STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALVA NAZARIO-BAUTISTA AND MARTIN AYALA, on behalf of and as parents and natural guardians of RAFAEL AYALA, a minor,

Petitioners,

vs. Case No. 10-8476N

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,

Respondent,

and

WINTER HAVEN HOSPITAL, INC., d/b/a WINTER HAVEN HOSPITAL, AND REGENCY MEDICAL CENTER; VINCENT GATTO, M.D.; EVA J. SALAMON, M.D.; MEGHAN GARLAND, CNM; SUSAN WESTMAN, CNM; BOND CLINIC, P.A.; MARIA KONG, M.D.; AND PEDIATRIX MEDICAL GROUP OF FLORIDA, INC.,

Intervenors.

SUMMARY FINAL ORDER OF DISMISSAL WITH PREJUDICE

This cause came on for consideration of Respondent's Motion for Summary Final Order served April 1, 2011.

A plethora of motions have been filed and addressed by timely orders, but effort has been made herein to discuss only

motions and orders related to the Motion for Summary Final Order.

STATEMENT OF THE CASE

1. On August 27, 2010, Alva Nazario-Bautista (mother) on behalf of and as parent and natural guardian of Rafael Ayala, a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan), for injuries allegedly associated with Rafael's birth on June 27, 2003. The Plan is represented by the Florida Birth-Related Neurological Injury Compensation Association (NICA).

2. The seminal statute requires both that a claim/petition against the Plan be filed with DOAH within five years of the child's birth (see section 766.313, Florida Statutes), and that no civil action may be brought until the determinations under section 766.309 have been made by DOAH's independent Administrative Law Judge (ALJ). See § 766.304, Fla. Stat.[1/]

3. DOAH served NICA with a copy of the claim on September 1, 2010; served Winter Haven Hospital, Inc., d/b/a Regency Medical Center on September 2, 2010; and served Vincent Gatto, M.D., on September 15, 2010. These are the only hospital and/or medical personnel named by the petition as present at, or associated with, Rafael's birth.

4. Upon their respective motions, an Order permitting intervention by Winter Haven Hospital, Inc., d/b/a Winter Haven Hospital and Regency Medical Center (hereafter "Winter Haven Hospital, Inc."), was entered on October 7, 2010; an Order permitting intervention by Vincent Gatto, M.D.; Eva J. Salamon, M.D.; Meghan Garland, CNM; Susan Westman, CNM; and Bond Clinic, P.A., was entered on June 1, 2011; and an Order permitting intervention by Maria Kong, M.D., and Pediatrix Medical Group of Florida, Inc. (PMGF), was entered on June 15, 2011. Dr. Gatto et al., and Dr. Kong and PMGF did not move to intervene until well after the filing of the Motion for Summary Final Order. Dr. Kong and PMGF were not named in the original or amended petitions and accordingly DOAH was not required by section 766.305 to serve them with a copy of the petition/claim and did not serve them. (See paragraphs 3, and 13-14 of this Order).

5. NICA's Motion for Summary Final Order,[2/] served April 1, 2011, and filed April 6, 2011, asserts that the petition/claim is barred by the section 766.313, five years' statute of limitations, and that Rafael's injuries do not meet the definition of a "birth-related neurological injury" as defined in section 766.302(2) and (7).

6. On March 28, 2011, Petitioner filed a Motion for Leave to Amend Petition for the purpose of requesting attorney's fees

and costs. The amendment would not affect the Motion for Summary Final Order.

