STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TISSANY STANDLEY, on behalf of, and as parent and natural guardian of DAVANTE SMITH, a minor,	)	
Petitioner,	)	
vs.	)	Case No. 05-0881N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
JOHN V. PARKER, M.D. and ADVANCED WOMEN'S HEALTH SPECIALISTS,	)	
Intervenors.	)	

FINAL ORDER

With the parties' agreement, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a hearing in the above-styled case on December 16, 2005, by teleconference.

APPEARANCES

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STATEMENT OF THE ISSUES

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

2. Whether the hospital and the participating physician complied with the notice provisions of Section 766.316, Florida Statutes.

PRELIMINARY STATEMENT

On March 9, 2005, Tissany Standley, on behalf of, and as parent and natural guardian of Davante Smith (Davante), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) to resolve whether Davante qualified for coverage under the Plan and whether the healthcare providers complied with the notice provisions of the Plan.[1]

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on March 9, 2005, and on July 29, 2005, following a number of extensions of time within which to do so, NICA responded to the claim and gave notice that it was of the view that Davante did

not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, and that, given the provisions of Section 766.313, Florida Statutes, and Davante's date of birth (June 27, 1996), the claim was time-barred. Nevertheless, since Plan immunity may be a viable defense to a civil suit, and the administrative law judge has exclusive jurisdiction to resolve whether a claim is compensable, NICA requested that a hearing be scheduled to resolve whether the claim was compensable. See §§ 766.301(1)(d), 766.303(2), and 766.304, Fla. Stat.; O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, 757 So. 2d 624 (Fla. 5th DCA 2000). In the interim, John V. Parker, M.D., and Advanced Women's Health Specialists were granted leave to intervene.

At the hearing held on December 16, 2005, to address the issues of compensability and notice, no testimony was offered. However, the parties stipulated to the factual matters set forth in paragraphs 1 and 2 of the Findings of Fact, and Joint Exhibits 1-3 and Intervenors' Exhibits 1-7 were received into evidence.[2]

The transcript of the hearing was filed January 10, 2006, and the parties were initially accorded until January 20, 2006, to file written argument or proposed orders. However, at Petitioner's request, the time for filing was extended to

January 30, 2006. The parties' proposals have been duly-considered.

FINDINGS OF FACT

Stipulated facts

1. Tissany Standley is the natural mother and guardian of Davante Smith, a minor. Davante was born a live infant on June 27, 1996, at Florida Hospital Altamonte, a hospital located in Altamonte Springs, Florida, and his birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Davante's birth was John V. Parker, 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 or spinal cord . . . caused by oxygen deprivation or mechanical injury occurring in the course 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 and 766.31, Fla. Stat.

4. Here, Petitioner and Respondent were of the view that Davante did not suffer a "birth-related neurological injury," as that term is defined by the Plan. In contrast, Intervenors harbored a contrary opinion, but failed to produce compelling proof to support their position.

Davante's birth and immediate postnatal course

5. The medical records related to Davante's birth reveal that at or about 3:25 p.m., June 26, 1996, with an estimated delivery date of July 8, 1996, and the fetus at 38 2/7 weeks gestation, Ms. Standley presented to Florida Hospital Altamonte for induction of labor. Notably, Ms. Standley was not in labor[3] when admitted, and fetal monitoring revealed a reassuring fetal heart rate.

6. With regard to Ms. Standley's labor and Davante's delivery, the records reveal that Pitocin induction started at or about 6:00 p.m.; Ms. Standley's membranes were artificially ruptured at 7:00 p.m., with clear fluid noted; and evidence of regular uterine contractions was documented at 8:30 p.m. Thereafter, Ms. Standley's labor slowly progressed, and at 4:35 a.m., June 27, 1996, Davante was delivered with Apgars of 7 and 9, at one and five minutes, respectively.[4] According to Dr. Parker's Clinical Resume, Davante's vacuum-assisted delivery was without complication.

