STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DASHEA JACKSON AND IFAGBEMI OLAMINA, ON BEHALF OF AND AS PARENTS AND NATURAL GUARDIANS OF MONIFA OLAMINA, A MINOR,	)	
Petitioners,	)	
vs.	)	Case No. 06-3753N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent.	)	

FINAL ORDER

With the parties' agreement, this claim was resolved based on the testimony provided and exhibits received into evidence at a hearing held March 20, 2007, in Gainesville, Florida, and the parties' Stipulated Record, filed May 3, 2007.

APPEARANCES

For Petitioners: Dashea Jackson, pro se
Ifagbemi Olamina, pro se
951 A Southeast 4th Street
Gainesville, Florida 32601

For Respondent: Tana D. Storey, Esquire
Roetzel & Andress
225 South Adams Street, Suite 250
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

At issue is whether Monifa Olamina, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On October 3, 2006, Dashea Jackson and Ifagbemi Olamina, on behalf of and as parents and natural guardians of Monifa Olamina (Monifa), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on October 4, 2006, and on January 2, 2007, following an extension of time within which to do so, NICA responded to the claim, and gave notice that it was of the view that Monifa did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, and requested that a hearing be scheduled to resolve the issue.

Pursuant to notice, such a hearing was convened on March 20, 2007, and Petitioners presented the testimony of Dashea Jackson, Ifagbemi Olamina, and Wende Smith-Ogunlano, and Respondent's Exhibits 1 and 2 were received into evidence. Then, at the Petitioners' request, the hearing was adjourned to accord Petitioners the opportunity to seek representation and additional medical information. Thereafter, on April 18, 2007,

a status conference was held with Petitioner Dashea Jackson and Respondent's counsel, at which the parties agreed no further hearing was necessary and that they would submit a stipulated record, with any additional evidence.

On May 3, 2007, the parties filed a Notice of Filing Stipulated Record, which provided:

> COME NOW, Petitioners, DASHEA JACKSON and IFAGBEMI OLAMINA and Respondent, FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION ("NICA")(collectively the "Parties"), and state:
>
> A. The Parties submit and stipulate to the entry into evidence the following documents:
>
> 1. Affidavits of Records Custodian of Putnam Community Medical Center and accompanying medical records for Dashea Jackson and Monifa Olamina filed by the Respondent with DOAH on March 13, 2007. These records were accepted into evidence at the March 20, 2007, hearing as Respondent's Exhibits 1 and 2.
>
> 2. Medical records from Shands at the University of Florida for Monifa Olamina filed by Respondent with DOAH on March 13, 2007.[1]
>
> 3. Report dated February 13, 2007, from Charles A. Williams, M.D., Division of Genetics, Department of Pediatrics, Shands Children's Hospital. The Parties agree that a true and correct copy is attached hereto as Exhibit 1.
>
> 4. Correspondence dated March 14, 2007, from Michael Duchowny, M.D., with Miami Children's Hospital. The Parties agree that

a true and correct copy is attached hereto as Exhibit 2.

B. The Parties further stipulate to the entrance of the following documents subject to the acknowledgement that the following documents are hearsay:[2]

5. Affidavit and accompanying report by Donald C. Willis, M.D. The original of this document was filed with DOAH on March 13, 2007. A copy of this document is attached hereto as Exhibit 3.

6. Affidavit and accompanying report by Michael Duchowny, M.D. The original of this document was filed with DOAH on March 13, 2007. A copy of this document is attached hereto as Exhibit 4.

C. The Parties hereby agree that the Administrative Law Judge may make his determination in this matter based on the testimony provided and documents received into evidence at the March 20, 2007, hearing, and the above-listed documents without conducting a further hearing in this matter.

FINDINGS OF FACT

Stipulated facts

1. Dashea Jackson and Ifagbemi Olamina are the natural parents and guardians of Monifa Olamina, a minor. Monifa was born a live infant on July 31, 2002, at Putnam Community Medical Center, a hospital located in Palatka, Florida, and her birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Monifa's birth was Michael Akhiyat, 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.

Monifa's birth and immediate newborn course

3. At or about 2:30 a.m., July 31, 2002, Mrs. Jackson, with an estimated delivery date of August 12, 2002, and the fetus at 38 weeks' gestation, was admitted to Putnam Community Medical Center, with complaints of contractions since 10:20 p.m., July 30, 2002. At the time, strong, regular contractions (at a frequency of 1-2 minutes) were noted; the membranes were intact; vaginal examination revealed the cervix at 9 centimeters dilation, 100 percent effacement, and the fetus at 0 station; and fetal monitoring was reassuring for fetal well-being, with fetal heart rate in the 110s, with variability present.

