STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BETHANY WEEKS, as Personal Representative of the Estate of DAVID WEEKS, a minor, deceased,	)	
Petitioner,	)	
vs.	)	Case No. 04-3173N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
ORLANDO REGIONAL HEALTHCARE SYSTEM, INC., d/b/a SOUTH SEMINOLE HOSPITAL; CHRISTOPHER QUINSEY, M.D.; DAVID GOSS, M.D.; JOHN V. PARKER, M.D.; and ADVANCED WOMEN'S HEALTH SPECIALISTS,	)	
Intervenors.	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a hearing in the above-styled case on August 29, 2005, by video teleconference, with sites in Tallahassee and Orlando, Florida.

APPEARANCES

For Petitioner: David J. White, Esquire
Searcy, Denney, Scarola, Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, Florida 33401

For Respondent: Wendell B. Hayes, Esquire
Broad & Cassel
390 North Orange Avenue, Suite 1100
Orlando, Florida 32801

For Intervenor Orlando Regional Healthcare System, Inc., d/b/a South Seminole Hospital:

Henry W. Jewett, II, Esquire
Rissman, Weisberg, Barrett, Hurt, Donahue & McLain, P.A.
201 East Pine Street, 15th Floor
Orlando, Florida 32801

For Intervenors Christopher Quinsey, M.D., and Advanced Women's Health Specialists:

Ruth C. Osborne, Esquire
McEwan, Martinez & Dukes, P.A.
Post Office Box 753
Orlando, Florida 32802-0753

For Intervenors David Goss, M.D., John V. Parker, M.D., and Advanced Women's Health Specialists:

James J. Evangelista, Esquire
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Tampa, Florida 33601-1438

STATEMENT OF THE ISSUES

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

2. If so, the amount and manner of payment of the parental award, the amount owing for attorney's fees and costs incurred in pursuing the claim, and the amount owing for past expenses.

3. Whether the hospital and the participating physician gave the patient notice, as contemplated by Section 766.316, Florida Statutes, or whether the 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.

PRELIMINARY STATEMENT

On September 3, 2004, Bethany Weeks, as Personal Representative of the Estate of David Weeks, a deceased minor, filed a petition (claim), with the Division of Administrative Hearings (DOAH) for compensation under the Plan, and for a determination of whether the healthcare providers complied with the notice provisions of the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on September 8, 2004, and on October 13, 2004, NICA responded to the claim and gave notice that it was of the view that the claim was compensable, and requested that a hearing be scheduled "to determine the compensability of the instant claim, notice, and all other matters . . . deem[ed] necessary." Such a hearing was ultimately held on August 29, 2005. In the interim, Orlando

Regional Healthcare System, Inc., d/b/a South Seminole Hospital; Christopher Quinsey, M.D.; David Goss, M.D.; John V. Parker, M.D.; and Advanced Women's Health Specialists, were granted leave to intervene.

At hearing, Petitioner presented the testimony of Bethany Weeks and Diana Dietrick, and Petitioner's Exhibits 1-7 and Respondent's Exhibit 1 were received into evidence. The physicians and Advanced Women's Health Specialists presented the testimony of Bonnie Mladec[1] and Christopher Quinsey, M.D., and their exhibits (marked Doctors' Exhibits) 1-10 were received into evidence. Orlando Regional Healthcare System, Inc. (ORHS) presented the testimony of Cheryl Ingram, R.N., and Bernadette Charles, R.N., and ORHS' Exhibits 1-8 were received into evidence.[2]

The transcript of the hearing was filed October 3, 2005, and the parties were accorded 10 days from that date to file written argument or proposed orders. The parties elected to file written argument or proposed orders, and they have been duly-considered.

FINDINGS OF FACT

Findings related to compensability

1. Bethany Weeks and Michael Weeks are the natural parents of David Weeks (David), a deceased minor, and Bethany Weeks is the Personal Representative of her deceased son's estate. David

was born a live infant at 11:00 p.m., November 3, 2002, at South Seminole Hospital, a hospital located in Longwood, Florida, and, following the termination of resuscitation efforts, was pronounced dead at 11:30 p.m. David's birth weight was 2,925 grams.

