STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LATASHA WILLIAMS AND PERRY RUSSELL, SR., on behalf of and as parents and natural guardians of PERRY RUSSELL, JR, a deceased minor,	)	
Petitioners,	)	
vs.	)	Case No. 09-6958N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
BAY MEDICAL CENTER,	)	
Intervenor.	)	

FINAL ORDER

Upon due notice, this cause came on for final hearing before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings on August 26, 2010, in Tallahassee, Florida.

APPEARANCES

For Petitioners: Grant A. Kuvin, Esquire
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Orlando, Florida 32801

For Respondent: M. Mark Bajalia, Esquire
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For Intervenor: Brian L. Smith, Esquire
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STATEMENT OF THE ISSUES

(1) Compensability, to wit: Whether the injury claimed is a birth-related neurological injury and whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital.

(2) Whether notice was accorded the patient, as contemplated by Section 766.316, Florida Statutes, or whether the failure to give notice was excused because the patient had an emergency medical condition, as defined in Section 395.002 (8)(b), Florida Statutes, or the giving of notice was not practicable.

PRELIMINARY STATEMENT

On December 21, 2009, Latasha Williams[1] and Perry Russell, Sr., on behalf of, and as parents and natural guardians of, Perry Russell, Jr. (Perry, Jr.), a deceased minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) entitled "Petition for Benefits Pursuant to Florida

Statute Section 766.301 et seq." The Petition alleged that Perry, Jr., "suffered brain damage and ultimately died as a result of a birth-related neurological injury--meconium aspiration syndrome,"[2] and contested that "all statutory requirements have been met, including, but not limited to, the issue of timely notice."

Bryce Vincent Jackson, M.D., of North Florida Obstetric and Gynecologic Center, P.A., and Bay Medical Center (hospital) were named in the Petition as associated with Perry, Jr.'s, birth. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on December 22, 2009; served Bay Medical Center on December 23, 2009; and served Dr. Jackson on February 22, 2010. Only Bay Medical Center sought to intervene, which intervention was granted by Order of February 25, 2010.

On February 3, 2010, NICA filed its response to the Petition, wherein it gave notice that it was of the view that Perry, Jr., did not suffer a "birth-related neurological injury," as that term is defined by Section 766.302(2), Florida Statutes, and requested that a hearing be scheduled to resolve whether the claim was compensable.

The case proceeded to hearing on August 26, 2010, upon the parties' Prehearing Stipulation, filed August 17, 2010.

At hearing, the parties stipulated to certain factual matters set forth in the Pre-Hearing Stipulation, including but not limited to the fact that Dr. Jackson had given statutory notice of NICA participation, but that the hospital, Bay Medical Center, had not given such notice.

The parties stipulated as a matter of law that Petitioners are entitled to a rebuttable presumption that Perry, Jr., suffered a birth-related neurological injury, pursuant to Section 766.309(1)(a), Florida Statutes.

Joint Exhibits A through R (Ex.), were admitted in evidence.[3]

Petitioners presented the oral testimony of Latasha Williams, Lakisha McClain, Patricia Williams, and Berto Lopez, M.D. (expert). Respondent NICA and Intervenor Bay Medical Center presented no oral testimony.

A Transcript was filed on September 22, 2010, and the parties were initially accorded 10 days thereafter in which to file proposed final orders. However, upon motion, the time for filing proposed orders was extended to October 8, 2010, thereby extending the time for entry of this Final Order.

Petitioners and Respondent filed their proposals on October 8, 2010. Intervenor filed its proposal on October 11, 2010, but the late-filing has not been objected-to by any party,

and therefore, all proposals have been considered in preparation of this Final Order.

FINDINGS OF FACT

Stipulated Facts[4]

1. Latasha Williams Russell is the natural mother of Perry Russell, Jr. (Perry, Jr.).

2. Perry Russell, Sr., is the natural father of Perry, Jr.

3. Perry, Jr., was born a live infant on May 7, 2008.

4. Perry, Jr., was born at Bay Medical Center, a licensed hospital located in Panama City, Florida.

5. Perry, Jr.'s, birth weight was in excess of 2,500 grams.

6. The physician providing obstetrical services at the time of Perry, Jr.'s, birth was Bryce Vincent Jackson. M.D.

7. At all times material, Dr. Jackson was a participating physician in the Florida Birth-Related Neurological Injury Compensation Plan.

8. Latasha Williams signed a Notice to Obstetric Patient (NICA notice form) stating that Bryce Vincent Jackson, M.D., is a "participating physician in the program" on November 20, 2007.

9. Bay Medical Center acknowledged at hearing that it had never given pre-delivery notice of NICA participation/limitation to Ms. Williams.

10. On May 7, 2008, Perry, Jr., suffered a brain injury caused by oxygen deprivation.

11. As a result of the oxygen deprivation, Perry, Jr., was permanently and substantially mentally and physically impaired.

12. Perry, Jr., subsequently died on October 8, 2008.

13. Perry Jr.'s, death was caused by the brain injury resulting from the oxygen deprivation.

14. The term, "resuscitation in the immediate postdelivery period" is not defined in the NICA Statute. §§ 766.301-766.316, Fla. Stat.

Other Facts Found

15. The term, "resuscitation in the immediate postdelivery period" is not uniformly defined in the medical community.

16. Latasha Williams Russell was an obstetrical patient of Dr. Jackson at North Florida Obstetric and Gynecologic Center, beginning on November 20, 2007. Her expected delivery date was May 11, 2008.

17. Labor began for Ms. Williams at approximately 0200 [2:00 a.m.] on May 7, 2008.[5] At 0840 [8:40 a.m.], she was admitted to Bay Medical Center, experiencing active contractions every 2-3 minutes for 60-80 seconds, four centimeters dilated, with the baby 100 percent effaced and fetal heart rate of 135 with variability present.