4. At 2:50 a.m., fetal heart rate continued in the 110s, with long term variability and accelerations present; at 2:53 a.m., Mrs. Jackson's membranes were artificially ruptured, with clear fluid noted; and soon thereafter an ISE (internal scalp electrode) was applied, IVF (intravenous fluid) bolus was started, and 0_2 (oxygen) per mask was given. At 3:00 a.m., variable decelerations were noted, with pushing; at 3:05 a.m., complete cervical dilation was documented; and at 3:09 a.m., Monifa was delivered, with vacuum assistance.

5. Upon delivery, Monifa was bulb-suctioned, given blow-by oxygen, and accorded tactile stimulation. Apgar scores were noted as 5 and 8, at one and five minutes, respectively.[3]

6. Following stabilization, Monifa was transferred to the newborn nursery, where she was received at 3:17 a.m., and where she remained until discharged with her mother on August 1, 2002. In the interim, Monifa's new born course was normal, except for a sacral dimple and evidence of segmentation abnormalities, noted August 1, 2002. Given those issues, an appointment was made at Shands Children's Hospital at the University of Florida (Shands) for August 5, 2002, for an ultrasound of back and x-ray of spine (lumbar and sacral), and on discharge instructions were given to follow-up with the appointment.

7. As instructed, Mrs. Jackson presented with Monifa at Shands on October 5, 2002. Ultrasound Lumbar and Sacral, noted the following findings and impression:

> FINDINGS: Clinical History: Ultrasound examination of the lower spine was done in this patient with a sacral dimple and the history of segmentation anomalies. There are no prior studies for comparison.
>
> Discussion: The spinal cord ends at about L2, a normal level. There is no evidence of tethering or a lipoma in the cord or nerve roots. There is no focal meningocele.
>
> IMPRESSION: Examination of the lower spine is normal.

Monifa's subsequent development

8. On August 19, 2002, Monifa was admitted to Shands on referral from her primary care doctor (Dr. Marcie Howard) for failure to thrive. At the time, the history of her illness was noted as follows:

> . . . The patient has had difficulty breast feeding and has been losing weight, although she has had a reasonable number of wet diapers and appears to try to take the breast, it is difficult to estimate how much she is getting. Her mother does indicate she tries to feed her about every two hours and that she latches on, but only for about 15 or 20 minutes and then does seem to have some difficulty staying on task. She often falls asleep. There is no spitting up, vomiting, diarrhea or emesis.
>
> Her weights have been six pounds at birth, four pounds eleven ounces on day six, four pounds eight ounces on day sixteen and four pounds fourteen ounces on day 19. That was measured at the scale in Dr. Howard's office. Her mother has tried to give her formula and been unsuccessful. She otherwise seems to [be] fine to her mother . . . .

9. Monifa was discharged from Shands on August 28, 2002. At the time, her Discharge Summary described Monifa's hospital course, as follows:

> The patient was admitted to evaluate for poor feeding and the decrease in body weight . . . . OT, PT, Lactation and Nutrition consults were involved, and the patient was evaluated poor sucking coordination. Patient was once NPO, then NG tube inserted to feed formula . . . . BMP, thyroid, ammonia, urine organic acid/serum amino acid

> were sent originally, and all showed normal and urine organic acid/serum amino acid, which are still pending. Brain MRI was done with normal findings . . . . Patient's body weight was increased from 2,212 gm on admission to 2,762 gm today. We also sent HIV antibody which showed a negative, and a chromosome karyotype type which is still pending. Sara Plager was consulted to evaluate for swallow study, and at this point, she did not feel it was necessary to have one. Because of her cardiac murmur, we took chest x-ray and the EKG to discharge home, which both showed within normal limits. We also consulted with Developmental Evaluation Intervention to setup to see Monifa after discharge home. Patient noted DC home with NG tube feeding . . . and they will follow-up with primary care provider.

Monifa was fed via NG tube for approximately 6 months,[4] and then transitioned to a bottle. Of note, following discharge from Shands, Monifa did not require re-hospitalization.

