STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MILAGROS MAGALY CASTRO AND WILLIAM MARCELO CASTRO, as Personal Representatives of the Estates of ISAAC CASTRO AND DAVID CASTRO, deceased twin minors,	)	
Petitioners,	)	
vs.	)	Case No. 05-4512N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
LIFEMARK HOSPITALS OF FLORIDA, INC., d/b/a PALMETTO GENERAL HOSPITAL,	)	
Intervenor.	)	

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 May 23, 2006, in Tallahassee, Florida.

APPEARANCES

For Petitioners: Jorge E. Silva, Esquire
Paul Jon Layne, Esquire
Silva & Silva
236 Valencia Avenue
Coral Gables, Florida 33134

For Respondent: Donald H. Whittemore, Esquire
Phelps Dunbar, LLP
100 South Ashley Drive, Suite 1900
Tampa, Florida 33602

For Intervenor: Steven J. Mitchel, Esquire
Schell, Mitchel & Cooley, L.L.P.
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STATEMENT OF THE ISSUE

Whether Isaac Castro and David Castro, deceased minors, qualify for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On December 12, 2005, Milagros Magaly Castro and William Marcelo Castro, as Personal Representatives of the Estates of Isaac Castro (Isaac) and David Castro (David), deceased twin minors, filed a petition with the Division of Administrative Hearings (DOAH) to resolve whether Isaac and David qualified for coverage under the Plan. Notably, Petitioners were of the view that the claim was not compensable, but requested a resolution of the issue as "a prerequisite to Petitioners' anticipated civil action."

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition on December 12, 2005, and on February 20, 2006, following an extension of time within which to do so, NICA responded to the petition and gave notice that it was of the view the claim was compensable. Thereafter, Lifemark Hospitals of Florida, Inc., d/b/a Palmetto General Hospital, was accorded leave to intervene, and a hearing was scheduled for May 23, 2006, to resolve whether the claim was compensable.

At hearing, the parties stipulated to the facts included in paragraphs 1 and 2 of the Findings of Fact which follow, as well as the following additional matters:

> 1. The hospital gave notice as required by the Plan. § 766.316, Fla. Stat.
>
> 2. The Petitioners have recovered under a settlement agreement with all healthcare providers involved in Isaac's and David's birth, with the exception of Palmetto General Hospital, and if the claim is compensable they are not entitled to an award. § 766.304, Fla. Stat.
>
> 3. At no time prior to Isaac's and David's birth was their mother, Mrs. Castro, in labor.
>
> 4. Isaac and David suffered a brain injury caused by oxygen deprivation that rendered them permanently and substantially mentally and physically impaired.[1] The sole issue is whether the injury occurred during delivery or immediate post-delivery resuscitation.

Moreover, Petitioners' Exhibits A[2] and B[3] were received into evidence and, with the parties' agreement, post-hearing Petitioners filed the DVDs (3) related to Dr. du Plessis' deposition, and they were received into evidence as Petitioners' Exhibit C.[4] No witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed June 9, 2006, and the parties were initially accorded 10 days from that date to file proposed orders. However, at Respondent's request, the time for filing was extended to June 23, 2006. The parties elected to file such proposals and they have been duly-considered.

FINDINGS OF FACT

Stipulated facts

1. Milagros Magaly Castro and William Marcelo Castro are the natural parents of Isaac Castro and David Castro, deceased minors, and the Personal Representatives of their deceased sons' estates. Isaac and David were the product of a multiple (twin) gestation, and were born live infants on November 25, 2004, at Palmetto General Hospital, a hospital located in Hialeah, Florida, each with a birth weight exceeding 2,000 grams. David died December 7, 2004, and Isaac died January 12, 2005.

2. The physician providing obstetrical services at Isaac's and David's birth was Monica Daniel, 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.

Isaac's and David's birth

3. At or about 1:50 p.m., October 11, 2004, Mrs. Castro, aged 40, with an estimated delivery date of December 30, 2004, and the twins at 28+ weeks' gestation, presented to Palmetto General Hospital on referral from her perinatologist for inpatient management, with concerns of elevated blood pressure (suspected pregnancy induced hypertension), and increased creatinine levels. At the time, Mrs. Castro's pregnancy was considered high risk, with advanced maternal age and twin gestation, and was further complicated by insulin dependent gestational diabetes and hypothyroidism. Nevertheless, numerous assessments during the term of her pregnancy were reassuring for fetal well-being, as was her initial assessment at Palmetto General Hospital.

