STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JON PETERSEN AND KIMBERLY PETERSEN, husband and wife and as parents and natural guardians of JENNIFER PETERSEN, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 04-1880N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
JANA M. BURES FORSTHOEFEL, M.D. and TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, INC.,	)	
Intervenors.	)	

FINAL ORDER ON COMPENSABILITY AND NOTICE

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a hearing in the above-styled case on July 15, 2005, in Tallahassee, Florida.

APPEARANCES

For Petitioners: William R. Waters, Jr., Esquire
Pearson & Waters, P.A.
703 North Monroe Street
Tallahassee, Florida 32303

For Respondent: M. Mark Bajalia, Esquire
Brennan, Manna & Diamond
76 South Laura Street, Suite 1700
Jacksonville, Florida 32202

For Intervenor Jana M. Bures Forsthoefel, M.D.:

Jeannette M. Andrews, Esquire
Andrews, Crabtree, Knox & Andrews, LLP
Post Office Box 12800
Tallahassee, Florida 32317-2800

For Intervenor Tallahassee Memorial Regional Medical Center, Inc.:

Jesse F. Suber, Esquire
Henry, Buchanan, Hudson,
Suber & Carter, P.A.
Post Office Drawer 1049
Tallahassee, Florida 32302

STATEMENT OF THE ISSUES

1. Whether Jennifer Peterson, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

2. Whether the hospital's failure to give notice, as contemplated by Section 766.316, Florida Statutes, was excused because the patient had an "emergency medical condition," as defined by Section 395.002(9)(b), Florida Statutes, or the giving of notice was not practicable.

PRELIMINARY STATEMENT

On May 27, 2004, Jon Petersen and Kimberly Petersen, as parents and natural guardians of Jennifer Petersen (Jennifer), a

minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on June 2, 2004, and on November 19, 2004, following a number of extensions of time within which to do so, NICA filed its response to the petition, wherein it gave notice that it was of the view that Jennifer did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, and requested that a hearing be scheduled to resolve whether the claim was compensable.

The hearing on compensability was initially scheduled for April 4, 2005, but at the parties' request was continued and a hearing was ultimately held on July 15, 2005. By then, Jana M. Bures Forsthoefel, M.D., and Tallahassee Memorial Regional Medical Center, Inc. (Tallahassee Memorial Hospital) had been accorded leave to intervene, and Petitioners had filed an amended petition which averred Jennifer's birth weight did not meet the statutory minimum for coverage under the Plan (2,500 grams for a single gestation), and that the hospital failed to comply with the notice provisions of the Plan. Consequently, the hearing scheduled for July 15, 2005, was noticed to resolve whether the claim was compensable, and whether the hospital's failure to give notice was excused because the patient had an

"emergency medical condition," as defined by Section 395.002(9)(b), Florida Statutes, or the giving of notice was not practicable.

At hearing, Joint Exhibits 1 and 2 were received into evidence, and post-hearing Petitioners' Exhibit 1 was received into evidence. (Transcript, page 5, and Order, dated August 2, 2005.) Testifying on behalf of Petitioners were Kimberly Petersen and Harlan Giles, M.D., and testifying on behalf of Tallahassee Memorial Hospital were Stacie Forbes, R.N., Jeff Ahsinger, R.N., and Jana M. Bures Forsthoefel, M.D. No other witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed August 9, 2005, and the parties were accorded 10 days from that date to file written argument or proposed orders. Intervenor Jana M. Bures Forsthoefel, M.D., elected to file written argument, and the other parties elected to file proposed orders. The parties' submittals have been duly considered.

FINDINGS OF FACT

Preliminary findings

1. Jon Petersen and Kimberly Petersen are the natural parents of Jennifer Petersen, a minor. Jennifer was born a live infant on December 20, 2001, at Tallahassee Memorial Hospital, a hospital located in Tallahassee, Florida.