18. Accompanied by female family and friends, Ms. Williams was placed in a Labor/Delivery/Recovery/Post-Partum Room (LDRP), and prepped for delivery. Although her female support team varied a little in composition in the beginning of her hospitalization, at all times material, Ms. Williams' mother and sister and at least one other woman were present in the LDRP room with her.

19. Ms. Williams' complete cervical dilation was reported at 1145 [11:45 a.m.]. At 1215 [12:15 p.m.], Dr. Jackson ruptured the membranes and found 3+ meconium-stained amniotic fluid. Meconium at 3+ would be of a putty-like consistency.

20. From 1220 [12:20 p.m.] to 1250 [12:50 p.m.], Ms. Williams pushed through her uterine contractions, and Perry, Jr.'s, fetal heart rate was sustained between 120 and 130 beats per minute through this period.

21. At 12:50 p.m., Ms. Williams delivered Perry Russell, Jr., a live, 2605-gram boy, via normal spontaneous vaginal delivery, assisted by a right medial and lateral episiotomy performed by Dr. Jackson. Despite the episiotomy, Ms. Williams suffered a fourth-degree laceration, requiring repair.

22. Dr. Jackson's narrative record reads:

> PROCEDURE PERFORMED:
> 1. Normal spontaneous vaginal delivery on May 7, 2008.
> 2. Right Medial and Lateral episiotomy.
> 3. Fourth-degree laceration repair.

> PROCEDURE DESCRIPTION: The patient underwent a NSVD[6] at 1250 on May 7, 2008, over a right medial lateral episiotomy. She delivered a male infant that had Apgars[7] of 6 and 9, and weight equals 5 pounds plus 11.8 ounces (2606 g.) The amniotic fluid was 3+ meconium stained. The baby's airway was suctioned with a bulb syringe as well a [sic] #10 French pediatric suction cannula connected to the wall suction by intermittent suction technique prior to delivery of the thorax. The placenta delivered spontaneously and was found to be intact. There were three umbilical cord vessels. The placenta mass was also small. The uterine cavity was then manually explored and found to be intact with no retained products of conception. Post-delivery examination of the episiotomy site revealed an approximately 12mm inlet vertically oriented laceration into the rectal mucosa. The anal sphincter was intact. One carefully identified the proximal and distal end of the laceration and closed the defect with a 4-0 chromic suture in a continuous fashion. The second layer of closure was then done over the first layer, again using a 4-0 chromic suture in a continuous fashion. The remainder of the laceration was sutured in normal episiotomy repair fashion using 3-0 and 2-0 chromic sutures. Estimated blood loss was estimated at 250 mL. Anesthesia equaled epidural.
>
> The mother and baby were left in LDRP in good stable condition.

(emphasis added).

23. There is no further written evaluation of the child by Dr. Jackson, and he did not testify.

24. Upon the foregoing obstetrician's record and the testimony of the mother, the grandmother, and an aunt who were present, it is found that Dr. Jackson suctioned Perry, Jr's, mouth by bulb and wall cannula while Perry, Jr.'s, head was out of the birth canal and his thorax remained inside, and then delivered the remainder of Perry, Jr.'s, body. Perry, Jr.'s, time of birth was recorded as 12:50 p.m.

25. After delivering the whole of the baby,[8] Dr. Jackson again suctioned him and "handed off" Perry, Jr., to one of two nurses, who took the baby to the LDRP crib/warmer and who examined and worked to stimulate him. The mother heard the baby cry when passed to the nurse. (Ex. K-522). Meanwhile, Dr. Jackson directed his primary attention to the repair of Ms. Williams' episiotomy tear.

26. By all accounts, one or two nurses were present in the LDRP room at least until shortly before Dr. Jackson finished the episiotomy repair.

27. At the LDRP's crib, a nurse bulb-suctioned Perry, Jr.'s, mouth and nose again (Ex. L-596, TR-74), but he would not suck her finger and was not very responsive to her vigorous stimulation by rubbing. She wiped him off and wrapped him in a swaddling blanket, but he still had meconium staining on his face and ears.

28. Perry, Jr.'s, Apgar scores at one and five minutes were documented by one of the nurses as 6 and 9 as follows:

	Heart Rate	Respiratory Rate	Muscle Tone	Reflex Irritability	Skin Color	Total
1 Min.	1	1	1	2	1	6
5 Min.	2	2	2	2	1	9

29. Out of a possible "10," or perfect Apgar score, Perry, Jr., improved from 6 to 9, in a four-minute period.

30. The testifying medical experts, Dr. Berto Lopez (live and by deposition) and Dr. Donald C. Willis (by deposition only), agreed that these Apgar scores are inconsistent with a baby who has previous thereto suffered an injury to the brain.

31. Entries by a nurse on a form entitled, "Possible Problems Typical of Age-Weight Categories," at 10 minutes post-birth and at 25 minutes post-birth, respectively, read as follows:

	[1:00 p.m.] (1300)	[1:15 p.m.] (1315)
Temperature	98.9R[9]	97.5AX[10]
Pulse	140	140
Respiration Rate	60	52
Respiratory Pattern	Unlabored	Unlabored
Nasal Flaring	None	None
Expiratory Grunt	None	None
Retractions	None	None
Color	Pink	Pink

Abdomen	Normal	Normal
Cry	Normal	Normal
Activity	Normal	Normal

32. The foregoing nurse assessments did not include oxygen saturation of the blood, blood pressure, or assessment of acidosis in the arterial blood gases. If such assessments had been made at that point and if acidosis had been found, it would have been an indicator of an hypoxic event.

33. The foregoing assessment form required that the nurses watch for asphyxia and meconium aspiration. None of the nurses' recorded assessments denote asphyxia, mechonium aspiration, hypoxia, or ischemia. "Hypoxia" denotes a low oxygen level in the blood. "Ischemia" occurs when there is not enough blood circulating in the body.[11] If meconium gets below the baby's vocal cords and is aspirated into his lungs, there can be oxygen deprivation, possibly followed by meconium aspiration syndrome. Dr. Lopez testified that 10 percent of all babies are born with meconium, and of those 10 percent, perhaps five percent develop meconium aspiration syndrome.