4. Mrs. Castro was admitted to the hospital at 3:00 p.m., that day, and her pregnancy was managed without apparent adverse incident until November 24, 2004, when, with the twins at 34 6/7 weeks' gestation, Mrs. Castro demonstrated severe preeclampsia, with increasing creatinine levels (worsening renal status). Notably, however, fetal monitoring between 1:01 p.m., and

approximately 4:07 p.m., that afternoon,[5] provided reassuring evidence of continued fetal well-being.[6]

5. Given her condition, Dr. Daniel ordered Mrs. Castro admitted to labor and delivery, where she was received at 9:10 p.m., for cesarean section delivery. Notably, Dr. Daniel's admission orders included a requirement for external fetal monitoring. However, that order was not followed, and no fetal monitor strips exist that would aid in assessing fetal status subsequent to 4:07 p.m., November 24, 2004. The progress notes do, however, include a few entries that bear on the issue.

6. At 9:10 p.m., on admission to labor and delivery, the nurse noted that Mrs. Castro reported normal fetal movement, and denied pain, vaginal discharge, or blurred vision. Thereafter, at 10:30 p.m., the nurse noted that Mrs. Castro showed abnormal lung sounds, with crackles bilaterally to the bases, and dyspnea (difficult or labored breathing). Mrs. Castro was provided supplemental oxygen by nasal cannula (NC). At 1:00 a.m., November 25, 2004, while being prepared for surgery, the nurse noted that Mrs. Castro was slightly dyspneic and still receiving supplemental oxygen, NC at 2 liters. Assessment revealed reassuring fetal heart tones, with "FHT's via US on right upper quadrant in the 130's [and] FHT's via US on lower left upper quadrant in the 120's." Otherwise, the records provide no

information regarding fetal status until the twins were delivered.[7]

7. At 1:35 a.m., Mrs. Castro was noted in the operating room, with an oxygen saturation level of 92 percent. She was given oxygen by mask, and by 1:45 a.m., her saturation levels were at 100 percent. No fetal heart tones were obtained "due to maternal instability," and, at 1:56 a.m., the incision was made (delivery began), and at 2:01 a.m., Isaac (identified as Twin A in the medical records) and at 2:02 a.m., David (identified as Twin B in the medical records) were delivered, severely depressed. Isaac's Apgar scores were noted as 1, 2, 2, 2, 2, 2, and 5, at one, five, ten, fifteen, twenty, twenty-five, and twenty-eight minutes, respectively.[8] David's Apgar scores were noted as 3, 5, and 6, at one, five, and ten minutes, respectively.[9]

8. Isaac's delivery and hospital course are documented in his Death Summary, as follows:

> BIRTH
>
> DATE: 11/25/2004 [TIME 02:01 hours]
>
> WEIGHT: 2.275kg
>
> GEST AGE: 35 weeks GROWTH: AGA
>
> Amniotic fluid was meconium stained. Presentation was vertex. The patient was born in the delivery room by emergent cesarean section under spinal anesthesia for maternal hypertension and increasing

creatinine. The patient was born first of twins. Apgar scores were 1 at 1 minute, 2 at 5 minutes and 2 at 10 minutes. At delivery, the patient was cyanotic, floppy, apneic and bradycardic. Treatment at delivery included oxygen, stimulation, oral suctioning, bag and mask ventilation, endotrachcal tube ventilation, epinephrine and cardiac compression. At birth baby was cyanotic, absent breathing effort, bradycardic (in the 20's-30's). Baby noticed to have particulate meconium. Oropharynx was suctioned by wall upon head delivery. Bag mask ventilation was started with no improvement in respiratory effort. Baby was intubated and epinephrine was given x 3 by EET but still no improvement in heart rate (in the 20's-30's). UAC line was placed while baby continued being bagged, and epinephrine was given IV x 2. Also 6 Meq of sodium bicarbonate was given x 2 plus one bolus of 4.5 Meq. Saline solution bolus of 20cc was given x1 . . . . On minute number 28-29 of life an adequate heart beat was finally noticed with improvement in color. Tone and activity still poor and no response to pain stimuli. ABG form UAC showed a pH=6.7 PCO2=47 PO2-380 BE=-31 HC03=5.6 . . . .