10. On May 21, 2004, Monifa was seen at the Pediatric Neurology Clinic, Shands Children's Hospital, for developmental delay. Dr. Paul R. Carney, a pediatric neurologist, reported the results of his evaluation, as follows:

> Monifa is a 1-9/12 year-old African-American female seen at today's Pediatric Neurology Clinic for her developmental delay. She is accompanied to clinic by her mom who provides the history. Her mom states that presently at 21 months of age the baby can scoot and the baby may sit in a tripod fashion for approximately two minutes. The baby is unable to get herself into a sitting position. She currently says "Dada" and will point. Other than that she is not crawling, is not making gains towards

pulling herself up or moving towards walking. She has been in therapy. Mom reports that the child has undergone an EEG in October 2003. It was abnormal with slowing and disorganization, nonspecific cortical neuro dysfunction.

* * *

Review of systems: Mom describes her as basically being healthy. Developmental history has been her marked area of concern in which she only rolled over at 7 months and has just now started to tripod with some assistance.

* * *

On exam the baby has a height of 79.0 cm, weight of 9.1 kg, head circumference of 44 cm which is less than the 5th percentile. . . . On general exam HEENT reveals a closed anterior fontanel, microcephalic child with marked [a]symmetrical face. . . . Baby is noted to have multiple Mongolian spots on back. It is unclear if baby has cafe au lait spots. . . . Specifically on nerve exam, one of the most striking features about this child is her asymmetrical face. She has decreased movement of her right upper face as well as her lower face. She is noted to have drooling from her face on the right, widened palpebral fissure. The pupils are equal, round, and reactive to light. She does demonstrate full extraocular movements. Tongue is noted to be midline. Motor exam is most noticeable for marked hypotonia. Baby has significant head lag, given her age of 21 months of age. The baby, though, is noted to have positive brisk reflexes in lower extremities and upper extremities as well. Sensory is grossly intact. Cerebellar reveals no tremor when reaching out for objects.

> Impression: The patient is presenting most likely with a central nervous system disorder. Given the presence of brisk reflexes and her low tone, we have concern that she may have had an intrauterine stroke that was not apparent on the first MRI that was done when she was a few weeks of age. A stroke-like finding on MRIs could certainly explain her asymmetrical face and may indicate that there was some type of distress which has been a cause for her developmental delay.
>
> Plan: At this time we will repeat an MRI. We will send labs for a CMP, urine organic acid, and plasma amino acids. We will follow her back in clinic following these studies to further review [with] the mom. . . .

11. The brain MRI was done July 9, 2004, and noted the following findings and impressions:

> Findings: Current study demonstrates striking cerebellar and pontine atrophy. There is a suggestion that the spinal cord is on the lower limits of size as well. In retrospect, the previous MR demonstrated a somewhat small cerebellum and cerebrum. These changes were not striking enough at that time to call abnormal. However, finding is more pronounced when compared to the current exam. No hydrocephalus, focal lesion, or intra-axial or extra-axial fluid collections are seen.
>
> IMPRESSION: Striking cerebellar and pontine atrophy. Differential diagnosis would include pontocerebellar atrophy syndrome, pontocerebellar hypoplasia, and spinocerebellar atrophy syndrome.

12. Apparently, Monifa moved with her family to Jacksonville following her MRI, and returned to Gainesville in early 2006. Then, on March 30, 2006, on the recommendation of her pediatrician, she was again seen at the Pediatric Neurology Clinic for evaluation. The results of that evaluation noted:

> . . . Today, mom reports that the patient has been slowly progressing and gaining milestones. At 3 years 8 months old she now talks both single words and phrases. She converses with her 2-year-old sister and repeats what her sister says. She cannot walk independently, however, she can walk with difficulty if someone supports her either by the hands and arms or by the trunk. She is able to feed herself. She has been sitting by herself since she was a little over 1 year of age.
>
> She was getting some therapy services until she turned 3, but then the services terminated. She was not enrolled for any school this year and therefore received no therapy from the school system.
>
> * * *
>
> OBJECTIVE: PHYSICAL EXAM: Today her height is 91.3 cm. Her head circumference is 48 cm, and her weight is 12.65 kg. . . . Monifa is awake and tracks with her eyes. She seems interested in her surroundings. She holds on to her mom for balance, standing beside mom's chair and holding onto mom's leg. She bends forward at the hips most of the time. HEENT reveals an asymmetrical face, which appears to be perhaps somewhat weak on the right. She also has a slightly disconjugate gaze. She is hypotonic both centrally and peripherally. She has brisk reflexes throughout and appears to have an up-going toe on the right and down-going toe on the

left. She is able to grasp onto a sticker that has been given to her, but does not spontaneously grasp when the examiner tries to hand her a pen. She ambulates with extreme difficulty occasionally taking a step which is very ataxic, and she has extremely poor balance and would fall immediately if she was not supported. She can sit on the exam table by herself, but is noted to hold one hand down on the table for support.