2. The physician providing obstetrical services at David's birth was Christopher Quinsey, 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.

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 . . . caused by oxygen deprivation . . . 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." § 766.302(2), Fla. Stat. See also §§ 766.309(1) and 766.31(1), Fla. Stat.

4. Here, the proof is compelling that David suffered an injury to the brain caused by oxygen deprivation, secondary to placental abruption, in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital, that led inevitably to his death shortly after birth. Consequently, the record demonstrated that David suffered a

"birth-related neurological injury" and, since obstetrical services were provided by a "participating physician" at birth, the claim is compensable. §§ 766.309(1) and 766.31(1), Fla. Stat.

Findings related to the award

5. Where, as here, it has been resolved that a claim is compensable, the administrative law judge is required to make a determination of how much compensation should be awarded. § 766.31(1), Fla. Stat. Pertinent to this case, Section 766.31(1), Florida Statutes, provides for an award of the following items:

> (a) Actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, family residential or custodial care, professional residential, and custodial care and service, for medically necessary drugs, special equipment, and facilities, and for related travel. However, such expenses shall not include:
>
> 1. Expenses for items or services that the infant has received, or is entitled to receive, under the laws of any state or the Federal Government, except to the extent such exclusion may be prohibited by federal law.
>
> 2. Expenses for items or services that the infant has received, or is contractually entitled to receive, from any prepaid health plan, health maintenance organization, or other private insuring entity.
>
> 3. Expenses for which the infant has received reimbursement, or for which the infant is entitled to receive reimbursement, under the laws of any state or the Federal

> Government, except to the extent such exclusion may be prohibited by federal law.
>
> 4. Expenses for which the infant has received reimbursement, or for which the infant is contractually entitled to receive reimbursement, pursuant to the provisions of any health or sickness insurance policy or other private insurance program.
>
> * * *
>
> (b)1. Periodic payments of an award to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury, which award shall not exceed $100,000. However, at the discretion of the administrative law judge, such award may be made in a lump sum.
>
> 2. Death benefit for the infant in an amount of $10,000.
>
> (c) Reasonable expenses incurred in connection with the filing of a claim under ss. 766.301-766.316, including reasonable attorney's fees, which shall be subject to the approval and award of the administrative law judge. In determining an award for attorney's fees, the administrative law judge shall consider the following factors:
>
> 1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
>
> 2. The fee customarily charged in the locality for similar legal services.
>
> 3. The time limitations imposed by the claimant or the circumstances.
>
> 4. The nature and length of the professional relationship with the claimant.
>
> 5. The experience, reputation, and ability of the lawyer or lawyers performing services.
>
> 6. The contingency or certainty of a fee.

6. In this case, Petitioner and NICA have agreed that, should Petitioner elect to accept benefits under the Plan,

Bethany Weeks and Michael Weeks, as the parents of David, be awarded $100,000.00, to be paid in lump sum. The parties have further agreed that Petitioner Bethany Weeks, as Personal Representative of the Estate of David Weeks, be awarded a death benefit of $10,000.00, and an award of $4,115.00 for attorney's fees ($1,575.00 for Petitioner's counsel David J. White, Jr., and $2,040.00 for Petitioner's co-counsel Patrick C. Massa) and other expenses ($500.00) incurred in connection with the filing of the claim. Finally, the parties have agreed that no monies are owing for past expenses. Such agreement is reasonable, and is approved.

The notice provisions of the Plan

7. While the claim qualifies for coverage under the Plan, Petitioner would prefer to pursue her civil remedies, and has averred, and requested a finding that, the hospital and the participating physician who delivered obstetrical services at David's birth (Dr. Quinsey), failed to comply with the notice provisions of the Plan. See Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 309 (Fla. 1997)("[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."). Consequently, it is necessary to

resolve whether the notice provisions of the Plan were satisfied.[3]

8. At all times material hereto, Section 766.316, Florida Statutes, 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.

