STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOUGLAS STALLEY, AS GUARDIAN OF THE PROPERTY OF INAAYA LIMONE,	)	
Petitioner,	)	
vs.	)	Case No. 08-1140N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
FLORIDA HEALTH SCIENCES CENTER, INC., d/b/a TAMPA 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 November 13 and 14, 2008, by video teleconference, with sites in Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioner: William E. Hahn, Esquire
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For Respondent: Robert J. Grace, Jr., Esquire
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For Intervenor: Edward J. Carbone, Esquire
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On March 5, 2008, Douglas Stalley, as Guardian Ad Litem for Inaaya Limone (Inaaya), a minor, filed a petition with the Division of Administrative Hearings (DOAH) to resolve whether Inaaya qualified for coverage under the Plan. The petition included the following allegations:

> 9. The Petitioners do not believe that Inaaya Limone suffered a "birth-related neurological injury["] which was caused by oxygen deprivation or mechanical injury occurring in course of labor, delivery or resuscitation in the immediate post-delivery period at Tampa General Hospital. While Petitioners do believe that Inaaya Limone has suffered permanent mental and physical impairments, it is our firm belief that this was a consequence of the failure to properly staff and prepare for the extubation which took place on March 31, 2004, more than two full days following the birth of Inaaya Limone.

> 10. Petitioners, in good faith, have filed this Petition as a direct consequence of an Order entered by the Honorable James M. Barton, Tampa[,] Florida, abating a civil action which has been brought against Tampa General Hospital . . . . [Emphasis in original]

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on March 6, 2008, and on August 21, 2008, following a number of extensions 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, and offered to provide benefits as prescribed by the Plan. In the interim, Florida Health Sciences Center, Inc., d/b/a Tampa General Hospital, was accorded leave to intervene.

Given that Petitioner was of the view that Inaaya did not suffer a "birth-related neurological injury," a hearing was scheduled for November 13 and 14, 2008, to resolve whether the claim was compensable. Left to resolve in a subsequent proceeding were issues related to an award. § 766.309(4), Fla. Stat.

At hearing, Joint Exhibits 1A, 1B, and 2-15 were received into evidence, and Petitioner called Paul Gatewood, M.D., Enid Gilbert-Barness, M.D., William Spellacy, M.D., and Michael Duchowny, M.D., as witnesses. No other witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed November 26, 2008, and the parties were initially accorded 10 days from that date to file proposed orders. However, at Respondent's request the time for filing proposed orders was extended to December 16, 2008. The parties elected to file such proposals and they have been duly-considered.

FINDINGS OF FACT

Stipulated facts

1. Douglas Stalley is the Guardian Ad Litem for Inaaya Limone, a minor, and Fatima El-Atriss is Inaaya's mother. Inaaya was born a live infant on March 29, 2004, at Florida Health Sciences Center, Inc., d/b/a Tampa General Hospital, a licensed hospital located in Tampa, Florida, and her birth weight exceeded 2,500 grams.

2. Obstetrical services were delivered at Inaaya's birth by William Spellacy, M.D., who, at all times material hereto, was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan as defined by Section 766.302(7), Florida Statutes.

3. The participating physician (Dr. Spellacy) and the hospital (Tampa General Hospital) complied with the notice provisions of the Plan.

4. Inaaya sustained a brain injury caused by oxygen deprivation and was thereby rendered permanently and substantially mentally and physically impaired.

Coverage under the Plan

5. 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.

6. Here, it is undisputed that Inaaya suffered a brain injury, caused by oxygen deprivation, which rendered her permanently and substantially mentally and physically impaired. What must be resolved is whether the record supports the conclusion that, more likely than not, such injury occurred "in the course of labor, delivery, or resuscitation in the immediate postdelivery period" in the hospital, 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, 160 (Fla. 4th DCA 2002)("According to the plain meaning of the words as written, the oxygen deprivation or mechanical injury to the brain must take place during labor, or

delivery, or immediately afterward."). As to that issue, Petitioner was of the view that Inaaya's brain injury was not birth-related (did not result from oxygen deprivation that occurred during labor, delivery, or resuscitation in the immediate postdelivery period), but followed Inaaya's extubation on March 31, 2004, when she stopped breathing, and efforts to re-intubate her were not successful for 7 to 8 minutes. In contrast, NICA was of the view that Inaaya's brain injury likely resulted from oxygen deprivation that occurred during labor, delivery, or resuscitation immediately thereafter. Intervenor agreed with NICA's position, and further contended that the oxygen deprivation caused Innaya to aspirate meconium, which lead to meconium aspiration syndrome, with further injury to her brain following delivery.