ASSESSMENT: This is a 3-year 8-month-old child with history of developmental delay, hypotonia, and ataxia. Past MRI has shown cerebellar and pontine atrophy. She is gaining in milestones and is not declining.

Because she continues to gain milestones, at this time, we do not think that she has spinal cerebellar atrophy, but most likely cerebral palsy.

PLAN: We have discussed this with mom and told her that this is likely cerebral palsy which is caused by in the birth injury.[5] We are going to repeat her MRI to see if there has been any progression in her atrophy. We are going to sign her up for Children's Medical Services because the patient needs aggressive PT, OT, and Speech Therapy. We are going to have her come back to our clinic in three months.

13. The brain MRI was done May 5, 2006, noted the following findings and impression:

Findings: The previous examination demonstrates striking cerebellar and pontine atrophy consistent with possible pontocerebellar atrophy syndrome, pontocerebellar hypoplasia, and spinocerebellar atrophy syndrome.

Today's examination demonstrates the same findings. There is apparent flattening of

> the clivus consistent with likely platybasia. There has been overall progression of cerebellar atrophy and malformation of the pons. There has been interval development of an area of increased signal intensity seen on FLAIR and T2 imaging within the left frontal lobe. This is uncertain etiology and may represent a focal area of gliosis.
>
> Otherwise, the brain density is appropriate for a young child. There is minimal retained interstitial water in the cerebral white matter. Myelination is appropriate for age with evidence of myelination in corticospinal tracts, visual pathways and corpus callosum. There is no hydrocephalus.
>
> IMPRESSION: Overall progression of cerebellar atrophy and pontine malformation with interval development of an area of increased signal intensity in the left frontal lobe of uncertain etiology. This may represent a focal area of gliosis. See above.

14. On August 3, 2006, Monifa was seen at the Pediatric Neurology Clinic in follow-up for cerebellar atrophy. The results of that evaluation noted:

> . . . Monifa has been evaluated for speech and language [May 9, 2006]. It is noted that she is approximately one and a half to two years behind in her language development. She remains delayed in her motor skills as well. She still is unable to walk. She has very poor balance but can hold onto a chair and move around the chair without assistance. She definitely cannot ambulate independently. Her mom reports the patient is speaking in two to three word phrases but not in sentences. She does try to mimic her sister. The patient has been signed up for Children's Medical Services, however, mom is still waiting for a nurse to

be assigned to her case so she can start getting PT, OT and speech therapy.

Overall, Mom does not feel as though Monifa has changed significantly since we saw her on March 30th. She continues to be concerned because the patient is unable to walk.

Today, her weight is 12.7 kg. . . . and her head circumference is 47.7 cm. . . . Monifa is sitting in her stroller chair. Her face is asymmetrical, appearing to be weak on the right side. She has very little verbal output but when she does speak, she is dysarthic.[6] She is hypotonic throughout. She has moderately brisk reflexes throughout. She has an upgoing toe on the right and a tight heel cord on the left. When stood up, the patient cannot stand without assistance. She has to be firmly supported. She does take a few steps, which are very ataxic.

Assessment: This is a 4-year-old child with progressing cerebellar atrophy. Today, we are going to send her to the lab for repeat serum amino acids and urine organic acids. We are also sending a comprehensive spinal genetics-testing screen to Athena Laboratories for cerebellar atrophy. We are going to get a lactate, a pyruvate and ammonia level. We are going to request a Genetics consult to request their assistance in trying to determine the etiology of this patient's symptoms. . . .

Today we have discussed the patient's most recent MRI scan with mom. As of this time, we are not sure whether or not she has spinocerebellar atrophy syndrome or whether she may have some metabolic disorder. Mom has asked if these conditions are progressive and she has been told that they are, however, at this point in time, the patient does not have a definitive diagnosis . . . .