7. Following delivery, Davante was bulb suctioned, given tactile stimulation and blow-by oxygen by mask for five minutes, and transferred to the newborn nursery. There, initial newborn examination was normal except for evidence of tachypnea and decreased movement of the right arm. Davante's history from admission until discharge on June 30, 1996, was documented in his Clinical Resume, as follows:

> PROBLEMS
>
> 1. Transient tachypnea of the newborn. The infant did not require oxygen therapy. Tachypnea resolved by 24 hours. The chest x-ray was unremarkable. Findings were consistent with transient tachypnea of the newborn. An arterial blood gas was normal in room air and transient tachypnea resolved.
>
> 2. Patent ductus arteriosus. The infant was noted to have a heart murmur on day #1. An echocardiogram was done on June 28, 1996, and showed a small patent ductus arteriosus. The remaining cardiac structures were normal.
>
> 3. Sepsis ruled out. The infant received three days of ampicillin and gentamicin. A blood culture was drawn on July 27, 1996, and was negative. A urine wellcogen was done and was negative. The infant remained clinically stable with normal complete blood count (CBC). Antibiotics were discontinued after three days. Blood culture remained negative and sepsis was ruled out.
>
> 4. Right brachioplexus injury, Erb-Duchenne palsy. The infant does not move the right arm. Right hand exhibits good grasp and movement. Occupational therapy and physical therapy evaluated the infant and instructed

> the mother in passive range of motions. The mother is to do passive range of motion exercises five to six times a day and the baby is to be followed up on an outpatient basis with Osteen Kimberly for physical therapy and the infant is also to see Dr. Borrero in one month for evaluation.
>
> FINAL DIAGNOSES:
>
> 1. A 38-WEEK, LARGE FOR GESTATIONAL AGE, MALE INFANT.
> 2. TRANSIENT TACHYPNEA OF A NEWBORN, RESOLVED.
> 3. SEPSIS RULED OUT.
> 4. RIGHT BRACHIOPLEXUS INJURY, ERB-DUCHENE PALSY.
> 5. SMALL PATIENT DUCTUS ARTERIOSUS.
>
> The baby's physical exam was within normal limits on the day of discharge except for palsy of the right arm . . . . The baby was discharged home with the mother on June 30, 1996, on ad lib formula feedings and is to see Dr. Iyer for routine well baby care. Appointment to be made this week. The baby is also to see Dr. Osteen Kimberly for pediatric HCC-FU for physical therapy and occupational therapy followup. The mother is to do passive range of motion exercises five to six times a day and she is instructed to call Dr. Borrero's office in one month for an appointment to evaluate brachioplexus palsy.

Davante's current presentation

8. Currently, Davante presents with a right brachial plexus palsy (an Erb-Duchenne palsy), with substantial impairment of the right upper extremity, that is likely to be permanent.[5] However, apart from that physical impairment,

Davante is otherwise neurologically sound, without evidence of impairment in his left upper extremity or lower extremities.

9. Regarding Davante's mental status, there was some disagreement. Dr. Robert Cullen, a pediatric neurologist associated with Miami Children's Hospital, who examined Davante on June 3, 2004, was of the opinion that Davente evidenced a cognitive disorder (an auditory memory, sequencing and retention disorder), which was likely permanent in nature. However, he did not, at the time, consider it substantial, and Davante's subsequent development does not suggest otherwise. (Intervenors' Exhibit 1, page 22). In contrast, Dr. Michael Duchowny, also a pediatric neurologist associated with Miami Children's Hospital, who examined Davante on July 11, 2005, was of the opinion that Davante's mental status was age appropriate or, stated otherwise, normal. Here, given the absence of any proof that Davante suffers a substantial mental impairment, it is unnecessary to resolve any conflict that may exist between the opinions of Doctors Cullen and Duchowny, since absent evidence of a substantial mental impairment Davante does not qualify for coverage under the Plan. Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla. 1997)(The Plan is written in the conjunctive and can only be interpreted to require both substantial mental and physical impairment.).

Similarly, it is unnecessary to resolve whether, if mentally impaired, such impairment is related to birth trauma, as opposed to another etiology.

The cause and timing of Davante's physical impairment

10. As for the etiology of Davante's physical impairment (a brachial plexus palsy of the upper right extremity), the proof is compelling that such impairment was the product of a right brachial plexus injury (a stretch injury to the brachial plexus) Davante suffered during the course of delivery, and was not the product of a brain or spinal cord injury. In so concluding, it is noted that a brachial plexus injury, such as that suffered by Davante, refers to damage to a network of nerves (a "plexus") that lies outside the spinal cord, and does not involve the brain or spinal cord (or, as they are commonly referred to, the "central nervous system").[6] (Joint Exhibit 2, page 7 and 10; Joint Exhibit 3, page 17 and 18. See also "plexus," and "brachial p." under "plexus," Dorland's Illustrated Medical Dictionary, 28th Edition, 1994.) Consequently, Davante's injury is not compensable under the Plan.