Inaaya's birth and immediate newborn course

7. At or about 12:01 a.m., March 29, 2004, Fatima El-Atriss, with an estimated delivery date of March 8, 2004, and the fetus post-dates at 43 weeks' gestation by ultrasound (US), presented to Tampa General Hospital complaining of the onset of uterine contractions at 7:00 p.m., the previous evening. There, physical examination revealed Ms. El Atriss to be morbidly obese (5'5", 383 lbs.); external fetal monitoring (begun at 12:11 a.m.) revealed an overall reassuring fetal heart rate in the 160 beat per minute (BPM) range; and vaginal examination (at

12:40 a.m.) revealed the cervix at 1 centimeter dilation, effacement thick, and the fetus high.

8. Ms. El-Atriss was admitted to labor and delivery at or about 1:30 a.m., for induction of labor; was induced with petocin; progressed to complete dilation by 2:07 p.m.; and at 2:14 p.m., Inaaya was born by spontaneous vaginal delivery. In the interim, at 7:50 a.m., Ms. El-Atriss' membranes were artificially ruptured, with thick meconium noted, and the Labor and Delivery Record documents recurrent moderate/severe variable decelerations and prolonged decelerations. However, given Ms. El-Atriss' obesity, at times monitoring was difficult. But, as late as 1:40 p.m., the physicians' progress notes described the fetal heart rate as overall reassuring.

9. At delivery, Inaaya was described as pink and vigorous, but with evidence of mild respiratory distress ("grunting") and was provided blow-by oxygen for 1 minute and suctioned (by bulb and catheter). Otherwise, Inaaya did not require resuscitation. Apgar scores were good (8 and 9, at one and five minutes, respectively).[1] Retractions were documented at 5 minutes of life, with improvement at 15 minutes of life. (Joint Exhibit 1A, Labor and Delivery Record, page 2).

10. According to the medical records, Inaaya was transferred to the newborn nursery at or about 2:25 p.m. (Joint Exhibit 1A, Labor and Delivery Record, page 2). There,

admission examination was normal, except for skin (meconium stained nails, skin and cord were noted), throat (secretions were noted), and lungs (retractions, grunting, and tachypnea were noted). Impression/Plan was noted as: (1) viable post-term appropriate for gestational age female - routine care; (2) tachypnea/respiratory distress (thick meconium) - required blowby on delivery, now to keep oxygen saturation greater than 90 percent, check chest x-ray. (Joint Exhibit 2, Newborn History and Physical).

11. Insofar as the record reveals, Inaaya did not require intervention until 2:50 p.m., when her respiratory rate was elevated at 84, her oxygen saturation level was low at 87, and she was accorded blow-by oxygen. Thereafter, at 3:15 p.m., notwithstanding she was receiving blow-by oxygen, Inaaya's respiratory rate was still elevated at 98, and her oxygen saturations remained low at 81. (Joint Exhibit 2, Transition Newborn Admission DataBase; Joint Exhibit 10, page 32). Accordingly, Inaaya was immediately tranferred to the neonatal intensive care unit (NICU) for further management.

12. Upon arrival at NICU, the neonatalogist noted that Inaaya was crying, pink, well-perfused, in mild to moderate distress (tachypnea, grunting, and retracting), and on exam breath sounds were described as coarse with rales bilaterally. Neurological exam was described as "normal/nonfocal."

Assessment was full-term, appropriate for gestational age baby girl with meconium aspiration syndrome. Respiration plan included NCPAP (nasal continuous positive airway pressure), chest x-ray (CXR), and arterial blood gases (ABGs). Neurological plan noted "[no] issues."