15. Insofar as the record reveals, Monifa has not been seen at the Pediatric Neurology Clinic since her visit of August 3, 2006. However, she was seen for a genetics consult by Charles Williams, M.D., at the Division of Genetics, Department of Pediatrics, Shands Children's Hospital, on February 13, 2007. The results of that consultation noted:

> The evaluation thus far has resulted in a normal peripheral blood karyotype, normal blood ammonia, essentially normal paravate, and lactate levels and she has had an [A]thena cerebellar ataxia mutation panel which was reported as normal. As well, she has had normal plasma amino acid studies.
>
> * * *
>
> She has been moving forward developmentally and the mother thinks that her mental age is somewhere between three and four years of age. There is no history of any progressive ataxia or loss of gross motor milestones.
>
> * * *
>
> On physical examination, Monifa was an interactive little girl who established eye contact and had obvious facial asymmetry with the left hypoplastic mandible and maxilla . . . She was able to smile with a reasonably symmetric facial expression. Her eating has been reported by the mother as fairly well now although she did have some difficulties with swallowing in the first year or two of life. The extremities show no abnormalities. The chest exam normal, abdominal exam negative. A skin exam was free of any birthmark abnormalities.
>
> We were able to review her two MRIs as well as her initial CT scan which was done at about two months [sic] of age with our

> neuroradiologists, and when we looked at all of these, it seemed evident that there was pontine atrophy and cerebellar atrophy present since the first CT scan was performed at age 2 months [sic] and the findings are consistent with actually nonprogressive, pons/brain stem atrophy problem. It is most reminiscent of some type of intrauterine disruption that would cause focal abnormalities in this area.
>
> Impression: Our thought at this time is that Monifa does not have any type of neuro-degenerative ponto cerebellar problem. We think that her facial abnormalities in combination with the brain stem findings on the various brain images points to some type of disruption problem . . . that occurred prenatally. However, it is somewhat noteworthy in that she does not show any obvious features of Moebius sequence in terms of her facial examination and although she has marked facial hypoplasia on the left, when we reviewed the literature regarding hemifacial microsomias, we found no association with pontocerebellar atrophic problems. Nevertheless, in view of her good moving forward clinical history, I think that is most likely that her brain abnormality represents some type of acquired in utero disruption process. For the time being, I do not recommend any additional genetic studies and I do appreciate an opportunity providing consultation.

Coverage under the Plan

16. 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 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.

The etiology and significance of Monifa's impairments

17. Insofar as the medical records reveal, among the physicians who have treated Monifa, and who were particularly qualified to address the etiology and significance of her impairments, none concluded that Monifa's impairments most likely resulted from a brain or spinal cord injury caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate postdelivery period in the hospital, or that Monifa was permanently and substantially mentally and physically impaired. Indeed, to date her physicians have not identified a unifying etiology for her impairments, but are looking to etiologies other than those associated with Monifa's birth, as a likely cause for her difficulties.

18. Apart from the medical records, Petitioners offered no medical evidence to demonstrate the likely cause or significance of Monifa's neurologic impairments. Consequently, the proof failed to support the conclusion that Monifa suffered a "birth-related neurological injury," as required for coverage under the Plan. See, e.g., Sunshine Plumbing v. Benecke, 558 So. 2d 162, 165 (Fla. 1st DCA 1990)("[T]he claimant bears the burden of

proving a causal connection between the employment and the injury."); Vero Beach Care Center v. Ricks, 476 So. 2d 262, 264 (Fla. 1st DCA 1985)("There being no medical evidence of causation, claimant here has not met her burden of proving that her medical condition was causally related to her industrial accident."); Handy v. Golden Gem Growers, Inc., 454 So. 2d 69 (Fla. 1st DCA 1984)("For conditions not readily observable or discoverable without medical examination, proof of causation requires medical testimony based on reasonable medical probability that the injury . . . is causally connected to the employment."); Ackley v. General Parcel Service, 646 So. 2d 242, 245 (Fla. 1st DCA 1994)("[D]etermining . . . cause of a non-observable medical condition, such as psychiatric illness, is essentially a medical question," requiring expert medical evidence.); Broadfoot v. Albert Hugo Association, Inc., 478 So. 2d 863, 865 (Fla. 1st DCA 1985)("[L]ay testimony cannot be used to establish causal relationship within reasonable medical probability as to conditions and symptoms that are not readily observable.").[7]

CONCLUSIONS OF LAW

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

20. 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.

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

22. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the administrative law judge to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned administrative law

judge in accordance with the provisions of Chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

23. 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 postdelivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital.

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

24. Pertinent to this case, "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.

25. As the proponent of the issue, the burden rested on Petitioners to demonstrate that Monifa suffered a "birth-related neurological injury." § 766.309(1)(a), Fla. Stat. See also Balino v. Department of Health and 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.").

