STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHONTEE JOYNER AND DAVID JOYNER, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF BRIANNA RENEE JOYNER, A MINOR CHILD,	)	
Petitioners,	)	
vs.	)	Case No. 08-2146N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
LAWNWOOD REGIONAL MEDICAL CENTER, INC.,	)	
Intervenor.	)	

FINAL ORDER

With the parties' agreement, this case was resolved on an agreed record.

STATEMENT OF THE ISSUES

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

2. Whether the hospital and participating physician provided the patient notice, as contemplated by Section 766.316,

Florida Statutes (2005), or whether notice was not required because the patient had an "emergency medical condition," as defined by Section 395.002(9)(b), Florida Statutes (2005),[1] or the giving of notice was not practicable.

PRELIMINARY STATEMENT

On April 30, 2008, Chontee Joyner and David Joyner, individually and as parents and natural guardians of Brianna Renee Joyner (Brianna), a minor, filed a Petition for Determination of Availability of NICA Coverage with the Division of Administrative Hearings (DOAH) to resolve whether Brianna qualified for coverage under the Plan and whether the healthcare providers complied with the notice provisions of the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition on May 1, 2008, and on September 15, 2008, following an extension of time within which to do so, NICA responded to the petition and gave notice that it was of the view that Brianna did not suffer a "birth-related neurological injury," as defined by the Plan, and requested that a hearing be scheduled to resolve the issue. In the interim, Lawnwood Regional Medical Center, Inc. (Lawnwood Regional Medical Center), was granted leave to intervene.

Given the issues raised, a hearing was scheduled for January 27, 2009, to resolve whether the claim was compensable

and whether the hospital and the participating physician complied with the notice provisions of the Plan. Left to resolve in a separate proceeding was the amount of an award. § 766.309(4), Fla. Stat.

In the interim, on January 20, 2009, the parties filed a Joint Motion to Submit Stipulated Factual Record and Written Argument in Lieu of a Contested Hearing, together with a Pre-Hearing Stipulation. That motion was granted by Order of January 21, 2009, and the hearing scheduled for January 27, 2009, was cancelled. Thereafter, on January 22, 2009, and February 6, 2009, respectively, the parties filed their Stipulated Record (Exhibits 1-21) and Supplement to Stipulated Record (Exhibit 22).

The parties were accorded until February 6, 2009, to file written argument or proposed orders. Respondent elected to file a proposed order and it has been duly-considered.

FINDINGS OF FACT

Stipulated facts

1. Chontee Joyner and David Joyner are the natural parents of Brianna Renee Joyner, a minor. Brianna was born a live infant on February 16, 2006, at Lawnwood Regional Medical Center, a licensed hospital located in Fort Pierce, Florida, and her birth weight exceeded 2,500 grams.

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

Coverage under the Plan

3. Pertinent to this case, coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as an "injury to the brain . . . 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."[2]

4. Here, Petitioners and Intervenor took no position on whether Brianna suffered a "birth-related neurological injury." In contrast, NICA was of the view that the record failed to support the conclusion that Brianna's impairments, admittedly substantial, were birth-related.

Whether Brianna suffered a "birth-related neurological injury"

5. To address whether Brianna suffered a "birth-related neurological injury," the parties offered a Stipulated Record (Exhibits 1-22), that included the medical records associated with Mrs. Joyner's antepartal course, as well as those

associated with Brianna's birth and subsequent development. The parties also offered the deposition testimony of Donald Willis, M.D., a physician board-certified in obstetrics and gynecology, and maternal-fetal medicine, and Raymond Fernandez, M.D., a physician board-certified in pediatrics and neurology with special competence in child neurology, who offered opinions as to the likely etiology of Brianna's impairments.