ADMISSION

DATE: 11/25/04

The patient was admitted immediately following delivery. Indications for admission included metabolic acidosis, possible sepsis, respiratory distress, prematurity and perinatal depression. Upon admission to NICU mechanical ventilation was started. Chest XR compatible with HMD vs. pneumonia. No air leak. Infasurf was given x 1 with good response, and several HCO3 corrections were needed.

ADMISSION PHYSICAL EXAM . . .

OVERALL STATUS: Critical - initial NICU day. BED: Radiant warmer. TEMP: Stable. HR: Stable. RR: Unstable. BP: Stable . . . .

CONDITION: Acrocyanotic and depressed, intubated, hypertonic extremities.

HEENT: Soft fontanelles, sluggish pupil reaction to light, ETT in place.

RESPIRATORY: Minimally depressed air exchange and decreased breath sounds bilaterally (improved after surfactant administration).

CARDIAC: Normal sinus rhythm . . . .

NEUROLOGIC: Depressed mental status. Severely decreased muscle tone initially and hypertonicity noticed after NICU admission. Seizures noticed (lip smacking and tonic-clonic seizures on all 4 extremities > on the R hand) . . . .

* * *

RESOLVED DIAGNOSES
DIAGNOSIS #1: RESPIRATORY DISTRESS

ONSET: 11/25/2004 RESOLVED: 1/12/2005

* * *

COMMENTS: Developed respiratory distress at birth. Chest Xrays compatible with HMD vs pneumonia. Initially severe respiratory acidosis. Improved with Infasurf x 1. On vent since birth, self-extubated during nursing touch-time on 12/5, was extubated for 19 hrs on nasal cannula but was reintubated on 12/6 for PC02 70 felt to be secondary to mucous plug. He has no gag reflex and has poor control of respiratory secretions reason why he has been kept on

mechanical ventilation. He is still ventilator dependent, was on ETT CPAP+5 and after an extubation attempt on 1/2 he failed oxyhood and was reintubated on 1/3/05. now extubated to nasal cannula.

* * *

DIAGNOSIS #3: POSSIBLE SEPSIS

ONSET: 11/25/2004 RESOLVED: 12/6/2004

* * *

COMMENTS: Completed a 10 day course of antibiotics for suspect sepsis due to unknown GBS, respiratory distress, and severe metabolic and respiratory acidosis. There is no clinical evidence of sepsis at this time.

* * *

DIAGNOSIS #10: SEVERE HYPOXIC-ISCHEMIC BRAIN INJURY

ONSET: 11/25/2004 RESOLVED: 1/12/2005

PROCEDURES: cranial ultrasound on 11/25/2004 (unofficially no bleed); MRI scan on 12/3/2004 (findings suggesting ischemic encephalopathy, normal size ventricles, no mass effects or midline shift)

COMMENTS: Adequate heart rate not obtained till 28-29 minutes of life. He presented with seizures and an abnormal neurologic exam and abnormal EEG findings. The pediatric neurologist impression was of a severe hypoxic ischemic encephalopathy with multifocal seizures. No clinical neurologic deterioration has been noted recently. The MRI was compatible with ischemic encephalopathy. Ped neurologist has been following the baby with us. No neurological improvement has been noted recently. . . . Baby remains unresponsive, fixed pupils, minimal spontaneous breathing,

does not have any spontaneous movement. No new changes noted recently. The baby has been unstable and recommended MRI of the brain was able to be done due to the critical condition of the infant.

DIAGNOSIS #11: SEIZURES

ONSET: 11/25/2004 RESOLVED: 1/12/2005

* * *

COMMENTS: The pediatric neurologist impression is of a severe hypoxic ischemic encephalopathy with multifocal seizures. Baby was initially noted to be lip-smacking shortly after admission to NICU then started with tonic-clonic movement of all four extremities > on the R hand. Initially treated with phenobarbital and Versed. Phenobarb discontinued 11/26. No clinical seizure activity on PE but on 11/29 EEG showed diffuse electrical sz. Phenobarb and Cerebryx started. EEG on 12/1 was unchanged but occasional correlation with subtle finger movement. 12/2 with decerebrate posturing of UE to deep painful stimuli. EEG from 12/3 showed seizure activity but some improvement was reported. Phenobarbital given x1 then held 2nd level elevated Cerebryx continued till 12/9 discontinued per pedi-neuro. Depacon added on 12/6 as recommended by pediatric neurologist no change before discontinued 12/10. Phenobarb was resumed on 12/8. level 42.3 on 12/11. The dose has been adjusted as per neurologist. No recent new neurological changes or improvement noted. He continues on phenobarb w/occasional clinical seizure noted . . . .