34. The foregoing nurse assessments required by the form are among the conditions that medical personnel look for, in an effort to determine whether or not a newborn is experiencing asphyxia, oxygen deprivation, or meconium aspiration syndrome. All of the foregoing recorded signs or symptoms existing at 10

minutes of life and 25 minutes of life suggest that Perry, Jr., had experienced no hypoxia, asphyxia, or meconium aspiration syndrome up to those points in time and that his transition from the uterus to the outside world had been successful.

35. No party presented testimony by any medical personnel present at the labor or delivery, or present during the initial obstetrician and nurse resuscitations, already described, which occurred immediately after delivery.

36. Dr. Berto Lopez faulted the sufficiency of the foregoing nurse assessments, maintained that they fall below recognized medical record-keeping standards, and are not the equivalent of a physician's evaluation of the child. The "Possible Problems Typical of Age-Weight Categories" form, itself, provided space for the nurses to periodically make, and record, new assessments at intervals at least four more times, but no further nurse assessments were recorded on this form after 1315 [1:15 p.m.], on May 7, 2008, and no further medical records of any kind were generated until 1412 [2:12 p.m.]. Nonetheless, Apgar scores and the 10-minute and 25-minute post-delivery nurse observations/assessments (see Finding of Fact 31) have not been shown to be other than the actual observations of the medical personnel at the times stated on them, and the medical experts testifying herein have considered those

assessments, as well as the Apgar scores, in rendering their respective opinions.

37. After Dr. Jackson completed the episiotomy repair, the family was left alone with the newborn in the LDRP. The baby was passed from woman to woman, each of whom examined and admired him.

38. Hospital records next show that at 2:12 p.m., Perry, Jr., suffered a cardiopulmonary event, became apneic (ceased breathing), and required intubation, chest compressions, and administration of epinephrine.

39. There is no documentation by any medical personnel of Perry, Jr.'s, condition between 1:15 p.m. and 2:12 p.m.

40. Also, no party presented testimony by any medical personnel present during the resuscitative efforts hereafter described, which occurred at 2:12 p.m.

41. Based on the time of Perry, Jr.'s, delivery recorded by Dr. Jackson (12:50 p.m.) Perry, Jr.'s, cardiopulmonary event at 2:12 p.m., occurred one hour and 22 minutes after his delivery at 12:50 p.m. Based on the time of the last nurse assessment as recorded on the "Possible Problems Typical of Age-Weight Categories" form (1:15 p.m.), Perry, Jr.'s, cardiopulmonary event at 2:12 p.m., occurred 57 minutes after the obstetrician and attending nurses had left him in the LDRP in what Dr. Jackson believed to be "good, stable" condition.

Based on the testimony of the female relatives, the cardiopulmonary event at 2:12 p.m., occurred within 20-25 minutes of the time Dr. Jackson exited the LDRP room.

42. The timing of precisely when Perry, Jr., became apneic is in dispute. Despite the foregoing health care professionals' records stating the cardiopulmonary event occurred at 2:12 p.m., Perry, Jr.'s, mother, grandmother, and aunt maintain that Perry, Jr., was continually struggling for breath while they were alone with him in the LDRP and that he ceased breathing within 20-25 minutes of Dr. Jackson's exiting the LDRP room. While these witnesses' testimony as to chronology of events and time elapsed is consistent with each other's testimony, they all base their time calculations on the recollection of the four women sequentially holding the baby for an estimated 4-5 minutes apiece as they passed him around, and they all concur that they were not sufficiently alarmed by his breathing on the day in question to immediately call for medical assistance.

43. In challenging the medical personnel's recordation that the cardiopulmonary event occurred at 2:12 p.m., Petitioners put forth the premise that all notations in the medical records are misleading, because they had to have been written down subsequent to the events or conditions recorded. For instance, the family believes that 2:12 p.m., is when the cardiopulmonary event was recorded/charted, not when it

occurred. This premise, that the medical notations were written down after the event recorded, is accepted, for what it is worth, because clearly, medical personnel cannot record events which have not yet taken place and cannot record them simultaneously with performing the medical procedures. However, the premise, by itself, does not establish either that the events recorded in the medical records did not ever occur or that those events occurred so far in advance of their being recorded as to prevent the records' content (including timing) from being credible.

44. The accuracy of the family's testimony as to timing is also diminished by their not being medically trained and their testifying in retrospect, without any notes made contemporaneously with the events. Also, as might be expected, in the joy and excitement of holding a new family member, none of Petitioners' witnesses looked at a watch or clock to time events, and if the 2:12 p.m., cardiopulmonary event and subsequent events occurred somewhat before the times written down, then all the events recorded as occurring prior to Dr. Jackson exiting the LDRP room also must have occurred somewhat prior to the time stated in the records, so that the span of time from delivery until Perry, Jr., suffered the hypoxic event would still be about an hour and 22 minutes post-

delivery and about 57 minutes after the delivery team exited the LDRP room, believing that Perry, Jr., had been stabilized.

45. On the other hand, the consistent testimony of the mother, grandmother, and aunt that after they were alone with Perry, Jr., he opened his eyes as they admired him; that he later closed his eyes, stopped breathing, and went limp as the mother held him the second time; that the grandmother ran, carrying him, to the nurse's station for help; and that it was a nurse who returned him to the LDRP's crib/warming unit where resuscitation occurred, is accepted over the small amount of contrary hearsay contained in Dr. Mohamed's discharge summary quoted infra at Finding of Fact 54.

46. Concerning Perry, Jr.'s, cardiopulmonary event at 2:12 p.m., a nurse recorded in the "Health Care Professionals' Progress Notes," in pertinent part, as follows:

> 5/7/08 1412: arrived to labor room 302. Observed infant on open warmer apneic and intubation performed per B. Miller with 3.0 ET tube PPV with 100% FI02. See Dr. Maniscalco progress notes. To newborn nursery via warmer with PPB en route with chest compression 2.6 cc epinephrine via ET tube. CPR continues ETC 11.5 cm @ lip HR54 . . .