6. Dr. Fernandez examined Brianna on July 31, 2008, and obtained the following history from Mrs. Joyner:

> Labor was induced at 39 weeks gestation. Her cervix was 1 cm dilated. She was given Cytotec and Pitocin, and overall duration of labor was 31 hours. Epidural anesthesia was given at 24 hours of labor. Towards the end of the labor, contractions occurred one after the other and she pushed for 2 hours. Vacuum extraction was used, but she was stuck, and she was then extracted manually. Brianna was pale and she did not cry after birth. She was given to Mrs. Joyner for "1 second" and then taken to the nursery because of breathing problems. She was transferred to the NICU because of an apneic spell. Subsequent to discharge she was referred to several specialist[s]. She was found to have a small patent ductus arteriosus that was not felt to be significant. The neurosurgeons found no clinically significant spinal abnormalities. She required PE tubes and tonsillectomy and adenoidectomy because of recurrent ear infections and apneic spells. Hearing is normal. Genetics and neurology have not arrived at a specific diagnosis. She has been enrolled in a developmental therapy program through the Early Steps Program, and has improved slowly, but she remains delayed. Brianna sat straight without

> support at about 13 months of age. She ambulates by scooting in the sitting position, by pulling with her legs and balancing with her arms. She tries to pull up, but only if offered assistance and encouragement by holding her hands. She reaches for objects, manipulates toys but does not play with them meaningfully, although she likes noisy toys. She rarely puts food in her mouth (Cheerios sometimes). She babbles, but no words are spoken. She does not seem to understand spoken language, but does respond to visual cues. She lifts her arms when a shirt is about to be put on. She plays pat-a-cake, but not consistently. Eye contact is improving. She smiles and is loving with family members, and tends to be anxious in the presence of strangers. She bangs blocks together, but does not stack them. She does not engage in imaginative play. She likes to be read to, and helps turn pages. She watches her younger brother and follows him around the house, and laughs when he does funny things.

Physical examination revealed the following:

> Recent weight was 27 pounds. Head circumference 47.25 cm (approximately 20th percentile). . . . Brianna was alert. She was anxious when approached, and comforted by her mother. She did not babble. No words were spoken. Eye contact was limited. She did not point. Mainly, she sat on her mother's lap and stared about the room and sometimes looked at me. There was no indication that she understood basic verbal requests. She did not point to body parts. She was not interested in toys, and pushed them away when offered. There were no specific dysmorphic features. She has 2 hyperpigmented macular-papular skin markings on her back. One is over the thoracic spine, and the other is to the right of midline. Pupils were equal and briskly reactive to light. Eye movement was full. She tracked visually, but eye contact was

> limited. Face was symmetric. She swallowed well. Low axial and proximal tone, but normal tone distally in extremities. No obvious weakness noted. She sat independently. She stood and took steps, but only with both hands held by her mother. There was no involuntary movement. Deep tendon reflexes 1+ throughout. Liver and spleen were not enlarged. Funduscopic examination was limited, only able to note normal red reflexes and unable to visualize optic nerves. She inconsistently turned toward sounds and when her name was called.

7. Based on his evaluation of July 31, 2008, as well as his review of the medical records, Dr. Fernandez was of the opinion that Brianna was permanently and substantially mentally and physically impaired. However, with regard to etiology, Dr. Fernandez was of the opinion that Brianna's impairments were, more likely than not, caused by a genetic abnormality, as opposed to a brain injury caused by oxygen deprivation or mechanical injury. In so concluding, Dr. Fernandez observed that the record did not provide evidence of an acute brain injury due to hypoxia or mechanical trauma during labor and delivery. Rather, he noted:

> There was mild shoulder dystocia but no evidence of upper extremity weakness. There was some medical instability after delivery but no evidence for an acute encephalopathy. Following a single fluid bolus she was then medically stable and began feeding well by the end of day 1. Hypotonia was noted initially and it has persisted without evolution or evidence of spasticity or involuntary movement. The initial brain CT scan [of February 20, 2006] showed no

> hemorrhage and later brain MRI [of May 18, 2006] was normal.

Finally, Dr. Fernandez pointed to the report of Charles Williams, M.D., a geneticist associated with Shands Children's Hospital at the University of Florida, Division of Pediatric Genetics, where Brianna had been seen because of her developmental delay and austic-like features. That report, following chromosome analyses, identified a chromosome deletion, a genetic abnormality, that in Dr. Fernandez's opinion likely explains Brianna's global delay and physical findings.