* * *

DIAGNOSIS #13: SEVERE METABOLIC ACIDOSIS

ONSET: 11/25/2004 RESOLVED: 12/2/2004

COMMENTS: Severe metabolic acidosis at birth pH 6.7 HCO3=5.6. Baby received HCO3 bolus x 3 in the OR and several corrections upon admission to NICU.

* * *

DEATH INFORMATION

DISPOSITION: The patient died on 1/12/2005 at 00:52 hours. The cause of death was Cardio-respiratory arrest. Baby Boy "A" Castro is an 48 d/o w/Hypoxic-ischemic-encephalopathy, seizures, s/p 28-29 min full resuscitation, initially w/o a heart rate; who has been in a vegetative neurological state, w/intractable seizures since birth 11/25/04. Baby never tolerated any feeds and remained in TPN, was extubated to n/c w/(+) spontaneous breathing but NO gag and unable to clear secretions since baby never had any spontaneous voluntary movement. Tonight while parents visited baby was having desaturations and bradycardia that required IPPB, to improve heart rate and O2 sats. Parents requested to stop the IPPB, and requested to hold baby w/O2 N/C. Baby expired almost immediately of cardiorespiratory arrest at 12:52 a.m. . . . .

9. David's delivery and hospital course are documented in his Death Summary, as follows:

BIRTH

DATE: 11/25/2004 TIME: 02:02 hours

WEIGHT: 2.150kg

GEST AGE: 35 weeks GROWTH: AGA

RUPTURE OF MEMBRANES: At delivery.

AMNIOTIC FLUID: Clear. PRESENTATION: Vertex. DELIVERY: Born in the delivery

room by emergent cesarean section under spinal anesthesia for maternal hypertension with increasing creatinine.

BIRTH ORDER: Second of twins. APGARS: 3 at 1 minute, 5 at 5 minutes and 6 at 10 minutes. CONDITION AT DELIVERY: Cyanotic and floppy. TREATMENT AT DELIVERY: Stimulation, oxygen, oral suctioning, bag and mask ventilation and endotrachael tube ventilation.
At birth baby was cyanotic, no respiratory effort, floppy, bradycardic in the 50's. Mouth was suctioned with bulb, and bag mask ventilation was started for about 5 minutes before improvement in color and activity were seen. Baby was intubated aprox on min of life 4-5 by pediatrician Dr. Torres. No medication was needed during intervention, and baby responded well to intubation, oxygen and ambu bag ventilation. Baby noticed to be floppy despite color and heart rate improvement. Transferred stable to NICU. Initial ABG's showed severe metabolic acidosis pH=6.9 HCO3=7.4 BE=-25.

ADMISSION

DATE: 11/25/2004

ADMISSION TYPE: Immediately following delivery. ADMISSION INDICATIONS: Metabolic acidosis, respiratory distress, possible sepsis, prematurity and perinatal depression. Upon admission to NICU mechanical ventilation was stated. Chest XR showed reticulogranular pattern and air bronchograms compatible with HMD vs. pneumonia. No air leak. Infasurf was given x 1 with good response. Na bicarbonate corrections were needed x 3.

ADMISSION PHYSICAL EXAM

OVERALL STATUS: Critical - initial NICU day. BED: Radiant warmer. TEMP: Stable. HR: Stable. RR: Unstable: BP: Stable.

URINE OUTPUT: Stable.

CONDITION: on PRVC, breathing above the ventilator (tachypneic), pink color, mild acrocyanosis.

HEENT: Pupils reactive to light, soft fontanelles, no bulging.

RESPIRATORY: Minimally decreased air exchange, initially decreased breath sounds, improved after Infasurf and mechanical ventilator sounds heard equally bilaterally.

CARDIAC: Normal sinus rhythm . . . .

NEUROLOGIC: Depressed mental status and decreased muscle tone.