(Ex. C-103).

47. It is also accepted that because of the run out/run in period, the note at 2:12 p.m., may actually show the hypoxic event as occurring a minute or two later than it actually

occurred, but such a small delay is immaterial, given the rest of the evidence.

48. Dr. Maniscalco's (surgeon's) progress note at 1455 [2:55 p.m.], reads, in pertinent part:

> 5/7/08 1455: Called stat to postpartum newborn in full arrest. CPR in progress. Intubated B. Miller . . . No IV access. Epinephrine/Atropin per ETT. HR 80's [to] 122+ palpable pulse. Dr. Azam in. IV established. Fluid bolus given. Pet. Color improved but . . . Dr. Azam to place UVC and assuming patient care.

(Ex. C-81).

49. After resuscitating Perry, Jr., at approximately 2:55 p.m., and moving him to the newborn nursery on mechanical ventilation, a chest X-ray was taken. Radiologist Billingsley's report, printed at 1604 [4:04 p.m.], on May 7, 2008, reads:

> INDICATION: Intubated, decreased breath sounds
>
> COMPARISON: None
>
> FINDINGS: The endotracheal tube tip is in the left mainstream bronchus. There is complete opacification of the right hemithorax likely due to inefficient aeration of the right lung. In the left lung there is patchy parenchymal opacification <u>which may be due to . . . meconium aspiration in a term infant</u>.

(emphasis added). (Ex. C-97; <u>see</u> <u>also</u> Ex. C-99-100).

50. Repeated X-rays thereafter also diagnosed "meconium aspiration syndrome."

51. Arterial blood gas printouts showed severe acidosis as follows:

Time	pH	pCO2	pO2
1520[3:20 p.m.]	6.549	65.4	152.3
1623[4.23 p.m.]	6.894	30.4	133.9
1755[5:55 p.m.]	7.096	32.5	76.5

52. At 1754 [5:54 p.m.], Perry, Jr., was noted as having tremors of the lips and facial tremors.

53. Ahmed Baker Mohamed, M.D., was notified of the infant's seizure(s) and phenobarbital was administered at 6:12 p.m.

54. At 1813 [6:13 p.m.], Perry, Jr., was air-lifted to Sacred Heart Hospital's Neonatal Intensive Care Unit (NICU). A discharge summary by Dr. Mohamed reads, in pertinent part:

> REASON FOR TRANSFER: Respiratory failure
> HISTORY OF PRESENT ILLNESS: This is a newborn, 1 day old, born in Bay Medical Hospital on May 7, 2008, as per report normal vaginal delivery with no reported complications during pregnancy or labor. After one hour from delivery, the baby was in the mother's room who asked for help because the baby stopped breathing and moving. The nurse rushed to the mother's room and found the baby pale, not moving and not breathing. The Ambu bag was started and called anesthesia who intubated the baby. Dr. Azam was called to evaluate the patient. She ordered epinephrine, IV fluid bolus and the patient was put on mechanical ventilation. It was reported that during the suction, meconium came out in a moderate amount. The patient was moved to the nursery on mechanical ventilation. Sacred Heart neonatal intensive care was called and arrangements were made to transport the

> patient to the neonatal intensive care. Prenatal labs were unremarkable.
>
> ***
>
> IMPRESSION: A one day newborn with respiratory failure, rule out sepsis, rule out aspiration, rule out pneumonia.

(emphasis added). (Ex. C-73).

55. Perry, Jr., stayed at Sacred Heart Hospital in Pensacola from May 7, 2008, to October 1, 2008, and was subsequently seen in other facilities.

56. On July 2, 2008, and September 10, 2008, Perry, Jr., was seen by C. Anthony Hughes, M.D. (pediatric otolaryngologist). Dr. Hughes diagnosed Perry, Jr., as having hepatic encephalopathy, bilateral cortical injury secondary to hypoxic ischemic encephalopathy.

57. On September 24, 2008, Perry, Jr., was seen by Kristin Van Hook, M.D., a pediatric pulmonologist, who diagnosed him at four months of age, with static encephalopathy and seizure disorder secondary to arrest shortly after birth from having suffered a severe anoxic injury at one hour of age.

Coverage under the plan and the statutory presumption.

58. Coverage is afforded under the Plan for infants who suffer a "birth-related neurological injury," which for our purposes here, is defined as:

> . . . injury to the brain . . . of a live infant . . . 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."

See § 766.302(2), Fla. Stat.

59. Normally, Petitioners, as the proponents of the issue, would have the burden to demonstrate that Perry, Jr., suffered a "birth-related neurological injury." See Balino v. Dep't of Health and Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal."); Galen of Fla., Inc. v. Braniff, 696 So. 2d 308, 311 (Fla. 1997)("[T]he assertion of NICA exclusivity is an affirmative defense."); Tabb v. Fla. Birth-Related Neurological Injury Compensation Ass'n, 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.").

60. However, herein, Petitioners have the benefit of a stipulation regarding notice issues and also that the statutory presumption contained in Section 766.309(1)(a) applies in this case. For our purposes here, the presumption reads:

> If the claimant has demonstrated, to the satisfaction of the administrative law

> judge, that the infant has sustained a brain . . . injury caused by oxygen deprivation . . . and that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.302 (2).

61. The parties have stipulated that, as a matter of law, Petitioners are entitled to a rebuttable presumption that Perry, Jr., suffered a birth-related neurological injury, and it is undisputed herein, that Perry, Jr., suffered an injury to his brain caused by oxygen deprivation which rendered him permanently and substantially mentally and physically impaired and which ultimately resulted in his death. What remains for determination is whether or not the oxygen deprivation and the brain injury together occurred "in the course of labor, delivery, or resuscitation in the immediate postdelivery period."