2. The physician providing obstetrical services at Jennifer's birth was Jana M. Bures Forsthoefel, M.D., who at all times material hereto, was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.

Coverage under the Plan

3. Pertinent to this case, coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as an

> injury to the brain . . . 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 . . . .

4. In this case, it is undisputed that Jennifer suffered an injury to the brain caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital, which rendered her permanently and substantially mentally and physically impaired. What is disputed is whether Jennifer weighed at least 2,500 grams at birth. As to that issue, Petitioners were of the view that "[b]ased on the evidence presented . . . it cannot be established what

Jennifer Petersen's 'actual' birth weight was at the time of her birth" or, alternatively, that it was most likely less than the 2,500 grams recorded on admission to the newborn intensive care unit (NICU), after she had been intubated. (Petitioners' proposed order, page 4.) In contrast, the other parties were of the view that the weight recorded in the NICU, which they chose to characterize as the "official birth weight," should be accepted as Jennifer's birth weight, without consideration of any weight attributable to the endotracheal tube that was inserted after delivery. (See Respondent's and Intervenors' post-hearing submittals.)

5. Notably, when it has been shown "that the infant has sustained a brain . . . 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 . . . [arises] that the injury is a birth-related neurological injury, as defined [by the Plan]." § 766.309(1)(a), Fla. Stat. Under the circumstances of this case, the presumption is that Jennifer's birth weight was 2,500 grams or greater. Consequently, to be resolved is whether there was credible evidence produced to support a contrary conclusion and, if so, whether absent the aid of the presumption the record demonstrates, more likely than not, that Jennifer's birth weight met or exceeded 2,500 grams.[1]

The proof regarding Jennifer's birth weight

6. Pertinent to Jennifer's birth weight, the proof demonstrates that when delivered at 12:42 a.m., December 20, 2001, at 33 4/7 weeks gestation, Jennifer was severely depressed, and was immediately intubated and given cardiopulmonary resuscitation. At 3 minutes of life, a heart rate greater than 100 beats per minute was achieved, and at 5 minutes of life the endotracheal tube was secured and she was transferred to the NICU, where she was admitted at 12:50 a.m.

7. Following admission to the NICU, Jennifer was weighed for the first, and insofar as the record reveals, the only time.[2] That process was credibly described at hearing by Stacie Forbes, R.N., one of two nurses on duty in the newborn intensive care unit at the time, as follows:

> Q. Okay. Ma'am, what I'm going to . . . show you is . . . [a document that's] identified as Bates stamp 0309 [the Newborn ICU Admission Assessment form[3]] and get you to tell the Judge, if you can, what that document is.
>
> A. Okay. This document is our standard admission document for the newborn intensive care unit. When a baby comes into our unit, this is our initial assessment, the very first thing we do.
>
> * * *
>
> Q. All right. Now, . . . did you write the entries on that form?
>
> A. Yes.

Q. And that's your signature down below?

A. Yes.

Q. Were you present when this baby Jennifer Peterson was weighed?

A. Yes.

* * *

Q. How much did that baby weigh?

A. 2500 grams, or 2.5 kilograms.

Q. What did you . . . write down how much it weighed?

A. I wrote 2.500.

Q. All right. Now, I would like for you, if you would, to just briefly describe to us how you go about weighing a baby to get that weight.

A. Okay. The baby comes in. As soon as the baby is stable, the first thing we do is we put the baby on the radiant warmer, we zero the warmer out, and then we lay the baby on the warmer and the grams comes up on the scale, on the bed scale.

Q. All right. So when you put the baby on the bed scale, the weight in grams appears on a digital display?

A. Yes.

Q. So it's digital, 2500?

A. Yes.

Q. You don't have to do any kind of conversion at all?

A. No.

Q. Okay. Is it always the grams weight that comes up first in every case?

A. Yes.

Q. All right. Now, if you look on that form that you are looking at, it's got a weight in pounds [5 pounds 8.1 ounces] next to it?