8. Dr. Willis reviewed the medical records associated with Mrs. Joyner's antepartal course; those associated with Mrs. Joyner's labor and delivery, including the fetal heart rate monitor strips; and those associated with Brianna's newborn course. Based on that evaluation, Dr. Willis was of the opinion that Brianna did not suffer a brain injury caused by oxygen deprivation or mechanical injury during labor, delivery, or the immediate postdelivery period. In so concluding, Dr. Willis observed there was no significant fetal distress on the fetal heart monitor during labor; the baby's Apgar scores were normal (8 at one and five minutes); the baby did not require any significant resuscitation at birth (only suctioning and blow-by oxygen); and CT scan of the head on February 20, 2006, was negative, without evidence of hypoxic changes.

9. When, as here, the medical condition is not readily observable, issues of causation are essentially medical questions, requiring expert medical evidence. See, e.g., Vero Beach Care Center v. Ricks, 476 So. 2d 262, 264 (Fla. 1st DCA 1985)("[L]ay testimony is legally insufficient to support a finding of causation where the medical condition involved is not readily observable."); Ackley v. General Parcel Service, 646 So. 2d 242, 245 (Fla. 1st DCA 1994)("The determination of the cause of a non-observable medical condition, such as a psychiatric illness, is essentially a medical question."); Wausau Insurance Company v. Tillman, 765 So. 2d 123, 124 (Fla. 1st DCA 2000)("Because the medical conditions which the claimant alleged had resulted from the workplace incident were not readily observable, he was obligated to present expert medical evidence establishing that causal connection."). Here, the opinions of Doctors Fernandez and Willis were not controverted or shown to lack credibility. Consequently, it must be resolved that the cause of Brianna's impairments was most likely a developmentally based genetic abnormality, as opposed to a "birth-related neurological injury." See Thomas v. Salvation Army, 562 So. 2d 746, 749 (Fla. 1st DCA 1990)("In evaluating medical evidence, a judge of compensation claims may not reject uncontroverted medical testimony without a reasonable explanation.").

The notice issue

10. Apart from issues related to compensability, Petitioners have sought an opportunity to avoid a claim of Plan immunity in a civil action, by requesting a finding that the notice provisions of the Plan were not satisfied by the participating physician and the hospital. § 766.309(1)(d), Fla. Stat. See Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 309 (Fla. 1997)["A]s a condition precedent to invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan a reasonable time prior to delivery."). Consequently, it is necessary to resolve whether the health care providers complied with the notice provisions of the Plan. § 766.309(1)(d), Fla. Stat.; Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearing, 948 So. 2d 705, 717 (Fla. 2007)("[W]hen the issue of whether notice was adequately provided pursuant to section 766.316 is raised in a NICA claim, we conclude that the ALJ has jurisdiction to determine whether the health care provider complied with the requirements of section 766.316.").

The notice provisions of the Plan

11. At all times material hereto, Section 766.316, Florida Statutes (2005), prescribed the notice requirements of the Plan, as follows:

> Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(9)(b) or when notice is not practicable.

12. Section 395.002(9)(b), Florida Statutes (2005), defined "emergency medical condition" to mean:

> (b) With respect to a pregnant woman:
>
> 1. That there is inadequate time to effect safe transfer to another hospital prior to delivery;
>
> 2. That a transfer may pose a threat to the health and safety of the patient or fetus;

or

3. That there is evidence of the onset and persistence of uterine contractions or rupture of the membranes.

13. The Plan does not define "practicable." However, "practicable" is a commonly understood word that, as defined by Webster's dictionary, means "capable of being done, effected, or performed; feasible." Webster's New Twentieth Century Dictionary, Second Edition (1979). See Seagrave v. State, 802 So. 2d 281, 286 (Fla. 2001)("When necessary, the plain and ordinary meaning of words [in a statute] can be ascertained by reference to a dictionary.").