62. NICA suggests that the statutory presumption has been rebutted, asserting that the evidence demonstrates that the oxygen deprivation and injury to Perry, Jr.'s, brain and his subsequent neurologic impairment did not occur during "labor, delivery, or resuscitation in the immediate postdelivery period in a hospital" (the statutory period), because both the hypoxic insult which created the brain injury and the resultant brain injury itself did not occur until more than an hour after Perry,

Jr., had been stabilized in the LDRP. NICA claims that both Perry, Jr.'s, oxygen deprivation and brain injury occurred when Perry, Jr., became apneic and was intubated, with chest compressions, and administration of epinephrine at 2:12 p.m.

The likely timing of Perry, Jr.'s, brain injury.

63. The statutory period is not defined under the Plan. Similarly, the medical experts herein acknowledged that this period is not defined within the medical community, but they agreed that this period would last until the infant was stabilized.

64. Dr. Willis testified that although the term "resuscitation in the immediate post-delivery period" is not defined under the NICA Plan, the statute, or within the medical community, it was his opinion that it should be defined as follows:

> [W]hen the baby's born, once the baby is stabilized and no longer requires medical attention, care to maintain adequate oxygenation, to maintain adequate blood pressure, when the baby is surviving on its own without intervention, then, as far as I'm concerned, the immediate resuscitative period is over.

(Ex. N-779).

65. Dr. Lopez's definition was not very different. He testified:

> I would imagine the immediate postdelivery period would be what some doctors and many

> organizations call the fourth stage of labor, which is the period of time after the complete delivery of the baby until the baby has been stabilized and is no longer under observation.

(TR-129).

66. Orlando Regional Health Care System, Inc. v. Florida Birth-Related Neurological Injury Plan, 997 So. 2d 426 (Fla. 5th DCA 2008), instructs that the determination of what is "immediate" is a factual determination upon which medical testimony should guide the Administrative Law Judge.

67. The medical experts, Dr. Willis and Dr. Lopez, are agreed that meconium only becomes an issue once the membranes are ruptured (during labor and delivery); the progress of meconium aspiration syndrome, if it occurs, is that the meconium is inhaled into the baby's lungs, creating an inability to take in enough oxygen to permit normal brain function, and eventually not enough oxygen is let in to sustain life. Dr. Lopez credibly testified that the alveoli of the lungs swell, cutting off the oxygen and causing cardiac arrest and oxygen deprivation.

68. Dr. Willis is a Florida-licensed, board-certified obstetrician-gynecologist and a maternal-fetal medicine specialist. In this capacity, he focuses on providing consultative care to women with high risk pregnancies. He has not delivered a baby within the last ten years. Because meconium becomes an issue only after a patient's membranes are

ruptured and the meconium becomes evident, Dr. Willis has not personally dealt with a meconium aspiration event in at least 10 years, and he was unable to give an opinion within reasonable medical probability as to whether meconium aspiration syndrome caused Perry, Jr.'s, hypoxic event and brain injury. However, he did opine that Perry, Jr.'s, brain injury did not occur within the statutory period so as to make it compensable under the NICA Plan.

69. Dr. Berto Lopez has been a Florida-licensed, board-certified obstetrician for 23 years. He currently has privileges at four hospitals, delivers 30 babies per month, and is part of a high-risk perinatal transfer team at St. Mary's Hospital, Palm Beach, Florida. As such, it is found that Dr. Lopez was more qualified than Dr. Willis to address the issues of this particular case.

70. Dr. Lopez faulted Dr. Jackson's records and failure to "evaluate" the child and further faulted the hospital's failure to monitor the child. He opined summarily that Perry, Jr.'s, loss of oxygen was an undiagnosed continuing insult that began at birth with aspiration of a moderate amount of thick meconium, and with loss of oxygen continuing through incomplete immediate resuscitative efforts in the LDRP, and that the remaining meconium, some of which was pumped out when Perry, Jr., was resuscitated at 2:12 p.m., had created a sequela of events,

including loss of oxygen, brain damage, and full cardiopulmonary arrest at that time, approximately an hour after birth. Therefore, he concluded that the postdelivery resuscitative period extended through the 2:12 p.m., episode.

71. However, upon closer questioning relevant to the issue of whether Perry, Jr.'s, oxygen deprivation and/or brain injury occurred within the statutory period of "labor, delivery, or resuscitation in the immediate postdelivery period in a hospital," Dr. Lopez testified as follows:

[Questions by Mr. Bajalia]

> Q: And based on your review of the fetal monitor strips, you agree that there was no hypoxic insult or injury to Perry Russell, Jr.'s brain during labor?
>
> A: That's correct. (TR-145).
>
> ***
>
> Q: . . . Regardless of what you think of what Dr. Jackson did or didn't do, his assessment and his determination was that the baby was in good and stable condition; you agree with that?
>
> A: That's correct. (TR-148).
>
> ***
>
> Q: So it's your testimony that he [Perry, Jr.] was never in good and stable condition at any point in time?
>
> A: I'm not saying that he wasn't stable for a period of time.

Q: There was a point in time, you're testifying here today, that he was in fact stabilized?

A: He was stable, yes. (TR-149).

***

Q: The one-minute Apgar score is inconsistent with a baby who has suffered an injury to the brain at that particular point in time?

A: That's correct.

Q: That one-minute Apgar score is not indicative of hypoxia or brain injury?

A: Correct.

Q: Now Perry's five-minute score was recorded as what?

A: Nine.

Q: And is that normal?

A: Yes. But, it's normal, but the resuscitation not only included bulb and suction catheter. That also under oxygen, this baby has a nine when it's given 80 percent oxygen by -- with something called blow-by. Blow-by is an open tube of oxygen that's usually attached to a wall oxygen dispenser. . . .

***

Q Is the fact that Perry Russell as part of the initial resuscitative efforts received blow-by oxygen, is that in and of itself indicative of him sustaining a brain injury at that particular point in time?

A: No.