A. Yes.

Q. Would you explain to the Court how you go about getting weight in pounds?

A. As soon as the grams comes up, there is a button on the scale that you push that converts it to pounds.

Q. Okay. And so, do you, as the nurse, have to do any sort of mathematical calculation or computation?

A. No.

Q. Who does that -- or how is that done?

A. It's done by the radiant warmer.

Q. Which is where the scale is?

A. Yes, the scale.

* * *

Q. . . . Now, the 2500 grams that you recorded on the newborn admission form?

A. Yes.

Q. Is that the official birth weight of the baby?

A. Yes.

Q. . . . [H]ow is that used later on, in terms of the care of the baby?

A. We do all of our medications, all of our IV fluids, blood transfusions, anything, any medical care, we use grams or kilograms, so, for the baby. We don't use the pounds.

Q. All right. So, in other words, then you take that weight and when you have to figure out how much medicine you are going to give them, it's based many times on the weight of the baby?

A. Yes.

Q. And the weight that you use for that is 2500 grams?

A. Yes, that's correct.

* * *

Q. Was [the baby] intubated when . . . [she] was admitted to the newborn ICU?

A. Yes.

* * *

Q. Okay. Was the baby intubated when it was weighed?

A. Yes.

Q. Do you know what the weight of a standard 3.5 intubation tube is?

A. No.

Q. Did you deduct anything for the intubation tube?

A. No. (Transcript, pages 15-19, 22 and 23.)

8. There is no reason to question Nurse Forbes' testimony that Jennifer's initial weight, as displayed by the bed scale, was 2,500 grams. However, since the scale calculated an equivalent in pounds and ounces as 5 pounds 8.1 ounces, when the correct figure would have been (5 pounds 8.185 ounces), closer to 5 pounds 8.2 ounces, and since only a weight of approximately 2,497.60 grams would produce an equivalent weight of 5 pounds 8.1 ounces, there is cause to question the reliability of the bed scale. Consequently, since no reasonable explanation for the discrepancy was offered at hearing, and since a plausible explanation is malfunction or improper calibration, the weight of 2,500 grams noted for Jennifer on her initial examination cannot be accepted as reliable. Similarly, since the weight of 2,500 grams is not reliable, a reduction of that weight by the weight of the endotracheal tube, if shown,[4] would likewise not produce an accurate reflection of Jennifer's birth weight.[5] Consequently, there being no other evidence of her birth weight, there was no credible evidence produced to rebut the presumption that Jennifer weighed at least 2,500 grams at birth.

The notice provisions of the Plan

9. With regard to notice, Petitioners have stipulated that "Dr. Forsthoefel provided notice to the Petitioners pursuant to Section 766.316, Florida Statutes," but contend the hospital, although it had a reasonable opportunity to do so, did not.

(Amended Pre-Hearing Stipulation.) In contrast, while acknowledging that notice was never given, the hospital and NICA contend the giving of notice was not required because, when Mrs. Petersen presented to the hospital on December 18, 2001, she had an "emergency medical condition as defined in s. 395.002(9)(b)," Florida Statutes. Petitioners dispute such contention. Therefore, it must be resolved whether the giving of notice was not required.[6]

10. At all times material hereto, Section 766.316, Florida Statutes (2001), prescribed the notice requirements of the Plan, as follows:

> Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients 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. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency

> medical condition as defined in s. 395.002(9)(b) or when notice is not practicable.

11. Section 395.002(9)(b), Florida Statutes, defines "emergency medical condition" to mean:

> (b) With respect to a pregnant woman:
>
> 1. That there is inadequate time to effect safe transfer to another hospital prior to delivery;
>
> 2. That a transfer may pose a threat to the health and safety of the patient or fetus; or
>
> 3. That there is evidence of the onset and persistence of uterine contractions or rupture of the membranes.