26. Here, the proof failed to support the conclusion that, more likely than not, Monifa's neurologic impairments were the result of an injury to the brain or spinal cord injury caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital, or that Monifa was

permanently and substantially mentally and physically impaired. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Monifa was not shown to qualify for coverage under the Plan. See also §§ 766.309(1) and 766.31(1), Fla. Stat.; Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 5th DCA 1995)("[B]ecause the Plan . . . is a statutory substitute for common law rights and liabilities, it should be strictly constructed 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); Nagy v. Florida Birth-Related Neurological Injury Compensation Association, 813 So. 2d 155, 160 (Fla. 4th DCA 2002)("According to the plain meaning of the words written, the oxygen deprivation or mechanical injury must take place during labor, delivery, or immediately thereafter"); 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.).

27. Where, as here, the administrative law judge determines that ". . . the injury alleged is not a birth-related neurological injury . . . she or 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 the claim for compensation filed by Dashea Jackson and Ifagbemi Olamina, on behalf of and as parents and natural guardians of Monifa Olamina, a minor, is dismissed with prejudice.

DONE AND ORDERED this 18th day of May, 2007, in Tallahassee, Leon County, Florida.

S

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

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of May, 2007.

ENDNOTES

1/ The medical records from Shands at the University of Florida for Monifa Olamina filed by Respondent with DOAH on March 13, 2007 (referred to in paragraph A.2. of the parties' Stipulated Record) have been marked as Respondent's Exhibit 3 and received into evidence. The transcript of the March 20, 2007, hearing was filed April 11, 2007.

2/ See Section 120.57(1)(c), Florida Statutes. ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.").

3/ The Apgar scores assigned to Monifa are a numerical expression of the condition of a newborn infant, and reflect 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 through a maximum score of 2. See Dorland's Illustrated Medical Dictionary, 28th Edition, 1994. Here, at one minute, Monifa's Apgar score totaled 5, with heart rate and respiratory effort being graded at 2 each, reflex irritability being graded at 1, and muscle tone and color being graded at 0. At five minutes, Monifa's Apgar score totaled 8, with heart rate, respiratory effort and reflex irritability being graded at 2 each, and muscle tone and color being graded at 1 each.

4/ The records are conflicting with regard to how long Monifa was fed via NG tube. The report of neurological evaluation at Shands, dated March 30, 2006, notes that Monifa "had the feeding tube for approximately six months." (Respondent's Exhibit 3.) The Speech and Language Evaluation at the Department of Communicative Disorders, at the University of Florida, dated May 9, 2006, noted that Monifa "was feed [sic] via NG tube for approximately 6 weeks." (Respondent's Exhibit 3.) Here, 6 months has been noted as the more likely time frame. However, the time frame is not material to the result reached.

5/ This appears to be a transcription error, and "in the birth injury" should likely read "in utero or birth injury." See "palsy," "cerebral p.," "any of a group of persisting, nonprogressive motor disorders appearing in young children and resulting from brain damage caused by birth trauma or intrauterine pathology."

6/ "Dysarthric" is defined as "characterized by or pertaining to dysarthria." Dorland's Illustrated Medical Dictionary, 28th Edition, 1994. "Dysarthria" is defined as "imperfect articulation of speech due to disturbances of muscular control which results from damage to the central or peripheral nervous system." Id.

7/ The Plan's no-fault system and the workers' compensation system share similar purposes and characteristics. Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 857 (Fla. 2d DCA 1995). In the case of workers' compensation, the claimant must prove a causal connection between the medical condition and the industrial accident. Under the Plan, the claimant must prove a casual connection between the child's medical condition and a brain or spinal cord injury, caused by oxygen deprivation or mechanical injury, that occurred during labor, delivery or resuscitation.

COPIES FURNISHED:
(Via certified mail)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(Certified Mail No. 7003 1010 0001 2044 5125)

Tana D. Storey, Esquire
Roetzel & Andress
225 South Adams Street, Suite 250
Tallahassee, Florida 32301
(Certified Mail No. 7003 1010 0001 2044 5132)

Ifagbemi Olamina
Dashea Jackson
951 A Southeast 4th Street
Gainesville, Florida 32601
(Certified Mail No. 7003 1010 0001 2044 5149)

Michael Akhiyat, M.D.
700 Zeagler Drive, Suite 1
Palatka, Florida 32178
(Certified Mail No. 7003 1010 0001 2044 5156)

Putnam Community Medical Center
Highway 20 West
Palatka, Florida 32178
(Certified Mail No. 7003 1010 0001 2044 5163)

Charlene Willoughby, Director
Consumer Services Unit - Enforcement
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7003 1010 0001 2044 5170)

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.