN, a minor, by and through GREGORY H. FISHER, as Court Appointed Guardian of the Property of COURTNEY LYNN GLENN, and ANNA LENTINI, f/k/a ANNA GLENN, individually, pursuant to an Order entered by Administrative Law Judge William J. Kendrick on April 16, 2002, hereby elect not to waive notice and to pursue their civil remedies in lieu of pursuing a claim for Plan benefits.

On May 2, 2002, Petitioners filed an Amended Petition on Behalf of Christopher Glenn to Pursue Civil Remedy in Lieu of Proceeding [sic] a Claim for Plan Benefits, stating:

> The Petitioner, CHRISTOPHER GLENN, by and through his undersigned attorney, hereby files this Amended Petition as the natural father of COURTNEY GLENN, a minor, and pursuant to an Order entered by Administrative Law Judge William J. Kendrick on April 16, 2002, hereby elects not to waive notice and to pursue his civil remedy in lieu of pursuing a claim for plan benefits.

> Counsel previously did sign the Petitioners' Election Pursuant to Order Entered on April 16, 2002, and amends that previous petition to specifically allege on behalf of CHRISTOPHER GLENN that he also elects specifically not to waive notice and he does desire to pursue his civil remedy in lieu of pursuing a claim for plan benefits.

Post-remand, on October 5, 2011, Petitioners filed an Amended Election Pursuant to Order Entered April 16, 2002, stating:

> Petitioners COURTNEY LYNN GLENN, a minor, by and through GREGORY H. FISHER, as Court Appointed Guardian of the Property of COURTNEY LYNN GLENN, and ANNA LENTINI f/k/a ANNA GLENN, individually, pursuant to an Order entered by Administrative Law Judge William J. Kendrick on April 16, 2002, hereby elect to pursue NICA benefits in lieu of pursuing their civil remedies.

At oral argument, post-remand, on November 17, 2011, Petitioners and Intervenor asserted that the ALJ had no jurisdiction to require an election in the April 16, 2002, Final Order.

4/ See n. 3, above, and Conclusion of Law 72 infra. Petitioners' change of position was prompted by the recent decision of the Florida Supreme Court in Bennett v. St. Vincent's Med. Ctr., Inc., 71 So. 3d 828 (Fla. 2011), which held that only a petitioner/claimant may assert the s. 766.309 (1)(a), presumption of compensability.

Due to their change of position and the new case law regarding the presumption of compensability, it should be noted that Petitioners asserted in the 2002 NICA hearing that "[w]e're taking the position that once the child was taken to the [Bayfront] newborn nursery, that subsequent to that, All Children's Hospital and their employees--that they missed it and this child was injured. It was an injury exacerbating a pre-existing injury . . ." (TR-25), and "It's not about an injury that occurred during labor, delivery, and immediate post-resuscitative period." (TR-32) and, ". . . we have a right to opt out of NICA, . . . we have the right to opt out . . . [Anna Lentini] does opt out." (TR-36). ". . . Christopher Glenn, can opt out. And he chooses to do so." (TR-38).

Also, the Florida Supreme Court noted that:

> "[t]he Glenns argued that either All Children's does not have NICA immunity because it is an agent of Bayfront and that, consequently, Bayfront's failure to provide notice is imputed to All Children's. In the alternative, the Glenns argue that All Children's is not immune from civil suit because the injuries claimed against All Children's did not occur during labor, delivery, or immediate post resuscitative efforts." All Children's Hospital, Inc. v. Dep't of Admin. Hearings, 29 So. 3d 992, 1000 (Fla. 2010).

5/ See n. 4.

6/ "Amniocentesis" is the percutaneous transabdominal puncture of the uterus to obtain amniotic fluid. Dorland's Illustrated Medical Dictionary 60 (28th ed. 1994).

7/ "Bradycardia" is slowness of the heartbeat, as evidenced by the slowing of the pulse rate to less than 60. "Fetal bradycardia" is a fetal heart rate of less than 120 beats per minute, generally associated with hypoxia. Dorland's Illustrated Medical Dictionary 223 (28th ed. 1994).

8/ "Hypoxia" is "reduction of oxygen supply to tissue below physiological levels despite adequate perfusion of the tissue by blood. Cf. anoxia."

"Fetal hypoxia" is "hypoxia in utero, caused by conditions such as inadequate placental function (often abruptio placentae), . . . " Dorland's Illustrated Medical Dictionary 812 (28th ed. 1994).

9/ "Hypotensive" is characterized by or causing diminished tension or pressure, as abnormally low blood pressure; a person with abnormally low blood pressure. Dorland's Illustrated Medical Dictionary 810 (28th ed. 1994).

10/ "Hypovolemic (or hypovolemia)" refers to abnormally decreased volume of circulating fluid [plasma] in the body. Dorland's Illustrated Medical Dictionary 812 (28th ed. 1994).

"Shock" is a condition of profound hemodynamic and metabolic disturbance characterized by the failure of the circulatory system to maintain adequate perfusion of vital organs. It may result from inadequate blood volume (hypovolemic shock). Hypovolemic shock is shock resulting from insufficient blood

volume for the maintenance of adequate cardiac output and blood pressure and tissue perfusion. Without modification, the term refers to absolute hypovolemic shock caused by acute hemorrhage or excessive fluid loss. Dorland's Illustrated Medical Dictionary 1516 (28th ed. 1994).

11/ "Hematocrit" 1. a tube with graduated markings so as to determine the volume of packed red cells in a blood specimen by centrifugation. 2. by extension, the measurement obtained using this procedure or the corresponding measurements produced by automated blood cell counters. Dorland's Illustrated Medical Dictionary 742 (28th ed. 1994).

12/ An Apgar score is a numerical expression of the condition of a newborn infant, usually determined at 60 seconds after birth, being the sum of points gained on assessment of the heart rate, respiratory effort, muscle tone, reflex irritability, and color. Dorland's Illustrated Medical Dictionary 1497 (28th ed. 1994).

13/ See nn. 3-4.

COPIES FURNISHED:
(Via Certified Mail)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(Certified Mail No. 7010 1670 0000 3103 8191)

Timothy F. Prugh, Esquire
Prugh and Associate, P.A.
1009 West Platt Street
Tampa, Florida 33606-2115
(Certified Mail No. 7010 1670 0000 3103 8207)

C. Howard Hunter, Esquire
Hill, Ward & Henderson, P.A.
101 East Kennedy Boulevard, Suite 3700
Tampa, Florida 33602
(Certified Mail No. 7010 1670 0000 3103 8214)

Wilbur E. Brewton, Esquire
Tana Story, P.A.
Brewton Plante, P.A.
225 South Adams Street, Suite 250
Tallahassee, Florida 32301
(Certified Mail No. 7010 1670 0000 3103 8221)

Steven C. Ruth, Esquire
Beltz and Ruth
Post Office Box 16847
St. Petersburg, Florida 33733-6847
(Certified Mail No. 7010 1670 0000 3103 8238)

Lynn Walker Wright, Esquire
Wright, Railey & Harding
2716 Rew Circle, Suite 102
Ocoee, Florida 34761
(Certified Mail No. 7010 1670 0000 3103 8245)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7010 1670 0000 3103 8252)

Elizabeth Dudek, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(Certified Mail No. 7010 1670 0000 3103 8269)

NOTICE OF RIGHT TO JUDICIAL REVIEW

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