The Plan does not define "practicable." However, "practicable" is a commonly understood word that, as defined by Webster's dictionary, means "capable of being done, effected, or performed; feasible." Webster's New Twentieth Century Dictionary, Second Edition (1979). See Seagrave v. State, 802 So. 2d 281, 286 (Fla. 2001)("When necessary, the plain and ordinary meaning of words [in a statute] can be ascertained by reference to a dictionary.") Here, the hospital does not suggest that, and the record would not support a conclusion that, the giving of notice was not practicable. Consequently, the sole issue is whether Mrs. Petersen had an "emergency medical condition."

Findings related to the hospital and notice

12. At 2:33 a.m., December 18, 2001, Mrs. Petersen, with an estimated delivery date of February 3, 2002, and the fetus at 33 2/7 weeks' gestation, presented to Tallahassee Memorial Hospital, where she was initially assessed in Labor and Delivery Triage. Of note, history revealed Mrs. Petersen had been seen in Triage the previous afternoon, on referral from her obstetrician's office for monitoring because of perceived cervical change. At that time, she complained of feeling menstrual-like cramping, but no cervical change was noted (cervical dilation was recorded at 1.5 centimeters dilation, effacement at 80 percent, and the fetus at -3 station), and nitrazine test was negative. Mrs. Petersen was treated with stat doses of terbutaline (to forestall preterm labor), stabilized, and discharged. During the night, Mrs. Petersen began to feel increasing discomfort, and returned to the hospital (at 2:33 a.m., December 18, 2001) where assessment revealed the cervix at 1.5 centimeters, effacement at 90 percent, and the fetus at station B (Ballott). Mild uterine activity was noted to have begun at 2:00 a.m., but regular or persistent uterine contractions were not noted.[7] Nevertheless, given evidence of early (preterm) cervical change and risk for preterm delivery, Mrs. Petersen was admitted for preterm labor

pathway and tocolysis (inhibilation of uterine contractions). (Joint Exhibit 2, Tabs 3, 4, 23, and 27.)

13. At 3:30 a.m., Mrs. Petersen was transferred from Triage to Labor and Delivery, where she was received at 3:45 a.m. External fetal monitor [EFM] was applied, which revealed a reassuring fetal heart rate and no uterine contractions. Moreover, no uterine contractions were charted until 7:30 a.m., and those that were subsequently charted were irregular until well after 10:00 a.m., December 19, 2001, when Mrs. Petersen's membranes spontaneously ruptured, and she was committed to deliver. At that time, the decision was made to discontinue tycolysis, and to augment labor with Petocin, in anticipation of vaginal delivery. (Joint Exhibit 2, Tabs 7 and 23, Transcript, pages 50, 51, 61, and 62.)

14. Petocin augmentation started at 1:40 p.m., and Mrs. Petersen's labor slowly progressed. Vaginal examination at 6:45 p.m., revealed the cervix at 2 centimeters dilation, effacement at 90 percent, and the fetus at station O, and vaginal examination at 10:11 p.m., revealed the cervix at 3.5 centimeters dilation, effacement at 95 percent, and the fetus at station O. (Joint Exhibit 2, Tab 23.)

15. At 11:55 p.m., Mrs. Petersen requested an epidural for pain management. Dr. Forsthoefel described the events that subsequently unfolded in her Operative Report, as follows:

[Patient] [r]equesting pain management in the form of an epidural. Had received Stadol X 2 with stable fetal heart tones, occasional variable decels with an inadequate pattern of labor with frequent contractions, but not of the intensity required for adequate progress. During the period of the epidural placement, was laid down immediately after the epidural placement and at that point fetal heart tones could not be identified. Immediately I was called and came to the room from Room #1 where there had also been fetal distress. At the time of entry in Room #4 for evaluation, epidural was in place. Blood pressure had dropped immediately after dosing of the epidural and was felt to be secondary to epidural dosing. Fetal heart tones were felt to be in the 70s and 80s, again felt to be secondary to epidural. However, exam was immediately done. Patient was noted to be 4-5 cm, complete vertex at -1 and 0 station.