The notice issue

11. In addition to Petitioner's claim that Davante does not qualify for coverage under the Plan, Petitioner also sought to avoid Plan immunity by averring, and requesting a finding

that, the hospital and the participating physician who delivered obstetrical services at Davante's birth (Dr. Parker) failed to comply with the notice provisions of the Plan.[7] 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."); Board of Regents v. Athey, 694 So. 2d 46 (Fla. 1st DCA), aff'd 699 So. 2d 1350 (Fla. 1997); Schur v. Florida Birth-Related Neurological Injury Compensation Association, 832 So. 2d 188 (Fla. 1st DCA 2002). However, since the claim is not compensable, it is unnecessary for Petitioner to have a favorable resolution of the notice issue to proceed with her civil suit. Nevertheless, to avoid any further delay should the conclusion regarding compensability be disturbed, and to allow contemporaneous review of the conclusion regarding notice, the issue will be addressed.

The notice provisions of the Plan

12. At all times material hereto, Section 766.316, Florida Statutes (1995),[8] 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 thereof as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan.

13. Pertinent to this case, the Florida Supreme Court described the legislative intent and purpose of the notice requirement, as follows:

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

Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 309 (Fla. 1997). The Court further observed:

> Under our reading of the statute, in order to preserve their immune status, NICA participants who are in a position to notify their patients of their participation a reasonable time before delivery simply need to give the notice in a timely manner. In those cases where it is not practicable to notify the patient prior to delivery, pre-delivery notice will not be required.
>
> Whether a health care provider was in a position to give a patient pre-delivery notice of participation and whether notice was given a reasonable time before delivery will depend on the circumstances of each case and therefore must be determined on a case-by-case basis.

Id. at 311. Consequently, the Court held:

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

Id. at 309.

Findings related to Ms. Standley's prenatal care and notice

14. Ms. Standley received her prenatal care at Advanced Women's Health Specialists (AWHS), Altamonte Springs, Florida, where she was first seen with regard to the pregnancy at issue on December 14, 1995. At that time, the AWHS group practice included at least three physicians: Edward S. Guindi, M.D.,

Jon F. Sweet, M.D., and Eileen F. Farwick, D.O. (Joint Exhibit 1-7). Whether Dr. Parker was also associated with the practice at that time is not apparent from the record; however, according to AWHS' records, he was associated with the practice by January 4, 1996. (Joint Exhibit 1-7).

15. Pertinent to the notice issue, Ms. Standley's patient chart at AWHS included a Notice to Our Obstetric Patients form, ostensibly signed by Ms. Standley on December 14, 1995. The notice form provided, as follows:

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 Jon F. Sweet, M.D. is a participating physician in that program, wherein certain limited compensation is available in the event certain neurological injury may occur during labor, delivery or resuscitation. For specifics on the program, I understand I can contact the Florida Birth Related Neurological Injury Compensation Association (NICA), Barnett Bank Building, 315 South Calhoun Street, Suite 312, Tallahassee, Florida 32301, (904) 488-8191. I further acknowledge that I have received a copy of the brochure by NICA.
>
> Dated this _____ day of _____, 19__.
>
> _____
> Signature
>
> _____
> Name of Patient

_____
SS#

Attest:

_____
(Nurse or Physician)

Date: _____

16. Notably, the notice form does not advise Ms. Standley that any AWHS physician, other than Dr. Sweet, was a participating physician in the Plan, although it had a reasonable opportunity to do so, if any were, and the record is devoid of any proof to suggest or support a conclusion that notice was provided by Dr. Parker or that it was not practicable for Dr. Parker to provide Ms. Standley notice during her prenatal care at AWHS. § 766.316, Fla. Stat. ("[E]ach participating physician . . . shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injures."); Schur v. Florida Birth-Related Neurological Injury Compensation Association, 832 So. 2d 188, 192 (Fla. 1st DCA 2002)("The plain language of this section shows an intention that the NICA plan immunizes a physician only when he or she provides notice.")