* * *

RESOLVED DIAGNOSES

DIAGNOSIS #1: SEVERE RESPIRATORY DISTRESS

ONSET: 11/25/2004 RESOLVED: 12/7/2004

* * *

COMMENTS: Respiratory distress at birth. Chest XR compatible with HMD vs pneumonia. Received Infasurf x 1 with adequate response. In room air but requiring vent support due to no spontaneous respirations breathing with the vent. Poor respiratory effort more likely due to hypoxic ischemic encephalopathy but no deterioration in respiratory status. He remains critically ill and on high ventilatory support, unstable and deteriorating due to DIC and sepsis. During the course of the day the baby continued to deteriorate clinically and presented episodes of bradycardia and decreased SAO2 requiring higher ventilatory support and multiple doses of epinephrine. Later in the afternoon he became bradycardic and did not respond to resuscitative

measures and was declared dead at 3:25 PM. . . .

DIAGNOSIS #2: METABOLIC ACIDOSIS

ONSET: 11/25/2004 RESOLVED: 11/29/2004

MEDICATIONS: Sodium bicarbonate on 11/25/2004.

COMMENTS: Upon admission required Na bicarbonate corrections x3. Initial ABG's showed a pH=6.9 HCO3=7.4 BE=-25, currently stable.

* * *

DIAGNOSIS #6: POSSIBLE SEPSIS

ONSET: 11/25/2004 RESOLVED: 12/5/2004

* * *

COMMENTS: Completing a 10 day course of antibiotics for suspect sepsis secondary to maternal GBS unknown, respiratory distress at birth, severe metabolic acidosis. The blood culture was negative and there is no clinical evidence of sepsis at this time.

* * *

DIAGNOSIS #10: HYPOXIC-ISCHEMIC BRAIN INJURY

ONSET: 11/25/2004 RESOLVED: 12/7/2004

PROCEDURES: cranial ultrasound from 11/25/2004 till 12/7/2004(normal)

COMMENTS: Perinatal depression, required bag mask ventilation, intubation and oxygen in order to improve. Apgar scores were 3/5/6. The baby had presented seizures and systemic failure and the assessment of the pediatric neurologist was of severe hypoxic and ischemic encephalopathy. Neurologically

> he has not changed recently and continues with an abnormal neurological exam and no improvement in neuro condition.
>
> DIAGNOSIS #11: SEIZURES
>
> ONSET: 11/25/2004 RESOLVED: 12/7/2004
>
> * * *
>
> COMMENTS: Shortly after admission to NICU he started with generalized tonic-clonic seizures. Persistent Sz activity on phenobarb and Cerebryx correlates with independent clonic movements of UE, extensor posturing of UE R>L and gaze deviation per neurologist Dr. Bustamante. Last EEG from 12/3 showed worsening EEG with seizure activity and burst suppression. The pediatric neurologist impression was of a severe hypoxic ischemic encephalopathy with multifocal seizures. Phenobarbital on hold since 12/1 for level 61.8 down to 29.5 will not resume per neuro and phosphenytoin level 18.8 on maintenance dose 2.5 mg/kg q 12. An MRI was not done due to the critical and unstable condition of the infant.
>
> * * *
>
> DEATH INFORMATION
>
> DISCHARGE TYPE: Died. DATE OF DEATH: 12/7/2004. TIME OF DEATH: 15:25 hours. CAUSE OF DEATH: Respiratory failure, sepsis and multisystemic failure . . . .

Coverage under the Plan

10. 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 and 766.31, Fla. Stat.

11. Here, it is undisputed that Isaac and David suffered an injury to the brain caused by oxygen deprivation, which rendered them permanently and substantially mentally and physically impaired. What is disputed is whether the injury occurred "in the course of labor, delivery, or resuscitation in the immediate postdelivery period," as required for coverage under the Plan. § 766.302(2), Fla. Stat.; Nagy v. Florida Birth-Related Neurological Injury Compensation Association, 813 So. 2d 155 (Fla. 4th DCA 2002). As to that issue, Petitioners are of the view that the brain injury occurred before delivery, and since it is undisputed that Mrs. Castro was never in labor the injury is not covered by the Plan. In contrast, NICA and the hospital are of the view that the injury either occurred during, or continued through, delivery and resuscitation, and is therefore compensable.