A forebag was once again palpated and ruptured. At this point, bloody fluid was noted from the rupturing of the forebag. IUPC that was present was removed for the possibility of reinsertion for re-evaluation. Scalp electrode was applied and at that time, fetal heart tones were again felt to be between 75 and 80, initially thought perhaps secondary to positioning and low blood pressure. Call to Anesthesia for ephedrine had been made and was in the process of being given. Patient was tilted from right and left rapidly with no response to fetal heart tones. Maternal heart tones were in the 100s and this was felt to be possible fetal. However, a moment later, it was noted the maternal heart rate was at 80 and what appeared to be the fetal heart was at the exact same rate. Concern that there was misjudgment of fetal tracing interpretation that heart rate had been lost on the fetus and that actual maternal heart rate was being picked up was considered and

although etiology of the event could not be determined at that immediate moment, call for immediate cesarean section was made.

Patient was rushed to the operating room and patient had general anesthesia and patient was prepped and draped for an abdominal procedure. Incision was made with the knife and extended through the fascia with the deep knife. The fascia was incised with the knife and extended in lateral fashion with both blunt and sharp dissection. Fascia was dissected from the underlying rectus muscles using sharp dissection. Rectus muscles were dissected laterally using blunt dissection. Peritoneum was entered with blunt dissection.

Immediately on entry, there was noted to be bloody fluid in the abdominal cavity. Examination of the lower uterine segment, however, quickly revealed no evidence of a defect of the lower uterine segment. Therefore an incision was made rapidly in the lower uterine segment and a transverse incision was made extended with bandage scissors. The infant was delivered [at 12:42 a.m., December 20, 2005] from a vertex presentation. Cord was clamped in two places and cut. Infant was suctioned and was limp. Handed to the Neonatal Team in sterile fashion for resuscitation.

* * *

FINAL ASSESSMENT: Intrauterine pregnancy at 33+ weeks with spontaneous rupture of membranes. In the face of preterm labor, magnesium sulfate discontinued. Patient positive for beta Strep, now contracting. Plan for delivery was made with Pitocin augmentation, intrauterine pressure catheter was placed. Fetal distress requiring immediate cesarean section with evidence of ruptured uterus at the fundus in a bivalve fashion compatible with previous classical incision.

16. To resolve whether Mrs. Petersen had an "emergency medical condition," the parties presented Joint Exhibit 2, which included the medical records related to Mrs. Petersen's admission of December 18, 2001, addressed supra. The hospital also presented the testimony of Dr. Forsthoefel, Mrs. Petersen's obstetrician, and Petitioners presented the testimony of Dr. Giles, a physician board-certified in obstetrics and gynecology, as well as maternal-fetal medicine.

17. On the issue of "emergency medical condition," it was Dr. Forsthoefel's opinion that on presentation to the hospital, Mrs. Petersen was having persistent uterine contractions, and that those contractions persisted despite efforts to stop them. It was further Dr. Forsthoefel's opinion that Mrs. Petersen was not medically stable when she presented to the hospital, or thereafter, and that a transfer might have compromised patient safety.

18. In contrast, it was Dr. Giles' opinion that on presentation to the hospital, Mrs. Petersen was not having persistent uterine contractions, and that she never evidenced persistent contractions until well after her membranes spontaneously ruptured. It was further Dr. Giles' opinion that Mrs. Petersen was medically stable on presentation to the hospital; that she remained medically stable until she entered

the active phase of labor, some time after her membranes ruptured; that the fetus evidenced good fetal heart rate status; and that a transfer would not have posed a threat to the safety of Mrs. Petersen or the fetus.