Findings related to Davante's birth and notice

17. As for Ms. Standley's admission to Florida Hospital Altamonte on June 26, 1996, for Davante's birth, there is no

proof that either Dr. Parker or Florida Hospital Altamonte provided Ms. Standley notice, although they had a reasonable opportunity to do so. There is likewise no proof to support a conclusion that there was a medical emergency or other reason that rendered it not practicable for them to have done so.

CONCLUSIONS OF LAW

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

19. In resolving whether a claim is compensable, the administrative law judge must make the following determination based upon the available evidence:

> (a) Whether the injury claimed is a birth-related neurological injury. If the claimant has demonstrated, to the satisfaction of the administrative law judge, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.302(2).
>
> (b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or

> resuscitation in the immediate post-delivery period in a hospital.

§ 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.

20. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes (1995), to mean:

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

21. Here, the proof demonstrated, that Davante's neurologic impairment (a right brachial plexus palsy) was not caused by "an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation" and that Davante was not "permanently and substantially mentally . . . impaired."[9] Consequently, given the provisions of Section 766.302(2), Florida Statutes, Davante does not qualify for coverage under

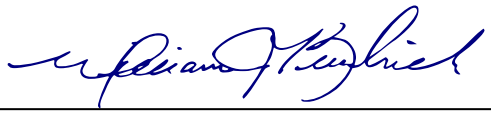
the Plan. See also Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 2d DCA 1995)("[B]ecause the Plan . . . is a statutory substitute for common law rights and liabilities, it should be strictly construed to include only those subjects clearly embraced within its terms."), approved, Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996); Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla. 1997)(The Plan is written in the conjunctive and can only be interpreted to require both substantial mental and physical impairment.). Moreover, for reasons appearing more fully in the Findings of Fact, the proof failed to demonstrate that the hospital and the participating physician complied with the notice provisions of the Plan.

CONCLUSION

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

ORDERED that the claim for compensation filed by Tissany Standley, on behalf of, and as parent and natural guardian of Davante Smith, a minor, is dismissed with prejudice.

DONE AND ORDERED this 31st day of January, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of January, 2006.

ENDNOTES

1/ The circumstances giving rise to the filing of the claim, as well as Petitioner's position on compensability and request for relief, were set forth in the petition, as follows:

Circumstances Getting Raised to the Filing of This Claim:

> 5. A medical malpractice suit was filed by the parents as the mother and father and natural guardians of, and on behalf of DAVANTE SMITH in the Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida, case number 98-1990-CA-09, on September 25, 1998.
>
> 6. On November 16, 2004, Defendants, by and through their counsel filed a Motion to Amend Answer and Affirmative Defenses to include that this matter was subject to the Neurological Injury Compensation Act (NICA), and on December 17, 2004, Defendants filed a Motion to Abate the Civil Action and requested referral to NICA.

7. An Order granting Defendants' Motion to Amend Answers to Affirmative Defenses and Defendants' Motion to Abate was entered by the Honorable Judge Debra Nelson in the circuit civil action on February 7, 2005, on the basis that compensability and notice issues were to be resolved by an Administrative Law Judge and were not within the circuit court jurisdiction, and Plaintiffs' were directed to file this petition.

8. Plaintiffs, TISSANY STANDLEY and DAVANTE SMITH deny that this matter meets the requirements of NICA.

* * *

The Request for Bifurcation:

10. The claimant requests that the Administrative Law Judge assigned to this matter bifurcate the proceedings, addressing compensability and notice pursuant to §766.316 at the first proceeding and the award pursuant to §766.31 at the second proceeding if it is determined DAVANTE SMITH incurred a birth related neurological injury subject to §766.301 et seq.

2/ The Joint Exhibits were, as follows: Joint Exhibit 1, medical records filed with DOAH on December 14, 2005, and identified in the Notice of Filing Medical Records as items 1-7, herein marked Joint Exhibit 1-1 through 1-7; Joint Exhibit 2, the deposition of Michael Duchowny, M.D.; and Joint Exhibit 3, the deposition of Donald Willis, M.D. Intervenors' exhibits were, as follows: Exhibit 1, the deposition of Robert Cullen, M.D.; Exhibit 2, medical records of Davante Smith from Florida Hospital for June 27, 1996 to June 30, 1996; Exhibit 3, medical records of Davante Smith from John Grossman, M.D.; Exhibit 4, psychological evaluation of Davante Smith from Deborah Day, Psy.D.; Exhibit 5, report of neurological consultation of Davante Smith from Robert Cullen, M.D.; Exhibit 6, deposition of John Grossman, M.D.; and Exhibit 7, Notice to Our Obstetric Patients, dated December 14, 1995.