Q: Now back to the Apgar score. You testified his Apgar score at five minutes was nine?

A: Yes.

Q: And that's normal?

A: Yes.

Q: And Perry's five minute Apgar score is, in your opinion, inconsistent with hypoxic [sic]?

A: Correct.

Q: It's inconsistent with him having suffered an injury to the brain at that particular point in time?

A: Correct.

Q: Now, I'm going to show you what's been marked and identified as Joint Exhibit C, and it's part of the records you have in front of you, page 107 of the stipulated record. Are you familiar with that document?

A: Yes.

Q: What is it?

A: It is the nurse evaluation form for part of the postpartum period.

Q: And in fact it's titled possible problems typical of age/weight categories?

A: That's what it's labeled, yes.

Q: And this appears to be an assessment of Perry's condition by the nurses charged with his care with respect to possible problems he may be experiencing; do you agree with that?

A: Yes.

Q: And one of these problems that is identified on this record is asphyxia and/or meconium aspiration?

A: Correct.

Q: Okay. So those are the things that they're specifically looking for in an effort to determine whether or not Perry Russell, at these particular points in time, was experiencing asphyxia, oxygen deprivation, or meconium aspiration, or meconium aspiration syndrome; you would agree with that?

A: Yes. (TR-150-153).

***

Q: Okay. And so despite the fact that Perry received some initial resuscitative efforts, which you described as suctioning and some blow-by oxygen, at 13:00, ten minutes after birth, based on what we've been through thus far, he seems to be looking pretty good?

A: Yes. (TR-155).

***

Q: Okay. Based on this assessment, at ten minutes after birth you described I think Perry Russell in your deposition as a rock star; do you remember that?

A: Yeah, he's a rock star, looks good.

Q: Appears to be stabilized?

A: Yeah.

Q: On this assessment Perry didn't appear to be experiencing or suffering from

asphyxia from meconium aspiration; you agree with that?

A: Correct.

Q: And he doesn't appear to have any difficulty breathing?

A: Correct.

Q: He's apparently breathing on his own?

A: Correct.

Q: He is not in respiratory failure?

A: Correct.

Q: Okay. This assessment is inconsistent with hypoxia at that particular point in time?

A: That's -- if we accept this as accurate, this photograph says at this moment things are looking great. (TR-155-156).

***

Q: Based on what's documented here, Perry apparently had no injury to his brain at this particular point in time?

A: Correct.

Q: At 13:00, based on what's documented there, Perry Russell is in good and stable condition?

A: Yes.

Q: He didn't appear to have any life-threatening condition at that point in time?

A: Correct.

Q: He appeared -- it appeared that he had made a safe transition from utero life to life outside the uterus?

A: Yes.

Q: Based on what's documented at 13:00, there were no active resuscitative measures being administered to Perry Russell?

A: Correct. (TR-157).

***

Q: Now let's talk about the assessment that was done at 13:15. Perry was born at 12:50. At 13:15, that's 25 minutes postdelivery?

A: Correct. (TR-158).

***

Q: At 25 minutes of life Perry Russell doesn't appear to be having any difficulty breathing?

A: Correct.

Q: At 25 minutes of life he's breathing on his own?

A: Correct.

Q: At 25 minutes of life he doesn't appear to be in respiratory distress?

A: Correct.

Q: At 25 minutes of life, based on what's documented there, this assessment would be inconsistent with a baby who has experienced hypoxia?

A: Correct.

Q: It would be inconsistent with a baby that's acidotic?

A: Correct.

Q: It would be inconsistent with a baby suffering from asphyxia?

A: Correct.

Q: It's inconsistent with a baby that has sustained an injury to the brain?

A: Correct.

Q: At 13:15, 25 minutes after he was born, it would appear that Perry was in good and stable condition?

A: Yes.

Q: It would appear that he had no life-threatening conditions?

A: Correct.

Q: It would appear that there were no active resuscitative measures being administered to Perry Russell at that time?

A: Correct.

Q: And it would appear none were needed?

A: Correct. (TR-160-161).

***

Q: Okay. And you told me at the beginning of this -- of my examination that just because a baby is experiencing an ongoing spectrum of oxygen deprivation, that doesn't mean that he has sustained an injury to the brain?

A: Not - at certain points in time. It's a spectrum that may start as okay and then go - progress to hypoxia and brain damage.

Q: Exactly, but the mere fact - my point is, the mere fact that Perry may have been experiencing a spectrum of oxygen deprivation, it doesn't mean he has a brain injury at 13:00?

A: Correct.

Q: It doesn't mean he had a brain injury at 13:15?

A: That's right.

Q: In fact, based on what's documented in the records and what we know with respect to what occurred at 14:12 an hour and 20 minutes after birth, that is when he probably and most likely incurred an injury to the brain?

A: No.

***

A: It was my opinion it occurred before that.

Q: Before 14:12 [2:12 p.m.]?

A: Right.

Q: Okay. But you have no idea when?

A: I could not pinpoint it to the exact minute or time. What we see at 14:12 [2:12 p.m.] is in fact that the baby is in full cardiopulmonary arrest, requiring extensive resuscitation. (TR-162-163).

***

Q: All right. And regardless of whether you think the nurses could have, should have done more with respect to their assessments of Perry Russell at 13:00 and 13:15 [1:00 p.m. and 1:15 p.m.], it is, in your opinion, what they documented at 13:00 and

13:15 you would agree would indicate he was not in respiratory distress?

A: Yes.

Q: Was not having any problems breathing?

A: That's right.

Q: And that he had not suffered an injury to his brain at that particular point in time?

A: Correct. (TR-165).

72. Overall, it is most probable that the oxygen deprivation that caused Perry, Jr.'s, brain injury did not happen until the code was called at 2:12 p.m., well beyond the time he was stabilized in the LDRP.