7. On April 12, 2011, an Order on Pending Motions was entered. It provided, in pertinent part:

> This cause came on for consideration of all pending motions by telephonic conference call on April 11, 2011. All parties were heard, and upon consideration, it is
>
> ORDERED:
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> * * *
>
> 3. Petitioner's Motion for Leave to Amend Petition [to include a prayer for attorney's fees and costs] was unopposed and is granted. This cause shall proceed upon the Amended Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq., filed simultaneously with the aforesaid motion. <u>This Amended Petition, as well as the original, is barred as against NICA by the statute of limitations (section 766.313) which ruling will be incorporated in the final order herein.</u>
>
> 4. Respondent NICA acknowledged it now deems the Petition (and necessary accompanying documentation of medical records) to be complete, and all parties stipulated that NICA's Motion for Summary Final Order may be considered as NICA's mandatory Response, provided-for by section 766.305(4), Florida Statutes.
>
> 5. Respondent's Motion for Summary Final Order, served April 1, 2011, is taken under advisement, pending the filing of responses by Petitioner and Intervenor.[3/] (Petitioner presented oral argument opposing [entry of an order of] dismissal solely upon the terms of section 766.313, Florida Statutes.)

> 6. Petitioner's Renewed Motion to Set Final Hearing has been considered, with input as to all parties' trial schedules, consideration of the pending Motion for Summary Final Order, and the remaining need for discovery, and is granted in part and denied in part as follows: Final hearing will be scheduled for July 11, 2011, by separate notice and order of prehearing instructions. (emphasis added).

8. After the telephonic hearing on April 11, 2011, Intervenor Winter Haven Hospital, Inc., filed a Motion for Extension of Time to Respond to NICA's Motion for Summary Final Order, seeking an extension to June 10, 2011, in which to respond to the Motion for Summary Final Order, and on April 14, 2011, an Order was entered granting Petitioner and Intervenor (then only Winter Haven Hospital, Inc.) to and until June 10, 2011, in which to file a response to NICA's Motion for Summary Final Order.

9. Also on April 14, 2011, Petitioner filed a pleading entitled, "Petitioner's Joinder with NICA's Motion for Summary Final Order as to the Issue of Compensability Only." By this pleading, Petitioner asserted that her failure to file her NICA petition/claim within the five years' statute of limitations was "moot" and that the claim was not compensable.

10. Thereafter, a final hearing on the merits was repeatedly scheduled, only to be cancelled so that Intervenor(s)

might have sufficient time to respond to the Motion for Summary Final Order.

11. On May 10, 2011, Petitioner served, and on May 11, 2011, Petitioner filed, another Motion for Leave to Amend Petition. This time, Petitioner(s) sought to amend the petition/claim to allege that Martin Ayala is the father of the child, Rafael Ayala, and to remove from the petition/claim all previous allegations of brain damage to Rafael Ayala. Removal from the claim of the initial allegations of brain damage substantively aligned Petitioners (now Rafael's mother and Mr. Ayala) with NICA's position that the claim is not compensable as asserted in NICA's Motion for Summary Final Order.

12. No timely response in opposition was filed, and on May 27, 2011, a Corrected Order on Second Amended Petition was entered, which provided:

> CORRECTED ORDER ON SECOND AMENDED PETITION[1]
>
> This cause came on for consideration upon Petitioners' Motion for Leave to Amend Petition served May 10, 2011. The motion does not state the other parties' positions(s) on the motion as required by Florida Administrative Code Rule 28-106.204(3), but no timely response in opposition thereto has been filed by any party.
>
> Upon consideration, it is ORDERED:

> 1. The Motion for Leave to Amend Petition served May 10, 2011, is granted.
>
> 2. This cause shall proceed upon the Second Amended Petition served May 10, 2011, and filed May 11, 2011. The Second Amended Petition, like all previous versions, is barred as against NICA by the statute of limitation (section 766.313) which ruling will be incorporated in the final order herein.
>
> ENDNOTE
>
> 1/ This Order clarifies the Order on Second Amended Petition entered May 25, 2011, to show this case is barred against NICA by the statute of limitations. (emphasis added).

13. On May 20, 2011, a Petition for Leave to Intervene was filed by Vincent Gatto, M.D., Eva J. Salamon, M.D., Meghan Garland, CNM, Susan Westman, CNM, and Bond Clinic, P.A. No timely response in opposition was filed, and on June 1, 2011, an Order was entered granting Intervenor status.