19. Here, Dr. Giles' testimony, is credited, as most consistent with the proof. Consequently, it is resolved that Mrs. Petersen was not having persistent uterine contractions when she presented to the hospital; that Mrs. Petersen did not evidence persistent uterine contractions until after her membranes ruptured; and that Mrs. Petersen was medically stable at and following admission, and a transfer would not have posed a threat to the safety of Mrs. Petersen or the fetus. Therefore, Mrs. Petersen did not have an "emergency medical condition," as that term is defined by Section 395.002(9)(b), Florida Statutes, and the hospital was required to give notice, during the course of Mrs. Petersen's December 18, 2001, admission.

CONCLUSIONS OF LAW

Jurisdiction

20. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. § 766.301, et seq., Fla. Stat.

Compensability and award

21. In resolving whether a claim is covered by 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. 766.303(2).
>
> (b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital.

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

22. "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 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.

23. In this case, it has been established that the physician who provided obstetrical services at Jennifer's birth was a "participating physician," and that Jennifer suffered a "birth-related neurological injury." Consequently, Jennifer qualifies for coverage under the Plan, and Petitioners are entitled to an award of compensation. §§ 766.309 and 766.31, Fla. Stat. However, in this case, the issues of compensability and notice, and issues related to an award were bifurcated. Accordingly, absent agreement by the parties, and subject to the approval of the administrative law judge, a hearing will be necessary to resolve any disputes regarding the amount and manner of payment of "an award to the parents . . . of the infant," the "[r]easonable expenses incurred in connection with the filing of . . . [the] claim . . ., including reasonable attorney's fees," and the amount owing for "expenses previously incurred." § 766.31(1), Fla. Stat. Nevertheless, since the

notice of intent to initiate civil litigation related to Jennifer's birth was mailed on or after September 15, 2003, the determination of compensability and notice constitute final agency action which is subject to appellate court review.[8] § 766.309(4), Fla. Stat.; Ch. 2003-416, § 77, Laws of Fla.

Notice

24. While the claim qualifies for coverage, Petitioners have sought the opportunity to avoid a claim of Plan immunity in a civil action, by requesting a finding that the notice provisions of the Plan were not satisfied by the hospital. As the proponent of the immunity claim, the burden rested on the hospital to demonstrate, more likely than not, that the notice provision of the Plan were satisfied. See Tabb v. Florida Birth-Related Neurological Injury Compensation Association, 880 So. 2d 1253, 1260 (Fla. 1st DCA 2004)("The ALJ . . . properly found that '[a]s the proponent of the issue, the burden rested on the health care provider to demonstrate, more likely than not, that the notice provisions of the Plan were satisfied.'"); Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 311 (Fla. 1997)("[T]he assertion of NICA exclusivity is an affirmative defense."); id. at 309 ("[A]s 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.")

25. Here, for reasons appearing in the Findings of Fact, the hospital failed to demonstrate that Mrs. Petersen had an "emergency medical condition" during her December 18, 2001, admission, until her membranes ruptured. Consequently, by having failed to give notice, when it had a reasonable opportunity to do so, the hospital failed to comply with the notice provisions of the Plan. Galen of Florida, Inc. v. Braniff, 696 So. 2d 308 (Fla. 1997); Board of Regents v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997)

CONCLUSION

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

ORDERED that the claim for compensation filed by Jon Petersen and Kimberly Petersen, as parents and natural guardians of Jennifer Petersen, a minor, be and the same is hereby approved.

It is FURTHER ORDERED that the participating physician complied with the notice provisions of the Plan, but the hospital did not.

It is FURTHER ORDERED that the parties are accorded 30 days from the date of this order to resolve, subject to approval by the administrative law judge, the amount and manner of payment

of an award to the parents, the reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees, and the amount owing for expenses previously incurred. If not resolved within such period, the parties shall so advise the administrative law judge, and a hearing will be scheduled to resolve such issues. Once resolved, an award will be made consistent with Section 766.31, Florida Statutes.

DONE AND ORDERED this 8th day of September, 2005, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of September, 2005.