12. As an aid to resolving such issue, Section 766.309(1)(a), Florida Statutes, provides that when, as here, the proof demonstrates "that the infant has sustained a brain . . . injury caused by oxygen deprivation . . . 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]." Here, since Mrs. Castro was never in labor, the presumption is that Isaac's and David's brain injury occurred in the course of delivery or resuscitation in the immediate postdelivery period. See Orlando Regional Healthcare Systems, Inc. v. Alexander, 909 So. 2d 582 (Fla. 5th DCA 2005). Consequently, to be resolved is whether there was credible evidence produced to support a contrary conclusion and, if so, whether, absent the presumption, the record demonstrates, more likely than not, that Isaac's and David's brain injury occurred during delivery or resuscitation in the immediate postdelivery period.[10]

The timing of the twins' brain injury

13. To address the timing of the twins' brain injury, the parties offered the medical records relating to Mrs. Castro's antepartal course, as well as those associated with the twins' birth and subsequent development. (Petitioners' Exhibit A, tabs 8-11, and Exhibit B). Additionally, the parties offered the deposition testimony of Dr. Daniel, a physician board-certified in obstetrics and gynecology; Adré du Plessis, M.D., a physician board-certified in pediatrics, and neurology with special competence in child neurology; Steven Chavoustie, M.D., a physician board-certified in obstetrics and gynecology;

Michael Katz, M.D., a physician board-certified in obstetrics and gynecology, and maternal-fetal medicine; and Donald Willis, M.D., a physician board-certified in obstetrics and gynecology, and maternal-fetal medicine. (Petitioners' Exhibit A, tabs 3-7) The testimony of Doctors Daniel, du Plessis, and Chavoustie was supportive of Petitioners' view, and the testimony of Doctors Katz and Willis was supportive of the views of NICA and the hospital.

14. The medical records and the testimony of the parties' experts have been carefully considered. So considered, it must be resolved that there was credible evidence (through the testimony of Doctors Daniel, du Plessis, and Chavoustie) to rebut the presumption established by Section 766.309(1)(a), Florida Statutes, and that, absent the presumption, the record failed to demonstrate, more likely than not, that any injury the twins may have suffered during delivery or immediate postdelivery resuscitation contributed significantly to the profound neurologic impairment they suffered. Indeed, the more compelling proof supports a contrary conclusion.

15. In so concluding, it is notable that the twins' brain injury started sometime after 4:07 p.m., November 24, 2004, when fetal reserves were lost, and the twins ability to compensate for a lack of oxygen failed, and that, given the severe depression the twins demonstrated at birth (cyanotic, apneic,

floppy, and profoundly bradycardic), consistent with injury to the brain stem, the more robust level of a newborn brain; the need for intensive delivery room resuscitation (with intubation and, in the case of Isaac, advanced CPR), likewise consistent with injury to the brain stem; and the profound acidotic state in which they presented, it is likely, more so than not, that the twins suffered profound brain damage well prior to delivery (which was quick and without complication), that accounts for the severe neurological impairment (mental and physical) they demonstrated at birth. Consequently, since Mrs. Castro was not in labor when the profound brain injury most likely occurred, the twins were not shown to have suffered a "birth-related neurological injury," as defined by the Plan.

CONCLUSIONS OF LAW

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

17. The Florida Birth-Related Neurological Injury Compensation Plan was established by the Legislature "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims" relating to births occurring on or after January 1, 1989. § 766.303(1), Fla. Stat.

18. The injured "infant, her or his personal representative, parents, dependents, and next of kin," may seek

compensation under the Plan by filing a claim for compensation with the Division of Administrative Hearings. §§ 766.302(3), 766.303(2), 766.305(1), and 766.313, Fla. Stat. The Florida Birth-Related Neurological Injury Compensation Association, which administers the Plan, has "45 days from the date of service of a complete claim . . . in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." § 766.305(4), Fla. Stat.

19. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the administrative law judge to whom the claim has been assigned. § 766.305(7), Fla. Stat. However, if a dispute exists, as it does in the instant case, the dispute must be resolved by the assigned administrative law judge in accordance with the provisions of Chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

20. In discharging this responsibility, 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 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.

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

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

22. As the proponent of the issue, the burden rested on the hospital and NICA to demonstrate that the twins suffered a "birth-related neurological injury." § 766.309(1)(a), Fla. Stat. See also Balino v. Department of Health Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1997)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.").

23. Here, the proof failed to support the conclusion that, more likely than not, the twins' suffered an "injury to the brain . . . caused by oxygen deprivation . . . occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period . . . [which rendered them] permanently and substantially mentally and physically impaired." Consequently, Isaac and David do not qualify for coverage under the Plan. § 766.302(2), Fla. Stat. 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).