14. On June 6, 2011, Maria Kong, M.D., and PMGF, filed a Petition for Leave to Intervene. There being no timely response in opposition thereto, an Order Granting Petition to Intervene was entered on June 15, 2011.

15. On June 6, 2011, Intervenor Winter Haven Hospital, Inc., had filed a Motion for Extension of Time to Respond to Motion for Final Summary Order [sic] and Continuance of Final Hearing Date. On June 22, 2011, an Order Extending Date for Responses to Motion for Summary Final Order and Cancelling Video

Teleconference Hearing was entered. That order provided, in pertinent part:

> This cause came on for consideration of Intervenors Winter Haven Hospital, Inc., d/b/a Winter Haven Hospital and Regency Medical Center's (hereinafter, "Winter Haven Hospital, Inc.'s") Motion for Extension of Time to Respond to Motion for Final Summary Order [sic] and Continuance of Final Hearing Date, served by U.S. Mail and filed on June 6, 2011. There has been no timely response in opposition filed by any other party.
>
> Entry of a summary final order at this point in the proceedings would be premature and contrary to well-settled Florida law.[1] The present case, as against Respondent NICA, is barred by the statute of limitations, so it is clear that an early setting of final hearing serves no viable purpose in this forum.
>
> Moreover, even Petitioners, by their response to the May 25, 2011, Order to Show Cause, filed June 3, 2011, has [sic] requested additional time before final hearing for discovery on the issue of notice or lack thereof.[2]
>
> ORDERED:
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> 1. Intervenor Winter Haven Hospital, Inc.'s Motion for Extension of Time to Respond to Motion for Final Summary Order [sic] and Continuance of Final Hearing is granted, upon the following terms:
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> (a) The video teleconference final hearing on the merits now scheduled for July 11, 2011, is hereby cancelled.
>
> (b) Respondent NICA's Motion for Summary Final Order and Petitioners' Joinder therein are deemed to "carry over" as

against the Second Amended Petition, served May 10, 2011, and filed May 11, 2011.

(c) The date for any party to file a response in opposition or support of Respondent NICA's Motion for Summary Final Order and Petitioners' Joinder therein, is extended to July 8, 2011.[3]

(d) Oral argument on the pending Motion for Summary Final Order (and Joinder) will be by telephonic conference call on July 11, 2011, at 9:30 a.m. . . .

* * *

(e) All parties shall have legal counsel present at the July 11, 2011, telephonic conference call and all counsel shall be prepared to select a date for final hearing on the merits, if a hearing on the merits becomes necessary.

2. In the interest of administrative economy and efficiency, this cause will not be rescheduled for final hearing until after the pending Motion for Summary Final Order is ruled upon. (Emphasis added).

ENDNOTES

1/ See Story v. Am. Optical Corp., 958 So. 2d 474, 475 (Fla. 4th DCA 2007); Sanchez v. Sears, Roebuck & Co., 807 So. 2d 196, 197 (Fla. 3d DCA 2002); Smith v. Smith, 734 So. 2d 1142, 1144 (Fla. 5th DCA 1999).

2/ Petitioners have raised the issue of lack of notice from the inception of this case. (See paragraph 7 of the initial petition (claim) filed August 27, 2010). However, through inadvertence, the Notice of Hearing mailed April 12, 2011, did not specify that the scope of final hearing would include both the issue of "compensability" and the issue of "notice." If raised, "notice" and "compensability"

issues should be heard in a single hearing. See § 766.309(4), Fla. Stat. Due to the flaw in the April 12, 2011, Notice of Hearing, an Order to Show Cause [why both issues should not be heard on the date scheduled for final hearing on compensability] was entered on May 25, 2011.

3/ Motions for summary final order and responses thereto are to be grounded in factual matters, substantiated by affidavits, depositions, etc.