9. 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[4] or rupture of the membranes.

10. 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.").

The NICA brochure

11. Responding to Section 766.316, Florida Statutes, NICA developed a brochure, titled "Peace of Mind for an Unexpected Problem" (the NICA brochure), which contained a clear and concise explanation of a patient's rights and limitations under the Plan, and distributed the brochure to participating physicians and hospitals so they could furnish a copy of it to their obstetrical patients. (Petitioner's Exhibit 7.)

Findings related to Mrs. Weeks' prenatal care and notice

12. Initially, Mrs. Weeks received prenatal care at the Seminole County Health Department, where she was first seen on June 18, 2002, and then transferred to Advanced Women's Health

Specialists (AWHS) in September 2002, at 29 3/7 weeks' gestation. Notably, Mrs. Weeks had extensive workups at the Seminole County Health Department, and she delivered a copy of her medical records (which she received from the health department on September 13, 2002) to AWHS, most likely at her first visit, Monday, September 16, 2002.[5] According to Mrs. Weeks' patient chart, AWHS received the following documents from the health department: a flow sheet; progress notes; history; physical; PAP; blood work/all labs; Chlamydia, gonorrhea, hepatitis results; RPR results; tri-screen results; HIV results; sonogram result; one hour GTT results; and urine culture results. (Doctors' Exhibit 10.)

13. Pertinent to the notice issue, the physicians (who were members of the AWHS group practice) and AWHS presented evidence (through the testimony of Bonnie Mladec, the clinical coordinator for AWHS) that when Mrs. Weeks presented to AWHS for her initial visit, AWHS had a routine pursuant to which all new patients, regardless of the stage of their pregnancy, and regardless of whether they started their prenatal care with another provider, were given a copy of the NICA brochure by the medical assistant who interviewed them, together with eight other documents. (Doctors' Exhibits 1-9.) Four of the documents were informational, and did not require a signature: the NICA brochure; a one-page list of safe medications to use

during pregnancy; a one-page document titled "Why Breastfeed?"; and a one-page document explaining the Healthy Start Program. The five documents that required a signature were a Notice to Our Obstetrics Patients (to acknowledge receipt of the NICA brochure)[6]; consent to HIV Antibody Test form (to accept or decline the test); a Triple Test Screening for Birth Defects form (to accept a decline the test); a Cystic Fibrosis Carrier Testing form (to accept or decline the test); and a Healthy Start Prenatal Risk Screen form (to accept or decline screening). Notably, Mrs. Weeks' chart does not include, as it should if AWHS's routine was followed, a copy of a Notice to Our Obstetric Patients form signed by Mrs. Weeks, or a copy of any of the other forms patients were routinely requested to sign. (Doctors' Exhibit 10; Transcript, pages 21-25.) Nevertheless, the physicians and AWHS contend there is no reason to conclude AWHS's routine was not followed because each test was performed, and AWHS would not have performed the tests absent Mrs. Weeks' written consent.

14. In contrast to the proof offered regarding AWHS's routine, Mrs. Weeks testified that no such routine was followed when she presented for her initial visit.[7] According to Mrs. Weeks, no one discussed the Plan with her, she did not receive a NICA brochure, did not sign a receipt for a brochure,

and did not sign any other document that would have been part of the routine.

15. Here, the evidence failed to support the conclusion that, more likely than not, AWHS's routine was followed. In so concluding, it is noted that, Mrs. Weeks' chart contains no document signed by Mrs. Weeks that would have been part of AWHS's routine, and contrary to the contention of the physicians and AWHS, and contrary to the testimony they offered to support such contention, the charting of HIV Antibody test results and a Triple Test Screening does not support the conclusion that AWHS's routine was followed. Rather, it demonstrates that AWHS merely accepted the results the health department had obtained. As for the Healthy Start Prenatal Risk Screen, Mrs. Weeks' chart contains no evidence that AWHS presented her with that form to sign. Rather, since the health department's prenatal record reveals that Healthy Start Screening had been completed, given AWHS's acceptance of other department of health testing, and given no further explanation, it is likely AWHS did not pursue the matter. Consequently, as to these forms, the record offers no compelling proof that AWHS followed its routine. Rather, it offers proof to the contrary.