13. Following evaluation, Inaaya was placed on NCPAP, and chest x-ray was obtained at 3:23 p.m., which showed marked prominence of pulmonary vessels consistent with congestive heart failure. However, an "emergency echocardiogram due to [patient's] clinical deterioration to rule out congenital heart disease," ordered at 4:56 p.m., showed normal intracardiac anatomy, and revealed pulmonary hypertension with bi-directional ductus. Initial arterial blood gases drawn at 4:07 p.m., indicated a pH of 7.43, PO_2 of 64, PCO_2 of 35, and a BE (base excess) of 0, findings inconsistent with acidosis. (Joint Exhibit 6, p. 15).

14. At or about 6:15 p.m., with her respiratory status deteriorating, Inaaya was sedated in preparation for intubation, and at 6:40 p.m., she was intubated and placed on high frequency oscillator ventilation (HFOV) until the early morning of March 30, 2004, when she was switched to synchronized intermittent mandatory ventilation (SIMV). In the interim, at 11:00 p.m., March 29, 2004, Dopamine was added to Inaaya's interventions to support her blood pressure, and when that

proved inadequate Dobutamine was added at 4:00 a.m., March 30, 2004.

15. At 3:10 p.m., March 31, 2004, Inaaya was extubated, and immediately clamped down and became apnic, with bradycardia. Code was initiated at 3:11 p.m., with chest compressions and positive pressure ventilation (PPV), and four attempts were made to re-intubate Inaaya, with the fourth attempt at 3:18 p.m., proving successful. Notably, during attempts to re-intubate Inaaya copious secretions were visualized below the cords, and they were suctioned following re-intubation. Following re-intubation, Inaaya was placed on SIMV.

16. According to the Code 19 Flow Sheet, from 3:11 p.m., when the code was called, through re-intubation at 3:18 p.m., "pulse ox[imeter] not reading," and saturations were noted as zero. During the same period, heart rate was noted as 40 to 50 beats per minute. Thereafter, at 3:19 p.m., heart rate was noted as 50, with saturations at 20 percent; at 3:20 p.m., heart rate was noted as 51, with saturations at 80 percent; and at 3:21 p.m., heart rate was noted at 117, with saturations at 77 percent. The Code ended at 3:25 p.m., and post-code heart rate was documented as 210, with saturations at 99 percent.

17. Of note, the last arterial blood gas before the Code was called, was taken at 1:52 p.m., and indicated a pH of 7.39, PO_2 of 83, PCO_2 of 37, and a BD (base deficit) of 2, which were

within the reference range. First arterial blood gas following the Code, at 3:33 p.m., indicated a pH of 7.10, PO_2 of 205, PCO_2 of 72, and a BD of 8, which were all outside the reference range, and consistent with metabolic acidosis. Arterial blood gases were still abnormal at 4:16 p.m., but by 6:57 p.m., they were within the reference range.

18. Later on March 31, 2004, sedation (Versed and Fentanyl) was decreased, and Inaaya was slowly weaned until April 2, 2004, when Versed and Fentanyl were stopped. In the interim, on April 1, 2004, the nurses note Inaaya's pupil reaction as sluggish bilaterally. However, given Inaaya's sedation, the reliability of such observation as clinical evidence of neurologic injury is fairly debatable.

19. On April 7, 2004, an MRI of the brain was done. The radiologist's impression was "[a]bnormal basal ganglia signal [symmetrically demonstrated bilaterally involving the globus pallidus]. This may be seen with hypoxia or hypoperfusion." Follow-up MRI was done on December 1, 2004, and reported by the same radiologist, as follows:

> CLINICAL INDICATION: Developmental delay. Abnormal MRI of the brain 04/07/04 performed at Tower Advanced MRI.
>
> The previous examination was performed at a time with the clinical history of hypoxic event. April, 2004. Comparison is made.
>
> * * *

> IMPRESSION:
>
> 1. SEQUELA ARE NOTED FROM HYPOXIC EVENT. THE AREA OF THE BASAL GANGLIA PREVIOUSLY NOTED AS ABNORMAL HAS EVOLVED INTO ABNORMALLY DECREASED SIGNAL SUGGESTING THE POSSIBILITY OF DYSTROPHIC CALCIFICATIONS....