16. Thereafter, many motions, most of them related to discovery sought by Intervenors in aid of their potential responses to the pending Motion for Summary Final Order, were filed. On July 11, 2011, a telephonic hearing was held on all pending motions, and on July 12, 2011, an Order was entered, which provided:

> On July 11, 2011, a telephonic hearing was held to address Respondent NICA's pending Motion for Summary Final Order (and Petitioners' Joinder therein). This hearing had been scheduled since June 22, 2011.
>
> On June 23, 2011, Intervenors Vincent Gatto, M.D., Eva J. Salamon, M.D., Meghan Garland, CNM, Susan Westman, CNM, and the Bond Clinic, P.A., served a "Joinder" with Intervenors Winter Haven Hospital, Inc., d/b/a Winter Haven Hospital and Regency Medical Center's Motion for Extension of Time to Respond to Motion for Final Summary Order and Continuance of Final Hearing Date.[1] Dr. Gatto et al.'s "Joinder" did not recite all parties' position(s) on it, as required by Florida Administrative Code Rule 28-106.204.
>
> On July 5, 2011, Intervenors Vincent Gatto, M.D., Eva J. Salamon, M.D., Meghan

Garland, CNM, Susan Westman, CNM, and the Bond Clinic, P.A., served their own Motion for Continuance of Oral Argument on the Pending Motion for Summary Final Order (and Joinder). On July 7, 2011, Maria Kong, M.D., and Pediatrix Medical Group of Florida, Inc., served their Motion for Extension of Time to Respond to Motion for Final Summary Order and Continuance of Final Hearing Date. Neither motion recited all the other parties' positions on the relief sought. On July 8, 2011, Petitioners served their response in opposition to the foregoing motions, titled "Petitioners Objection to Intervenors' Motions for Continuance of Oral Argument on the Pending Motion for Summary Final Order." Accordingly, all issues having been addressed in Petitioners' response, all pending motions were heard at the previously scheduled telephonic conference on July 11, 2011.[2]

Upon consideration of all pending motions and oral argument by all parties, it is ORDERED:

1. Respondent NICA's Motion for Summary Final Order remains under advisement.

2. <u>Any party may show good cause, in writing, filed with the Division of Administrative Hearings, on or before August 12, 2011, why the Motion for Summary Final Order should not be granted. Failure to timely show good cause will result in a summary final order of dismissal.</u>

3. The parties have stipulated that, in the event the Motion for Summary Final Order is denied on or about August 13, 2011, they can be ready and available for a final hearing on compensability and notice on September 21, 2011. That date is hereby reserved for final hearing.

ENDNOTES

1/ However, Winter Haven's motion had previously been granted by the June 22, 2011, Order Extending Date for Responses to the Motion for Summary Final Order and Cancelling Video Teleconference Hearing.

2/ It is noted that oral argument on motions is in the discretion of the ALJ and compliance with Florida Administrative Code Rules 28-106.204 and 28-106.103 usually results in disposition of a motion within 7 to 12 days without the necessity of oral argument. (emphasis added).

17. Further discovery ensued, and on July 26, 2011, Winter Haven Hospital, Inc., served a notice for the July 29, 2011, deposition of M. Nur Qureshi, M.D. Dr. Qureshi is apparently the child's treating physician. On July 27, 2011, Petitioners filed "Plaintiff's [sic] Objection to Intervenors Bond Clinic, Gatto, Salamon, Westman, and Garland Notice of Taking Deposition for Friday, July 29, 2011."[4/] Petitioners' "objection" did not seek to quash Intervenor's subpoena for Dr. Qureshi's deposition or seek a protective order, but did allege that the deposition should be cancelled and rescheduled because Petitioners' lead counsel was ill and unable to attend the deposition as scheduled for July 29, 2011. Intervenor Winter Haven Hospital, Inc.'s Response to Objection was filed later on July 27, 2011, and explained that Winter Haven Hospital, Inc., had subpoenaed Dr. Qureshi for deposition on July 29, 2011, because, despite repeated requests, Dr. Qureshi would not voluntarily make

herself available for deposition and because Petitioners' lead counsel had not agreed to any date for taking their physician's deposition prior to the date that Intervenors' responses in opposition to the Motion for Summary Final Order were required to be filed.