16. As for the Cystic Fibrosis Carrier Test, the record does reveal that test was done at AWHS, and Mrs. Weeks' chart (Antepartum Record, page D, under Comments/Additional Labs)

contains an entry ("[C]ystic F[ibrosis]=accepted [,] drawn on 9/16/02") that supports the conclusion she consented to the test at her initial visit. However, given the proof, or lack thereof, these findings are not compelling proof that Mrs. Weeks' consent to the Cystic Fibrosis Carrier Test was part of an invariable routine that was followed at a patient's initial visit. Therefore, the proof fails to support the conclusion that AWHS's routine was followed on Mrs. Weeks' initial visit, or that Mrs. Weeks received a NICA brochure or signed a receipt for a NICA brochure on her initial visit.

Findings related to David's birth and notice

17. At or about 8:15 p.m., November 3, 2002, Mrs. Weeks, with an estimated delivery date of November 27, 2002, and the fetus at 36 5/7 weeks' gestation, presented to Labor and Delivery Triage, at South Seminole Hospital, in labor (with evidence of the onset and persistence of uterine contractions). At the time, Mrs. Weeks' chief complaint was noted as "[contractions] most of today, becoming more uncomfortable since [6:00 p.m.]." The notes of the triage nurse (Bernadette Charles, R.N.) include the following narrative:

> Client received from ER in wheelchair with above complaints. Crying and complain of labor pains. Denies rupture of membranes or bright red vag bleeding. Client's restless and uncooperative. Encouraged to relax between contractions . . . . Elevated B[lood] P[ressure] noted. Client complained

> of headaches, DTRs 3[+ very brisk], no clonus, edema 2 to 3+ . . . [P]ain scale [8-9/10].

(Petitioner's Exhibit 1, pages 21 and 22; Petitioners Exhibit 6, page 0533.)

18. Initial assessment in triage noted uterine contractions of moderate intensity, every 2 to 3 minutes, with a duration of 40 to 50 seconds. Blood pressure was elevated (164/112), and vaginal examination revealed the cervix at 2 centimeters dilation, effacement at 70 percent, and the fetus between station -1 and -2.

19. At 8:45 p.m., Ms. Charles spoke with Lesann Dwyer, a certified nurse midwife (CNM) at AWHS, and at 8:55 p.m., she spoke with Dr. Quinsey, and received orders to admit Mrs. Weeks to labor and delivery. Thereafter, at 9:05 p.m., Mrs. Weeks was moved by wheelchair from triage to labor and delivery room 403, where she was admitted at 9:10 p.m. According to Ms. Charles' admission note:

> client admitted to LR 403 in early labor . . . P[ain]/S[cale] 6/10-Client crying-uncooperative. Requesting something for pain . . . .

20. According to the medical records, by 9:15 p.m., the time at which the activities were documented, Mrs. Weeks was in her bed, positioned on her right side, and an external fetal monitor and blood pressure monitor were attached. At the time,

assessment revealed an elevated blood pressure (173/103); a fetal heart rate baseline of 120 to 130 beats per minute, with decreased long-term variability; the cervix at 2 centimeters dilation, effacement at 70 percent, and the fetus at station -1; moderate uterine contractions, at a frequency of 1 to 2 minutes, with a duration of 30 to 40 seconds; and a pain severity level of 7-8/10. Also noted, an IV had been started, labs drawn, and Mrs. Weeks had been asked to sign a number of documents, including an acknowledgment of receipt of NICA notice.[8] The acknowledgement form provided, as follows:

> **FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN ACKNOWLEDGMENT OF PATIENT RECEIPT OF NOTICE**
>
> I have been advised that Orlando Regional Healthcare System, Inc. and its resident physicians are participating members in the Florida Birth-Related Neurological Injury Compensation Plan. This Plan provides that certain limited compensation is available in the event certain birth-related neurological injuries may occur during labor, delivery or post-delivery resuscitation, irrespective of fault. For specifics on the Plan, I understand I can contact the Florida Birth-Related Neurological Injury Compensation Association (NICA), Post Office Box 14567, Tallahassee, Florida 32317-4567; (904) 488-8191/ 1 (800) 398-2129. I further acknowledge I have received from Orlando Regional Healthcare System, Inc., a copy of the form brochure regarding the Plan. The form brochure is prepared and furnished by

the Florida Birth-Related Neurological Injury Compensation Association.

Dated this _____ day of _____, 2002.

_____
Signature

_____
Name of Patient

Social Security No. _____

Witness: _____

Date: _____

Mrs. Weeks concedes she signed the acknowledgment form. However, she denies she received the NICA brochure.

21. Subsequently, at 9:20 p.m., Mrs. Weeks was given Stadal (for pain) and magnesium sulfate (for pregnancy-induced high blood pressure), and at 9:30 p.m., the records note a fetal heart rate baseline of 120 to 130 beats per minute, with decreased long-term variability, and contractions of moderate intensity, at a frequency of 1 to 2 minutes, with a duration of 30 to 40 seconds. Thereafter, there is a gap in documentation until 10:00 p.m., when fetal heart rate is noted in the 90 to 100 beat per minute range, Mrs. Weeks is given oxygen and a position change, and Dr. Quinsey is called and updated. Shortly thereafter, at 10:05 p.m., anesthesiology was alerted to a possible cesarean section, and at 10:20 p.m., Ms. Charles

attempted to place a fetal scalp electrode and Mrs. Weeks membranes ruptured.

22. By 10:25 p.m., Dr. Quinsey had arrived at the hospital, and was noted at bedside. At the time, Dr. Quinsey observed Mrs. Weeks was having constant abdominal pain, with a tense abdomen, consistent with placental abruption, and an emergent cesarean section was indicated. Under the circumstances, it was Dr. Quinsey's opinion, which was credible and uncontroverted, that inadequate time remained to safely transfer Mrs. Weeks to another hospital prior to delivery, and any transfer may have posed a threat to the health and safety of Mrs. Weeks or her fetus.

23. Given Mrs. Weeks' presentation, a stat cesarean section was called, and Mrs. Weeks was moved to the operating room, where she was admitted at 10:40 p.m. According to the records, surgery started at 10:57 p.m., and David was delivered at 11:00 p.m., with an Apgar score of 1 and 0, at one and five minutes respectively.[9]

Resolution of the notice issue with regard to the participating physician

24. With regard to Dr. Quinsey, the participating physician who provided obstetrical services at David's birth, the proof demonstrates that, although it was practicable to do so during her prenatal care at AWHS, Mrs. Weeks was not given

notice.[10] However, since Mrs. Weeks had an "emergency medical condition," as defined by Section 395.002(9)(b), Florida Statutes, when Dr. Quinsey provided obstetrical services to her on November 3, 2002, he was exempt from the pre-delivery notice requirement, notwithstanding it may have been practicable for him to have provided Mrs. Weeks notice during her prenatal care at AWHS. § 766.316, Fla. Stat.; Orlando Regional Healthcare System, Inc. v. Alexander, 909 So. 2d 582, 586 (Fla. 5th DCA 2005)("We hold that the statute contains two distinct exemptions, each of which independently provides an exception to the pre-delivery notice requirement. As such, [the hospital] was excused from providing notice to [the patient] when she arrived at the [hospital] under emergency medical conditions, and her previous visits to the hospital during her pregnancy did not negate this clear statutory exemption."). Consequently, with regard to the participating physician, the notice provisions of the Plan were satisfied.