Notably, while Inaaya's brain injury is consistent with a hypoxic/ischemic event, it is not possible, based solely on the MRIs, to time the onset of the injury (i.e., as birth-related or as related to the Code event).

20. A neurology consult was requested, and on April 9, 2004, Inaaya was evaluated by Maria Gieron-Korthals, M.D., a pediatric neurologist. Dr. Gieron-Korthals reported the results of her evaluation, as follows:

> REASON FOR CONSULTATION: Abnormal MRI and poor sucking.
>
> HISTORY OF PRESENT ILLNESS: This baby was born on March 29th, so it is 12 days old by normal vaginal delivery with meconium-stained amniotic fluid and respiratory distress, subsequently diagnosed with meconium-aspiration syndrome . . . .
>
> The baby was initially put on ventilator, subsequently placed on CPAP and subsequently on oxygen by a nasal cannula and now is on room air. On day four of life, the infant apparently coded and needed some pressors for a couple of days. The present concern is that the baby has a poor suck and does not take a lot by mouth.
>
> Regarding the feeding, the information I gather is that the sucking ability is inconsistent. At times the baby does suck

well, at some other time not. Nevertheless, the baby is gaining weight and the feeding is supplemented by NG. The MRI of the brain was performed a couple of days ago and it was abnormal showing bilateral basal ganglia lesions ie decreased signal on diffusion-weighted images of MRI. We reviewed the MRI today.

PHYSICAL EXAMINATION: On physical examination, the baby's behavior was somewhat unusual. The baby had episodes of very strong cry, inconsolable and then suddenly would stop crying, become motionless with eyes widely open and turned down. This behavior occurred intermittently throughout the entire period of evaluation. The head was shaved for IV and all sutures were somewhat overlapping anterior fontanel can be covered with the tip of the fifth finger. There was a swelling and redness of the right lower eyelid more than the left. The pupils seem equal and reactive to light and eye's moved to doll's maneuver. The facial expression was symmetrical and movements were normal. The gag reflex, however, is decreased and the sucking is intermittent and not strong. The other developmental reflexes, such as Moro, palmar and plantar grasps were present, but rooting was not elicited.

On motor system examination, even when the baby was crying, there was a marked head lag on pulling up to sitting position. The posture of the rest of the body with flexion at the elbows and knees was normal. In ventral suspension, however, the head was flexed and the back was curved, indicative of mild hypotonia. Deep tendon reflexes were about 1+ biceps and patella and there was no clonus at the ankle.

IMPRESSION: This is a 12 day-old baby with meconium aspiration syndrome followed by an episode during which the baby coded and with abnormal MRI for basal ganglia involvement

> which is most likely secondary to hypoxic event that occurred during the above episode. The baby's suck is indeed of concern and so is the baby's behavior of going from crying to motionless state. One should consider the possibility of seizures and the plan is to obtain one EEG today to capture the episode of going from crying to motionless state and determine whether or not these are seizures . . . .

EEG was done and was interpreted as normal.

21. On April 12, 2004, Inaaya was discharged from Tampa General Hospital. The diagnoses at that time included:

> 1) Meconium Aspiration Syndrome
> 2) Hypotension, resolved
> 3) Clinical Sepsis, resolved
> 4) Respiratory distress syndrome with tacypnea, resolved
> 5) Poor po intake, resolved

Outpatient follow-up with pediatrics, neurology, and cardiology was recommended.

22. Currently, Inaaya presents with severe cerebral palsy, with profound mental and physical disabilities, that indisputably are related to the brain injury she suffered (to the basal ganglia) because of oxygen deprivation. Left to resolve is the likely timing of Inaaya's brain injury.

The statutory presumption

23. When, as here, the proof demonstrates that the infant suffered an injury to the brain caused by oxygen deprivation that rendered her permanently and substantially mentally and physically impaired, a rebuttable presumption arises that the

injury is a "birth-related neurological injury," as defined by the Plan. § 766.309(1)(a), Fla. Stat. See also Orlando Regional Healthcare System, Inc. v. Alexander, 909 So. 2d 582 (Fla. 5th DCA 2005). In this case, the presumptions is that Inaaya's injury occurred "in the course of labor, delivery, or resuscitation in the immediate postdelivery period in . . . [the] hospital." Consequently, it must be resolved whether there was credible evidence produced to support a contrary conclusion and, if so, whether absent the aid of such presumption the record demonstrates, more likely than not, that Inaaya's injury "occurred in the course of labor, delivery, or resuscitation in the immediate postdelivery period.[2] Here, there should be no serious debate that credible evidence was produced (through the medical records and the various experts and fact witnesses who testified) to support a contrary conclusion.