ENDNOTES

1/ Where, as here, a presumption is "established primarily to facilitate the determination of a particular action in which the presumption is applied, rather than to implement public policy, [it] is a presumption affecting the burden of producing evidence." § 90.303, Fla. Stat. The nature and effect or usefulness of such a presumption in assessing the quality of the proof was addressed in Berwick v. Prudential and Casualty Insurance, Co., 436 So. 2d 239, 240 (Fla. 3d DCA 1983), as follows:

> Unless otherwise provided by statute, a presumption established primarily to facilitate the determination of an action, as here, rather than to implement public policy is a rebuttable "presumption affecting the burden of producing evidence," see § 90.303, Fla. Stat. (1981), a "bursting bubble" presumption, see C. Ehrhardt, supra, at §§ 302.1, 303.1. Such a presumption requires the trier of fact to assume the existence of the presumed fact unless credible evidence sufficient to sustain a finding of the non-existence of the presumed fact is introduced, in which event the bubble bursts and the existence of the fact is determined without regard to the presumption. See § 90.302(1), Fla. Stat. (1981); C. Ehrhardt, supra at § 302.1; see generally Ladd, Presumptions in Civil Actions, 1977 Ariz.St.L.J. 275 (1977)

Accord Caldwell v. Division of Retirement, 372 So. 2d 438 (Fla. 1979), Public Health Trust of Dade County v. Valcin, 507 So. 2d 596 (Fla. 1987), and Insurance Company of the State of Pennsylvania v. Estate of Guzman, 421 So. 2d 597 (Fla. 4th DCA 1982. See also Gulle v. Boggs, 174 So. 2d 26, 29 (Fla. 1965), citing with approval Tyrrell v. Prudential Insurance Co., 109 Vt. 6, 192 A. 184, 115 A.L.R. 392, where in it was stated:

> Presumptions disappear when facts appear; and facts are deemed to appear when evidence is introduced from which they may be found.

2/ With but one exception, the records of Tallahassee Memorial Hospital consistently reflect Jennifer's initial weight as it was entered on the Newborn ICU Admission Assessment form (2,500 grams and 5 pounds 8.1 ounces). (Joint Exhibit 1, Tab 26.) That exception is the Labor and Delivery Summary (Joint Exhibit 2, Tab 5), which reflects a weight of 2,495 grams and 5 pounds 8 ounces. The reason for the discrepancy is reasonably explained by the fact that the weight was provided in pounds and ounces to labor and delivery by the newborn intensive care unit, and since the labor and delivery Watchchild Computer System only accepts whole ounces, a weight of 5 pounds 8 ounces was entered in the system. The system then displayed the equivalent in grams as 2,495 (a whole number derived from a conversion figure of

2,494.8 grams). Note, as used in this order, all conversions are calculated based on an equivalency of 1 gram = 0.035274 ounces, and 1 ounce = 28.350 grams. See Petitioners' Exhibit 1, pages C-11 and C-18, and Dorland's Illustrated Medical Dictionary, 28th Edition (1994), Appendix 5 (Table of Weights and Measures), page 1929.

3/ Joint Exhibit 1, Tab 26.

4/ In this case, no credible proof was offered regarding the weight of the endotraceal tube. § 120.57(1)(c), Fla. Stat. ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.") However, given the conclusion that a weight of 2,500 grams is not reliable, the implications of that failure need not be addressed.

5/ Were a weight of 2,500 grams a reliable reflection of Jennifer's weight when initially assessed in the newborn intensive care unit, it would have been appropriate to reduce that figure by the weight of the endotracheal tube to derive her birth weight. Respondent's and Intervenors' contention that 2,500 grams, as Jennifer's "official birth weight," should be used, as her actual birth weight, without reduction for the weight of the endotracheal tube, is rejected as unpersuasive. In so concluding, the hospital's suggestion that "[t]o find otherwise would be to ignore the policy and practice of . . . [the hospital] in recording the NICU weight as the infant's official weight and thereafter relying on that figure for medications and other health care decisions," has not been overlooked. (Hospital's Proposed Order on Compensability and Notice, paragraph 22.) However, the Plan speaks in terms of "birth weight," which would not include an endotracheal tube, and not "official birth weight," a term not used in the Plan. Therefore, the hospital's policy cannot subvert the unambiguous language of the Plan. Moreover, the hospital's records, as with all evidence, are subject to scrutiny, and when shown to be inaccurate cannot support a finding of fact. As for the hospital's practice of medicating a newborn based on its NICU weight, hopefully, if the weight of the foreign object is significant to the decision-making, its weight would be taken into account before medicating the child.