Resolution of the notice issue with regard to the hospital

25. With regard to the hospital, it was the hospital's policy to provide the patient with a copy of the NICA brochure, together with an acknowledgment form for the patient to sign acknowledging receipt of the brochure, following admission to labor and delivery. Here, there is no dispute that Mrs. Weeks

signed the acknowledgment form at or about 9:15 p.m., following her admission to labor and delivery.[11] What is disputed, is whether Mrs. Weeks was given a NICA brochure. Petitioner also contends that the brochure, if given, was not provided a reasonable time prior to delivery to allow for the exercise of an informed choice of providers. As to this contention, Petitioner notes that the hospital had an opportunity to provide meaningful notice during two prior admissions, as well as during Mrs. Weeks' preregistration, but failed to do so, and that "[a]t the time [] the NICA brochure was allegedly given to Bethany Weeks [on November 3, 2002] she was expected to read it while she was having contractions, in pain, receiving lactate ringers, and while labs were being drawn," a less than opportune time. (Petitioner's Proposal Final Order, paragraph 26.) Stated otherwise, Petitioner contends that, if she was given the brochure on November 3, 2002, it was not efficacious notice.

26. However, the hospital, like the participating physician who delivered obstetrical services at David's birth, was exempt from the pre-delivery notice requirement, since when Mrs. Weeks presented to South Seminole Hospital at or about 8:15 a.m., November 3, 2002, she had an "emergency medical condition" ("evidence of the onset and persistence of uterine contractions"), as defined by Section 395.002(9)(b), Florida Statutes, and notwithstanding it may have been practicable for

the hospital to have provided Mrs. Weeks' notice during her previous visits to the hospital. § 766.316, Fla. Stat.; Orlando Regional Healthcare Systems, Inc. v. Alexander, supra. Consequently, it is unnecessary to address whether Mrs. Weeks was given a NICA brochure or whether, if given, the notice was efficacious.

CONCLUSIONS OF LAW

Jurisdiction

27. 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

28. 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.

29. "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.

30. In this case, it has been established that the physician who provided obstetrical services at David's birth was a "participating physician," and that David suffered a "birth-related neurological injury." Consequently, David qualifies for coverage under the Plan, and Petitioner is entitled to an award

of compensation. §§ 766.309 and 766.31, Fla. Stat. Here, the parties have stipulated to such award, as set forth in paragraph 6 of the Findings of Fact.

Notice

31. While the claim qualifies for coverage, Petitioner has 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 or the participating physician. As the proponent of the immunity claim, the burden rested on the healthcare providers 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.")

32. Here, for reasons appearing in the Findings of Fact, the proof demonstrated that Mrs. Weeks had an "emergency medical condition" on presentation to, and during her November 3, 2002, admission at South Seminole Hospital. Consequently, the hospital and the participating physician who provided obstetrical services at David's birth were exempt from the pre-delivery notice requirement of the Plan. Orlando Regional Healthcare Systems, Inc. v. Alexander, supra.

CONCLUSION

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

ORDERED that the claim for compensation filed by Bethany Weeks, as Personal Representative of the Estate of David Weeks, a deceased minor, be and the same is hereby approved.

It is FURTHER ORDERED that the hospital and the participating physician complied with the notice provisions of the Plan.

It is FURTHER ORDERED that the following benefits are awarded:

1. Since no monies are owing for past expenses, no award is made for expenses previously incurred. § 766.31(1)(a), Fla. Stat.

2. Bethany Weeks and Michael Weeks, as the parents of David, are awarded $100,000.00, to be paid in lump sum. § 766.31(1)((b)1, Fla. Stat.

3. Bethany Weeks, as the Personal Representative of the Estate of David Weeks, a deceased minor, is awarded a death benefit of $10,000.00. § 766.31(1)(b)2, Fla. Stat.

4. Bethany Weeks, as the Personal Representative of the Estate of David Weeks, a deceased minor, is awarded $4,115.00 for attorney's fees and other expenses incurred in connection with the filing of the claim. § 766.31(1)(c), Fla. Stat.