18. On July 28, 2011, an Order was entered which provided as follows:

> This cause came on for consideration upon Petitioners' Objection to Intervenors' Notice of Taking Deposition for Friday, July 29, 2011, filed July 27, 2011, and Intervenors' Response thereto filed the same date.
>
> Upon consideration thereof, it is
>
> ORDERED:
>
> 1. In the event Petitioners are unable to have any attorney from Diez-Arguelles & Tejedor, P.A., attend the deposition of Dr. Qureshi, scheduled for 4:15 p.m., July 29, 2011, they shall notify Intervenors' counsel by 12:00 p.m., on July 29, 2011.
>
> 2. Simultaneous with any notification provided by Petitioners pursuant to paragraph 1., above, Petitioners' counsel shall provide available dates prior to August 8, 2011, and shall produce their treating physician, Dr. Qureshi, for deposition prior to August 8, 2011.
>
> 3. Absent Petitioners producing Dr. Qureshi for deposition in the time period specified, the time for responses to the Motion for Summary Final Order (August 12, 2011), will be extended and the trial date selected by the parties

(September 21, 2011), will be cancelled until such time as Intervenors have had adequate time for discovery so as to respond to the Motion for Summary Final Order. (emphasis added).

19. The same day, July 28, 2011, Intervenor Winter Haven Hospital, Inc., filed a Notice of Cancellation of Deposition of Dr. M. Nur Qureshi and on August 1, 2011, filed an Amended Notice of Taking Deposition for August 3, 2011.

20. No party has notified the undersigned that Dr. Qureshi's deposition did not go forward as rescheduled for August 3, 2011.

21. As of the August 12, 2011, due date for filing any responses in opposition to NICA's pending Motion for Summary Final Order, no responses in opposition to the motion had been filed, and there have been no further motions for extension of time in which to file responses in opposition to the Motion for Summary Final Order, which has been pending since April 6, 2011.

THE MOTION FOR SUMMARY FINAL ORDER

22. NICA's Motion for Summary Final Order is based on two premises. First, NICA asserts that Petitioners' claim is barred as against NICA because the first petition, filed August 27, 2010, was filed more than five years after the date of Rafael Ayala's birth on June 27, 2003. Second, NICA asserts that Rafael did not suffer a birth-related neurological injury as defined in section 766.302(2) because neither his brain nor

his spinal cord were injured during labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, and that, in fact, Rafael suffered an injury due to shoulder dystocia which resulted in a brachial plexus injury and a brachial plexus injury does not affect the brain or spinal cord.

23. Petitioners' "Joinder with NICA's Motion for Summary Final Order as to the Issue of Compensability Only" agrees that their claim is not compensable because Rafael suffered a non-compensable brachial plexus injury. Also, at no time, through several amendments to the petition, have Petitioners ever suggested that a NICA claim/petition had been filed within five years of Rafael's birth.

24. Petitioners' legal assertion that the statute of limitations is "moot," is nonsensical. A statute of limitations is always a threshold issue in any case, and here, there is no factual dispute among the parties that the original petition was filed more than five years after Rafael's birth.

25. As to the issue of compensability or lack thereof, Respondent NICA had Rafael's birth records evaluated by Donald Willis, M.D., an obstetrician with special competence in maternal-fetal medicine. Dr. Willis submitted an affidavit expressing views within reasonable medical probability as follows:

* * *

3. The Florida Birth-Related Neurological Injury Compensation Association retained me as its expert in maternal-fetal medicine to review the medical records from both RAFAEL AYALA and his mother, ALVA NAZARIO-BAUTISTA. The purpose of my review of the medical records of RAFAEL AYALA and his mother, ALVA NAZARIO-BAUTISTA was to determine whether an injury occurred in the course of labor, delivery or resuscitation in the immediate post-delivery period in the Hospital due to oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the Hospital.