The likely cause and timing of the brain injury that rendered Inaaya profoundly, neurologically impaired

24. To address the likely cause and timing of the brain injury that rendered Inaaya profoundly, neurologically impaired, the parties offered the medical records related to Ms. El-Atriss' antepartal course, as well as those associated with Inaaya's birth and subsequent development. Additionally, the parties offered the testimony (by deposition or live) of many of the health care providers who were involved with Ms. El-Atriss'

and Inaaya's care at Tampa General Hospital, including William Spellacy, M.D., the participating physician who provided obstetrical services at Inaaya's birth; Enid Gilbert-Barness, M.D., a pediatric pathologist; Terri Ashmeade, M.D., a neonatologist; Maria Gieron-Korthals, M.D., a pediatric neurologist; and Edward Blum, III, a respiratory therapist. Finally, between them, the parties offered the testimony (by deposition or live) of eight experts retained by them to offer opinions related to the likely cause and timing of Inaaya's brain injury. Offered by Petitioner were Paul Gatewood, M.D., an obstetrician/gynecologist; Michael Duchowny, M.D., a pediatric neurologist; William Rhine, M.D., a neonatologist; and Elias Chalhub, M.D., a pediatric neurologist. Offered by Respondent was Joseph Casadonte, M.D., a pediatric neurologist, and offered by Intervenor were Barry Schifrin, M.D., an obstetrician/gynecologist; Edwina Popek, M.D., a pediatric pathologist; and Marcus Hermansen, M.D., a neonatologist.

25. The medical records, as well as the testimony of the various health care providers, have been thoroughly reviewed. Having done so, it is apparent that Inaaya developed respiratory dysfunction, caused by meconium aspiration in utero, induced by the stresses of labor, that revealed itself following delivery with evidence of grunting and retractions. However, the record failed to demonstrate that, more likely than not, any oxygen

deprivation she may have suffered during labor, delivery, or resuscitation in the immediate postdelivery period, as a result of her respiratory dysfunction or otherwise, resulted in brain injury. Rather, the likely cause of Inaaya's brain injury was shown to be the oxygen deprivation she suffered during the Code event.

26. In so concluding, it is noted that, following delivery at 2:14 p.m., March 29, 2004, Inaaya was described as pink and vigorous, albeit with evidence of mild respiratory distress; she required minimal resuscitation measures (blow-by oxygen for 1 minute and suctioning); her Apgar scores were good (8 and 9, at one and five minutes, respectively); her initial arterial blood gases at 4:07 p.m., did not reveal any acidosis; her neurological evaluations before sedation at 6:40 p.m., were normal; the first arterial blood gases following the Code event of March 31, 2004, were consistent with metabolic acidosis; there was evidence of neurologic dysfunction after, but not before, sedation was stopped on April 2, 2004; and the MRI results were consistent with an acute hypoxic ischemic event. Given the proof, it is likely, as opined by the health care providers offered by Petitioner, that the cause of Inaaya's brain injury was the oxygen deprivation she suffered during the Code event on March 31, 2004, and not any oxygen deprivation she may have suffered during labor, delivery, or resuscitation in

the immediate postdelivery period in the hospital.[3] Consequently, Inaaya was not shown to have suffered a "birth-related neurological injury" as defined by the Plan. § 766.302(2), Fla. Stat. See also 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 as written, the oxygen deprivation or mechanical injury to the brain must take place during labor, or delivery, or immediately afterward.").

CONCLUSIONS OF LAW

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

28. 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.

29. 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 within five years of the infant's birth. §§ 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(3), Fla. Stat.

30. 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.

31. 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.

32. 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.