73. Given the proof, it is resolved that, more likely than not, Perry, Jr., did not suffer brain injury due to oxygen deprivation that occurred during labor, delivery, or resuscitation immediately following delivery. Rather, it is more likely than not that Perry, Jr., suffered hypoxic ischemic brain damage sometime after the statutory period had ended, that is, after the obstetrician and nurses left him in stable condition in the LDRP. It is most likely that the damage was done when he became apneic and had to be resuscitated about an hour later. (See Findings of Fact 31 and 38). Alternatively, it is conceivable, but not proven, that Perry, Jr., suffered oxygen deprivation from some unspecified point after being

stabilized at 1:15 p.m., and the oxygen deprivation continued undetected until he went into cardiac arrest at 2:12 p.m., but either way, he did not suffer brain damage during the statutory period.

CONCLUSIONS OF LAW

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

75. 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.

76. 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.

77. 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.

78. 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.

79. 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, deliver, 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.

80. As the proponent of the issue, the burden rested on Petitioners and Intervenor to demonstrate that Perry, Jr., suffered a "birth-related neurological injury." § 766.309(1)(a) Fla. Stat. See also Balino v. Dep't of Health and Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1997)("[T]he burden of

proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.").

81. Herein, due to the parties' stipulation that the statutory presumption of compensability applies, Respondent NICA had the burden to rebut the presumption established at Section 766.309(1)(a), Florida Statutes, and quoted at Conclusion of Law 78.

82. The interpretation of the requirements for compensation in the NICA statute is a matter of law, but whether a particular injury occurred in the course of resuscitation in the immediate postdelivery period is to be determined on a case-by-case basis. See Orlando Reg'l Health Care Sys., Inc. v. Fla. Birth-Related Injury Comp. Plan, supra. Three cases, determined by three different appellate courts, are instructive in how the instant case should be determined.

83. Nagy v. Florida Birth-Related Neurological Injury Compensation Association, 813 So. 2d 155 (Fla. 4th DCA 2002), was not a resuscitation case but one involving "mechanical injury." However, therein, the court stated clearly and succinctly:

> . . . Because the initial injury was to something other than the baby's brain or spinal cord, by definition, it is not a 'birth-related neurological injury' within section 766.302(2). . . . The fact that a brain injury from oxygen deprivation could be traced back to a mechanical injury

> outside the brain resulting in subgaleal hemorrhaging does not satisfy the requirement that the oxygen deprivation or mechanical injury to the brain must occur during labor or delivery.

84. Orlando Regional Health Care System, Inc. v. Florida Birth-Related Neurological Injury Compensation Plan, supra, involved a resuscitation case in which the Administrative Law Judge had ruled that while the child had continuous respiratory support throughout his six days of life, his injury did not occur during "resuscitation in the immediate postdelivery period." The court overruled the Administrative Law Judge on the issue of law and determined the meaning of the term "immediate," within the statutory phrase, "resuscitation in the immediate postdelivery period." The court stated, in pertinent part: ". . . [w]hile this Court must determine the meaning of the term 'immediate' in interpreting the phrase 'resuscitation in the immediate postdelivery period,' the application of this definition in determining plan compensability must be applied on a case-by-case basis." Additionally, the court stated:

> Under the Plan, the terms 'resuscitation' and 'immediate' are important qualifiers to determining the compensability of a claim. However, those terms are not defined by statutes. When a term is not defined within a statute, a fundamental construction tool requires giving a statutory term its 'plain and ordinary meaning.' Green v. State, 604 So. 2d 471, 473 (Fla. 1992); Dianderas v. Fla. Birth-Related Neurological, 973 So.2d 523, 527 (Fla. 5th DCA 2007). When

> necessary, the plain and ordinary meaning can be ascertained by reference to a dictionary. Green, 604 So. 2d at 473; see also L.B. v. State, 700 So. 2d 370, 372 (Fla. 1997) (explaining that 'court may refer to a dictionary to ascertain the plain and ordinary meaning'). This Court has previously utilized references to dictionaries and medical references to interpret other provisions of the statute. See, e.g., Dianderas, 973 So. 2d at 527.
>
> . . . '[I]mmediate' 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 643 (2d ed. 1985); see Merriam-Webster's Collegiate Dictionary 578 (10th ed. 2000) (defining 'immediate' as 'being next in line or relation[;] . . . existing without intervening space or substance[;]. . . being near at hand[;] . . . occurring, acting, or accomplished without loss or interval of time.[;] . . . near or related to the present').
>
> ***
>
> . . . It is not logical to find that 'immediate' only means through the first resuscitative attempt when [the child] was initially revived but no spontaneous respirations could otherwise be established. [The child] continued to need resuscitation without interruption, and that ongoing need creates a onetime period -- the 'immediate postdelivery period.'

(Emphasis in the original. Bracketed material substituted for child's name).

85. In Orlando Regional Health Care System, Inc., supra. The court ruled the injury was compensable where the newborn required and received immediate and continuous respiratory

support, representing an ongoing, uninterrupted, resuscitative effort from delivery to arrest. That was not the situation in Perry, Jr.'s, case.

86. In St. Vincent's Medical Center, Inc. v. Bennett, 27 So. 3d 65 (Fla. 1st DCA 2009), the court addressed a situation in which the Administrative Law Judge had declined to apply the Section 766.309(1)(a) presumption in favor of NICA and the intervenors. In reversing the Administrative Law Judge, the court considered that shortly after delivery, the child was placed in a special care nursery where she remained until she died, and therefore, the time between the child's delivery by caesarean section and the events through her death constituted the "immediate postdelivery period in the hospital." Although the opinion digressed into issues with regard to application vel non of the statutory presumption, which issues do not apply herein, the court concluded that: "It is oxygen deprivation or mechanical injury which must occur during 'labor, delivery, or resuscitation in the immediate postdelivery period' under the statutory scheme. The applicable statutes do not preclude coverage if neurological damage becomes manifest at a later date."

87. St. Vincent's also expanded the "immediate postdelivery resuscitative period" significantly beyond the interpretations of the two prior cases. Upon that and several

other points, the St. Vincent's decision is currently before the Florida Supreme Court, Case No. SC10-364.