24. Where, as here, the administrative law judge determines that "the injury alleged is not a birth-related neurological injury . . . he [is required to] enter an order [to such effect] and . . . cause a copy of such order to be sent immediately to the parties by registered or certified mail." § 766.309(2), Fla. Stat. Such an order constitutes final agency action subject to appellate court review. § 766.311(1), Fla. Stat.

CONCLUSION

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

ORDERED that the claim for compensation filed by Milagros Magaly Castro and William Marcelo Castro, as Personal Representatives of the Estates of Isaac Castro and David Castro, deceased twin minors, is dismissed with prejudice.

DONE AND ORDERED this 27th day of June, 2006, 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 27th day of June, 2006.

ENDNOTES

1/ The transcript contains a scriveners' error at page 7, line 5, in that it fails to note that the parties' stipulation included an agreement that Isaac and David were rendered both substantially mentally and physically impaired.

2/ Petitioners' Exhibit A is a binder which includes 11 tabbed items, identified in the index, as follows: Item 1, Revised Final Joint Pre-Hearing Stipulation; Item 2, Petitioners' Motion to Strike or for Evidentiary Inference Against Intervenor Palmetto General Hospital; Item 3, Deposition Transcript of Dr. Monica Daniel; Item 4, Deposition Transcript of Adré du Plessis; Item 5, Deposition Transcript of Dr. Steven Chavoustie; Item 6, Deposition Transcript of Dr. Michael Katz; Item 7, Deposition Transcript of Dr. Donald Willis; Item 8, Baby "A" and Baby "B" delivery outcome 11/25/04; Item 9, Notes/Orders/Progress and Nursing Records 24 Hours Prior to Delivery; Item 10, Death Summary - Isaac (Baby A); and Item 11, Death Summary - David (Baby B).

3/ Petitioners' Exhibit B is a box of medical records, that contains Milagros Castro's medical records from Palmetto General Hospital (Volumes I and II), Isaac's (Baby A's) medical records from Palmetto General Hospital (Volumes I and II), and David's (Baby B's) medical records from Palmetto General Hospital (one volume).

4/ Post-hearing, Petitioners also filed the exhibits to Dr. Katz's deposition. Those exhibits have been placed at the back of Dr. Katz's deposition which is Item 6 of Petitioners' Exhibit A.

5/ The fetal monitor strips run from 1:01 p.m., to approximately 1:45 p.m., and from 3:35 p.m., to approximately 4:07 p.m., November 24, 2004.

6/ During her admission Mrs. Castro underwent a series of biophysical profiles that were consistently reassuring for fetal well-being, with the last test being done November 23, 2004. Fetal monitoring during her admission was likewise reassuring for fetal well-being.

7/ The entry at 9:10 p.m., regarding normal fetal movement and the entry at 1:00 a.m., regarding reassuring fetal heart tones are suggestive of continued fetal well-being, but insufficient to render the issue free from doubt.

8/ An Apgar score is a numerical expression of the condition of a newborn infant, and reflects the sum points gained on assessment of heart rate, respiratory effort, muscle tone, reflex irritability, and color, with each category being assigned a score ranging from the lowest score of 0 to a maximum score of 2. See Dorland's Illustrated Medical Dictionary, 28th Edition, 1994. Here, at one minute, Isaac's Apgar score totaled 1, with heart rate being graded at 1 (less than 100 beats per minute), and all other criteria being graded at 0; at five, ten, fifteen, twenty, and twenty-five minutes, Isaac's Apgar score totaled 2, with heart rate and color being graded at 1 each, and all other criteria being graded at 0; and at twenty-eight minutes Isaac's Apgar score totaled 5, with heart rate being graded at 2 (greater than 100 beats per minute), reflex irritability, color, and respiratory effort being graded at 1 each, and muscle tone being graded at 0.

9/ At one minute, David's Apgar score totaled 3, with heart rate, reflex irritability, and color being graded at 1 each, and respiratory effort and muscle tone being graded at 0; at five minutes David's Apgar score totaled 5, with heart rate being graded at 2, muscle tone, reflex irritability, and color being graded at 1 each, and respiratory effort being graded at 0; and at ten minutes, David's Apgar score totaled 6, with heart rate being graded at 2, and all other criteria being graded at 1.

10/ 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), wherein it was stated:

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

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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.