Resolution of the notice issue

14. When, as here, the Petitioners dispute that the healthcare providers complied with the notice provisions of the Plan, "the burden rest[s] on the health care providers to demonstrate, more likely than not, that the notice provisions of the Plan were satisfied." Tabb v. Florida Birth-Related Neurological Injury Compensation Association, 880 So. 2d 1253, 1260 (Fla. 1st DCA 2004). Here, the parties' Pre-Hearing Stipulation and Stipulated Record (Exhibits 1-22) provide no such evidence. Consequently, it must be resolved that Lawnwood Regional Medical Center and William B. King, M.D., failed to establish they complied with the notice provisions of the Plan, or that any such failure was excused because the patient

presented in an "emergency medical condition" or the giving of notice was otherwise "not practicable."[3]

CONCLUSIONS OF LAW

Jurisdiction

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

Compensability

16. 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.

17. 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.

18. 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(6), 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.

19. 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.

20. 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.

21. Here, the proof failed to demonstrate that Brianna'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 compelling proof established that the

cause of Brianna's impairments was most likely a genetic abnormality, as opposed to a "birth-related neurological injury." Consequently, given the provisions of Section 766.302(2), Florida Statutes, Brianna 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).

22. 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.

Notice

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

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

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

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

> will depend on the circumstances of each case and therefore must be determined on a case-by-case basis.

Id. at 311. Consequently, the Court concluded:

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

Id. at 309.

24. Also speaking to the issue, the Court in Weeks v. Florida Birth Related Neurological Injury Compensation Association, 977 So. 2d 616, 619 (Fla. 5th DCA 2008), concluded:

> In summary, we hold that the NICA notice must be given within a reasonable time after the provider-obstetrical patient relationship begins, unless the occasion of the commencement of the relationship involves a patient who presents in an "emergency medical condition," as defined by the statute, or unless the provision of notice is otherwise "not practicable." When the patient first becomes an "obstetrical patient" of the provider and what constitutes a "reasonable time" are issues of fact. As a result, conclusions might vary, even where similar situations are presented. For this reason, a prudent provider should furnish the notice at the first opportunity and err on the side of caution.

25. Here, for reasons appearing in the Findings of Fact, it has been resolved that the hospital (Lawnwood Regional Medical Center) and the participating physician (Dr. King) failed to comply with the notice provisions of the Plan.

CONCLUSION

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

ORDERED that the claim for compensation filed by Chontee Joyner and David Joyner, individually, and as parents and natural guardians of Brianna Renee Joyner, a minor, is denied with prejudice.

It is FURTHER ORDERED that Lawnwood Regional Medical Center and William B. King, M.D., failed to comply with the notice provisions of the Plan.

DONE AND ORDERED this 23rd day of March, 2009, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
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Filed with the Clerk of the
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this 23rd day of March, 2009.

ENDNOTES

1/ Section 766.316, was amended, effective July 1, 2007, by Chapter 2007-230, Section 205, Laws of Florida, to substitute a reference to Section 395.002(8)(b) for the reference to Section 395.002(9)(b) because the definition of "emergency medical condition" was moved to that subsection.

2/ In its entirety, Section 766.302(2), Florida Statutes, provides:

> (2) Birth-related neurological injury means 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.

Here, there is no proof to support a conclusion that Brianna suffered an injury to the spinal cord that rendered her permanently and substantially mentally and physically impaired. Consequently, that alternative need not be addressed.

3/ Although Petitioners raised the notice issue in their petition, and preserved the issue in the parties' Pre-Hearing Stipulation, neither NICA nor the hospital addressed the issue in the Pre-Hearing Stipulation or thereafter. Nevertheless, the Stipulated Record (Exhibits 1-22) has been reviewed, including the most likely repositories of such information, if it existed (Exhibit 1, Medical Records from Dr. William King for Mrs. Joyner's antepartal care, and Exhibit 2, Medical Records from Lawnwood Regional Medical Center for Mrs. Joyner's

admission for Brianna's birth). However, that record fails to contain any evidence that the hospital or Dr. King provided notice of their participation in the Plan, or that they provided notice "on forms furnished by the association . . . [that] include a clear and concise explanation of a patient's rights and limitations under the plan." The record also fails to support the conclusion that such failure was excused because the patient presented in an "emergency medical condition" or the giving of notice was otherwise "not practicable."

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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.