6/ 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.") Accord University of Miami v. M.A., 793 So. 2d 999 (Fla. 3d DCA 2001); Tabb v. Florida Birth-Related Neurological Injury Compensation Association, 880 So. 2d 1253 (Fla. 1st DCA 2004). See also Gugelmin v. Division of Administrative Hearings, 815 So. 2d 764 (Fla. 4th DCA 2002); Behan v. Florida Birth-Related Neurological Compensation Association, 664 So. 2d 1173 (Fla. 4th DCA 1995). But see All Children's Hospital, Inc. v. Department of Administrative Hearings, 863 So. 2d 450 (Fla. 2d DCA 2004)(certifying conflict); Florida Health Sciences Center, Inc. v. Division of Administrative Hearings, 871 So. 2d 1062 (Fla. 2d DCA 2004)(same); Florida Birth-Related Neurological Injury Compensation Association v. Ferguson, 869 So. 2d 686 (Fla. 2d DCA 2004)(same); and, Bayfront Medical Center, Inc. v. Florida Birth-Related Neurological Injury Compensation Association, 893 So. 2d 636 (Fla. 2d DCA 2005).

7/ The first stage of "labor" is commonly understood to "begin[] with the onset of regular uterine contractions." Dorland's Illustrated Medical Dictionary, Twenty-eighth Edition (1994). "Regular," is commonly understood to mean "[o]ccurring at fixed intervals, periodic." The American Heritage Dictionary of the English Language, New College Edition (1979). Similarly, "persistent" is commonly understood to mean "[i]nsistently repetitive or continuous." Id.

8/ Amended Pre-Hearing Stipulation, paragraph 11, wherein the parties stipulated that the notice of intent was mailed on November 17, 2003.

COPIES FURNISHED:
(By certified mail)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
1435 Piedmont Drive, East, Suite 101
Tallahassee, Florida 32308
(Certified Mail No. 7099 3400 0010 4399 5810)

William R. Waters, Jr., Esquire
Pearson & Waters, P.A.
703 North Monroe Street
Tallahassee, Florida 32303
(Certified Mail No. 7099 3400 0010 4399 5803)

Jeannette M. Andrews, Esquire
Andrews, Crabtree, Knox & Andrews, LLP
Post Office Box 12800
Tallahassee, Florida 32317-2800
(Certified Mail No. 7099 3400 0010 4404 1745)

M. Mark Bajalia, Esquire
Brennan, Manna & Diamond
76 South Laura Street, Suite 1700
Jacksonville, Florida 32202
(Certified Mail No. 7099 3400 0010 4399 5735)

Jesse F. Suber, Esquire
Henry, Buchanan, Hudson,
Suber & Carter, P.A.
Post Office Drawer 1049
Tallahassee, Florida 32302
(Certified Mail No. 7099 3400 0010 4399 5728)

Jana Bures Forsthoefel, M.D.
1405 Centerville Road
Tallahassee, Florida 32308
(Certified Mail No. 7099 3400 0010 4399 5711)

Tallahassee Memorial Hospital
1300 Miccosukee Road
Tallahassee, Florida 32308
(Certified Mail No. 7099 3400 0010 4399 5704)

Charlene Willoughby, Director
Consumer Services Unit - Enforcement
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7099 3400 0010 4399 5698)

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 the original of a notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 766.311, 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.