It is FURTHER ORDERED that pursuant to Section 766.312, Florida Statutes, jurisdiction is reserved to resolve any disputes, should they arise, regarding the parties' compliance with the terms of this Final Order.

DONE AND ORDERED this 25th day of October, 2005, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of October, 2005.

ENDNOTES

1/ Bonnie Mladec was incorrectly identified in the transcript as Bonnie Mallott.

2/ At hearing, Petitioner's objections to portions of ORHS' Exhibit 1 (the deposition of Bethany Weeks) and ORHS' Exhibit 3 (the deposition of Diana Dietrick) were taken under advisement. Upon consideration, Petitioner's objections are overruled.

3/ 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).

4/ 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.

5/ In resolving that the records were most likely delivered at her first visit, it is noted that the AWHS Antepartum Record of

September 16, 2002, under initial physical exam, adopts information from the "H[ealth] D[epartment] P[hysical] E[xam] Form," and includes entries for various lab work and testing that was done by the Seminole County Health Department.

6/ The Notice to Our Obstetric Patients provided:

NOTICE TO OUR OBSTETRIC PATIENTS

I have been furnished information by Advanced Women's Health Specialists prepared by the Florida Birth Related Neurological Injury Compensation Association, and have been advised that Edward S. Guindi, M.D., Jon F. Sweet, M.D., David L. Goss, M.D., John V. Parker, M.D., Christopher K. Quinsey, M.D., Carolyn M. Staub, MN, CNM, Lesann Dwyer, MSN, CNM, Ca'Sha Archer-Knight, MS, CNM are participating physicians/midwife in that program, wherein certain limited compensation is available in the event certain neurological injury may occur during labor, delivery or resuscitation. For specifics on the program, I understand I can contact the Florida Birth Related Neurological Injury Compensation Association (NICA), 1435 East Piedmont Drive, Suite 101, Tallahassee, Florida 32312, (904) 488-8191. I further acknowledge that I have received a copy of the brochure by NICA.

Dated this _____ day of _____, 20__.

Signature _____

Name of Patient _____

Social Security Number _____

Attest:

Nurse or Physician _____

Date: _____

(Doctors' Exhibit 2.)

7/ There was no suggestion made or proof offered that Mrs. Weeks was provided notice at any other time during her prenatal care at AWHS, although it was clearly practicable to do so, that the physicians associated with AWHS (including Doctors Quinsey, Goss, and Parker) were participants in the Plan.

8/ The hospital's policy was to provide NICA notice only when the patient was admitted for delivery. Therefore, notice was not routinely given when patients presented to triage or when they were admitted for antepartum care. Consequently, Mrs. Weeks was not given notice when she was admitted October 15, 2002, to October 19, 2002, and October 25, 2002, to October 27, 2002, for antepartum care, or in October 2002, when she preregistered at South Seminole Hospital, although it was clearly practicable for the hospital to have done so.

9/ The Apgar scores assigned to David are a numerical expression of the condition of a newborn infant and reflect the sum points gained on assessment of heart rate, respiratory effort, reflex irritability, muscle tone, and color, with each category being assigned a score ranging from the lowest score of 0 through a maximum score of 2. As noted, at one minute, David's Apgar score totaled 1, with heart rate being graded at 1, and respiratory effort, reflex irritability, muscle tone, and color being graded at 0. By five minutes, David's heart rate was likewise graded at 0.

10/ Dr. Quinsey argued that since he did not ever see Mrs. Weeks prior to her admission of November 3, 2002, or provide her prenatal care at AWHS, it was not practicable for him to have provided notice. Given the proof, including the evidence presented regarding AWHS's routine practice, such contention is rejected as unpersuasive.

11/ Diana Dietrick, Mrs. Weeks' mother, was present at the time, and signed as a witness. Mrs. Dietrick also printed Mrs. Weeks' name on the "Name of Patient" line and entered Mrs. Weeks' Social Security Number. Mrs. Charles also signed as a witness and dated the form "11-3-02" and entered the time "2115," on the Date line.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Sections 120.68 and 766.311, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing 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.