88. The facts here do not fit the pattern developed in St. Vincent's, and herein, the presumption was applied and rebutted. Moreover, the facts herein do not support a finding that Perry, Jr.'s, hypoxic ischemic insult occurred before he was pronounced in "good stable condition" by Dr. Jackson, so they do not support a finding that the neurological injury occurred during "labor, delivery, or in the immediate postdelivery resuscitative period." Moreover, the evidence most strongly suggests that both the hypoxic insult and the brain injury occurred approximately an hour after the "resuscitation in the immediate postdelivery period" had ended. Sequential resuscitations outside the statutory period after a period of stability do not prolong the statutory period.

89. Here, the presumption was rebutted so that the proof failed to support the conclusion that, more likely than not, Perry's neurological impairment was the result of an injury caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital. Indeed, the more compelling proof demonstrated that the brain injury post-dated the immediate postdelivery period. Consequently, given the provisions of Section 766.302(2), Perry, Jr., does not qualify for coverage under the

Plan. See also §§ 766.309(1) and 766.31 (1), Fla. Stat.; Humana of Fla., 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 construed to include only those subjects clearly embraced within its terms."), approved, Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996); Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n, supra.

90. 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:

(1) The claim for compensation filed by Latasha Williams and Perry Russell, Sr. on behalf of, and as parents and natural guardians of, Perry Russell, Jr., a deceased minor, is dismissed with prejudice.

(2) Under the circumstances, all issues of notice are moot.

DONE AND ORDERED this 3rd day of December, 2010, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of December, 2010.

ENDNOTES

1/ Latasha Williams is also Latasha Williams Russell.

2/ "Meconium" is a dark green mucilaginous material in the intestine of the full-term fetus, being a mixture of the secretions of the liver, intestinal glands, and some amniotic fluid. See Dorland's Illustrated Medical Dictionary page 998 (28th ed. 1994). "Meconium aspiration syndrome" can occur when the infant inhales meconium; it is explained more fully in the body of this Final Order.

3/ Jt. Ex. A is medical records from Bryce Vincent Jackson, M.D., for Latasha Williams November 20, 2007 to May 8, 2008, (Bates 1-21); Jt. Ex. B is medical records from Bay Medical Center for Ms. Williams' labor and delivery records May 7, 2008 to May 8, 2008, (Bates 22-68); Jt. Ex. C is medical records from Bay Medical Center for Perry, Jr., dated May 7, 2008 (Bates 69-114); Jt. Ex. D is fetal monitor strips from Bay Medical Center for Perry, Jr., dated May 7, 2008 (Bates 115-155); Jt. Ex. E is medical records from Sacred Heart Hospital following Perry,

Jr.'s, transfer from Bay Medical Center, dated May 7, 2008 (Bates 156-320); Jt. Ex. F is medical records from Dr. Peter Jennings for Perry, Jr., dated October 3, 2008 to October 8, 2008 (Bates 321-355); Jt. Ex. G is medical records from Caring Hearts Pediatric Extended Care for Perry, Jr., dated October 6, 2008 to October 8, 2008 (Bates 356-427); Jt. Ex. H is Donald Willis, M.D.'s reports, dated February 1, 2010 and August 23, 2010 (Bates 428-430,430A); Jt. Ex. I is Petitioners' Answers to Respondent's Interrogatories dated July 29, 2010 (Bates 431-448); Jt. Ex. J is Respondent's Answers to Petitioners' Interrogatories dated May 3, 2010 (Bates 449-453); Jt. Ex. K is the Deposition Transcript of Latasha Williams, with exhibits 1-3, July 29, 2010 (Bates 454-578); Jt. Ex. L is the Deposition Transcript of Patricia Williams, July 29, 2010 (Bates 579-637); Jt. Ex. M is the Deposition Transcript of Lakisha McClain, July 29, 2010 (Bates 638-699); Jt. Ex. N is the Deposition Transcript of Donald C. Willis, M.D., July 27, 2010, with Ex.1 thereto, (Bates 700-807); Joint Exhibit O is Bay Medical Center's Response to Respondent's First Set of Interrogatories dated August 18, 2010 (Bates 808-815); Jt. Ex. P is Deposition Transcript of Berto Lopez, M.D., August 6, 2010, with exhibits 1-10 (Bates 816-1030); Jt. Ex. Q is a copy of the Prehearing Stipulation; Jt Ex. R is a copy of the Amended Stipulated Record.

4/ See Joint Prehearing Stipulation for Findings of Fact 1-8 and 10-14. See TR-31-32, for Finding of Fact 9.

5/ For clarity, most universal or military times on documents have been converted by the undersigned to standard a.m. and p.m. times in brackets.

6/ NSVD abbreviates "normal spontaneous vaginal delivery".

7/ Apgar scores are a numerical expression of the condition of a newborn infant, and reflect the sum of points gained on assessment of heart rate, muscle tone, respiratory effort, reflex irritability, and color, with each category being assigned a score ranging from the lowest score of zero through a maximum score of two. See Dorland's Illustrated Medical Dictionary page 1497 (28th ed. 1994).

8/ "Delivery" means 1. Expulsion or extraction of the child and the after-birth; see also "labor". "Vaginal delivery" means delivery of an infant through the normal openings of the uterus and vagina. Dorland's Illustrated Medical Dictionary page 438 (28th ed. 1994).

9/ Presumably, this was a rectal reading. By medical testimony herein, it was a normal temperature for a newborn.

10/ Presumably, this was an axial (armpit) temperature. By medical testimony herein, it was a normal temperature for a newborn.

11/ "Hypoxia" is a reduction of oxygen supply to tissue below physiological levels, despite adequate perfusion of the tissue by blood. "Ischemia" is a deficiency of blood in a part, usually due to functional constriction or actual obstruction of a blood vessel. Dorland's Illustrated Medical Dictionary page 812 (28th ed. 1994).

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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.