33. As the proponents of the issue, the burden rested on Respondent and Intervenor to demonstrate that Inaaya suffered a

"birth-related neurological injury." See Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal."); Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 311 (Fla. 1997)("[T]he assertion of NICA exclusivity is an affirmative defense."); Tabb v. Florida Birth-Related Neurological Injury Compensation Association, 880 So. 2d 1253, 1260 (Fla. 1st DCA 2004)("As the proponent of the issue, the burden rested on the health care providers to demonstrate, more likely than not, that the notice provisions of the Plan were satisfied.").

34. Here, the proof failed to demonstrate that Inaaya's impairments were, more likely than 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 in the immediate postdelivery period in a hospital." Indeed, the more compelling proof established that the cause of Inaaya's neurologic impairments was most likely a brain injury caused by oxygen deprivation that post-dated labor, delivery, and resuscitation in the immediate postdelivery period. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Inaaya 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).

35. 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 Douglas Stalley, as Guardian Ad Litem for Inaaya Limone, a minor, is dismissed with prejudice.

DONE AND ORDERED this 11th day of March, 2009, 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 11th day of March, 2009.

ENDNOTES

1/ 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 of 2. (Dorland's Illustrated Medical Dictionary, 28th Edition, 1994; Joint Exhibit 1A, Labor and Delivery Record). Here, at one minute, Inaaya'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. At five minutes, Inaaya's Apgar score totaled 9, with heart rate, respiratory effort, muscle tone, and reflex irritability being graded at 2 each, and color being graded at 1.

2/ 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 Property 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.

3/ In enacting the Florida Birth-Related Neurological Injury Compensation Plan, the Legislature expressed its intent, as follows:

> It is the intent of the Legislature to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation. This plan shall apply only to birth-related neurological injuries.

§ 766.302(2), Fla. Stat.

In defining "birth-related neurological injury," the Legislature chose to limit coverage to brain injuries that occurred during "labor, delivery, or resuscitation in the immediate postdelivery period." § 766.302(2), Fla. Stat. However, the Legislature did not define "resuscitation in the immediate postdelivery period."

When not defined, "the plain and ordinary meaning of words in a statute can be ascertained by reference to a dictionary." Seagrave v. State, 802 So. 2d 281, 286 (Fla. 2001). "Resuscitate" is commonly understood to mean "[t]o return to life or consciousness; revive." The American Heritage Dictionary of the English Language, New College Edition, 1979. Dorland's Illustrated Medical Dictionary, 28th Edition, 1994, defines "resuscitation" as "the restoration to life or consciousness of one apparently dead; it includes such measures as artificial respiration and cardiac massage." "Immediate" is commonly understood to mean "[n]ext in line or relation[;] . . . [o]ccuring without delay[;] . . . [o]f or near the present time[;] . . . [c]lose at hand; near." The American Heritage Dictionary of the English Language, New College Edition, 1979. Finally, "period" is commonly understood to mean "[a]n interval of time characterized by the occurrence of certain conditions or events." The American Heritage Dictionary of the English Language, New College Edition, 1979.

Under the statutory scheme then, the brain injury must occur during labor, delivery, or immediately thereafter. 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 as written, the oxygen deprivation or mechanical injury to the brain must take place during labor, or delivery, or immediately afterward."). Such conclusion is also consistent with "the requirement that statutes which are in derogation of the common law be strictly construed and narrowly applied." Nagy, 813 So. 2d at 159; Humana of Florida, Inc. v. McKaughn, 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. McKaughn, 668 So. 2d 974, 979 (Fla. 1996).

Under the facts of this case, resuscitation in the immediate postdelivery period ended not later than the five-minute Apgar, by which time Inaaya had been provided blow-by oxygen for 1

minute and suctioned. Thereafter, Inaaya required no further respiratory support until after her transfer to the newborn nursery, when at 2:50 p.m., she was again provided blow-by oxygen. Inaaya's subsequent brain injury, post-dated her "resuscitation in the immediate postdelivery period." (Joint Exhibit 6, pp. 36-39, 43-46, 66 and 67). Compare, Orlando Regional Health Care System, Inc. v. Florida Birth-Related Neurological Injury Compensation Association, 33 Fla.L.Weekly D2563 (Fla. 5th DCA 2008).

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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.