3/ The first stage of "labor" is commonly understood to "begin[] with the onset of regular uterine contractions." Dorland's Illustrated Medical Dictionary, 28th 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," as that term is used in Section 395.002(9)(b)3, Florida Statutes (Supp. 1998), discussed infra at Endnote 8, is commonly understood to mean "[i]nsistently repetitive or continuous." Id.

4/ The Apgar scores assigned to Davante are a numerical expression of the condition of a newborn, and reflect the sum points gained on assessment of heart rate, respiratory effort, muscle tone, reflex irritation, and skin color, with each category being assigned a score ranging from the lowest score of 0 to a maximum score of 2. As noted, at one minute, Davante's Apgar score totaled 7, with heart rate, respiratory effort, and reflex irritation being graded at 2 each, muscle tone being graded at 1, and skin color being graded at 0. At five minutes, Davante's Apgar score totaled 9, with heart rate, respiratory effort, muscle tone, and reflex irritation being graded at 2 each, and color being graded at 1.

5/ Michael Duchowny, M.D., a physician board-certified in pediatrics, neurology with special competence in child neurology, and clinical neurophysiology, examined Davante on July 11, 2005, and noted the following physical limitations:

> Devante's NEUROLOGICAL EXAMINATION reveals a striking asymmetry of the right shoulder, dorsal region and upper extremity. There is widespread atrophy of the shoulder, arm and forearm compartments with a prominent flexion contracture of the right elbow. Devante has very limited supination. The pectoralis major and minor musculature is clearly diminished on the right compared to the left and there is prominent scapular winging with loss of musculature of the serratus anterior, the rhomboids, and teres musculature. The deltoid region is also small and there is hollowing of the suprascapular region. Devante is unable to elevate the right arm to the horizontal position and cannot move the right arm vertically without pulling on it with his

> left arm. He has diminished arm swing while walking and has an unsteady motion due to the right flexion contracture. There is sensory loss in the C4, 5 and C6 dermatomal distributions. The right triceps and biceps reflexes are absent compared to 1-2+ on the left and the brachial radialis is trace compared to 1+ on the left. In contrast, the deep tendon reflexes in the lower extremity are 2+ and symmetric and both plantar responses are downgoing. Devante also manifests a mild scoliosis, which is convex to the left.

(Joint Exhibit 2).

6/ The "central nervous system" is commonly understood to mean "that portion of the nervous system consisting of the brain and spinal cord." See "central nervous s." under "system," Dorland's Illustrated Medical Dictionary, 28th Edition, 1994.

7/ 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).

8/ Section 766.316, Florida Statutes, was amended by Chapter 98-113, Section 4, Laws of Florida, to read as follows:

> 766.316 Notice to obstetrical patients of participation in the plan.--Each hospital

> with a participating physician on his 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 injures. 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. (Amendment underlined).

And, Section 395.002(9)(b), Florida Statutes (Supp. 1998) defined "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.

However, Chapter 98-113, Section 7, Laws of Florida, provided that "[a]mendments to section 766.316, Florida Statutes, shall take effect July 1, 1998, and shall apply only to causes of action accruing on or after that date." Consequently, since

Davante was born June 27, 1996, neither the amendments to Section 766.316, Florida Statutes, nor the definition of "emergency medical condition," as it appears in Section 395.002(9)(b), Florida Statutes, are applicable to this case. Nevertheless, were the amendments applicable it would not change the result reached, since there was no proof that on admission to Florida Hospital Altamonte on June 26, 1996, at 3:25 p.m., or thereafter, until 7:00 p.m., when her membranes were ruptured, Ms. Standley had an "emergency medical condition," as defined by Section 395.002(9)(b), Florida Statutes (Supp. 1998), or the giving of notice was otherwise not practicable.

9/ Given Davante's failure to otherwise qualify for coverage under the Plan, it is unnecessary to resolve whether, although Davante evidences a substantial impairment to his upper right extremity, Davante is substantially "physically impaired," as that term is used in the Plan.

COPIES FURNISHED:
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NOTICE OF RIGHT TO JUDICIAL REVIEW

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