4. A true and accurate copy of my Report is attached hereto as Exhibit 1. All of the statements and opinions expressed therein are true and correct based upon my review of the medical records.

5. In summary, delivery was complicated by shoulder dystocia that resulted in a brachial plexus injury and a fractured clavicle. The one minute Apgar score was low, most likely related to the shoulder dystocia. The baby responded to resuscitation and had a normal Apgar of 8 at five minutes. These findings suggest the baby did not have oxygen deprivation or mechanical trauma that resulted in brain injury during labor or delivery.

6. The injury sustained by the child was a brachial plexus injury and a fractured clavicle. These are not injuries to the brain or spinal cord itself.

7. As such, it is my opinion that there was no oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery in the Hospital that resulted in loss of oxygen or mechanical trauma to the

> baby's brain or spinal cord. Accordingly, there was no causal event which would have rendered RAFAEL AYALA permanently and substantially mentally and physically impaired as a result of same.

26. Moreover, Dr. Willis attached to, and incorporated in, his affidavit his medical report which reads, in pertinent part, as follows:

> I have reviewed the medical records for the above individual. The mother, Nazario Alba [sic][5/] was a 41 year old G4 P3 with Gestational Diabetes. She was admitted at term in labor. The fetal heart rate (FHR) monitor on admission shows a normal baseline FHR of 135 bpm and a reactive pattern. Some FHR decelerations, primarily variable decelerations, began about four hours before delivery. The decelerations were intermittent and not severe.
>
> Vaginal delivery was complicated with a shoulder dystocia. Birth weight was 3,751 grams or 8 lbs 5 ozs. The time from delivery of the head until delivery was completed was estimated to be only one minute. Apgar scores were 3/8. The newborn suffered a left Erb's Palsy and a fractured clavicle related to the shoulder dystocia.
>
> The baby was depressed at birth, but improved quickly with resuscitation. Resuscitation included bag and mask ventilation, intravenous fluids for volume expansion and Na Bicarbonate. Bag and mask ventilation was required for about one minute. The baby responded favorable [sic] to resuscitation and was taken to the nursery.
>
> Respiratory distress required the baby to be taken to the NICU for management. An arterial blood gas was done with a pH of 7.26. Respiratory distress was managed with

> nasal cannula oxygen and intubation was never required. Platelet count was decreased at 87,000, but returned to normal without platelet transfusions. Sepsis was considered due to respiratory distress and thrombocytopenia, but all cultures were no growth. There was a question that the respiratory distress may have been related to narcotics used during labor.
>
> Head ultrasound on DOL 3 was normal. The baby was discharged home at 6 days of life. I do not have any medical records after newborn hospital discharge.
>
> In summary, delivery was complicated by shoulder dystocia that resulted in a brachial plexus injury and a fractured clavicle. The one minute Apgar score was low, most likely related to the shoulder dystocia. The baby responded to resuscitation and had a normal Apgar of 8 at five minutes. These findings suggest the baby did not have oxygen deprivation or mechanical trauma that resulted in brain injury during labor or delivery.

27. Preferably, the Motion for Summary Final Order might have provided the affirmative evidence of a neurologist who had personally examined Rafael and diagnosed him as having only a brachial plexus injury. However, here, a qualified obstetrician has opined, without refutation, that the medical records, which Petitioners were required to furnish as part of their claim/petition (see section 766.305(3)) and upon which Petitioners' claim relies, provide no evidence of oxygen deprivation or of mechanical injury, and upon that basis, NICA's Motion for Summary Final Order may be granted. Moreover, NICA's

affiant obstetrician has opined, without refutation, that "the injury sustained by the child was a brachial plexus injury and a fractured clavicle. These are not injuries to the brain or spinal cord itself."

28. Finally, standard medical texts describe a brachial plexus injury as not occurring within the brain or spinal cord. For instance, a brachial plexus injury is defined in the 28th Edition of Dorland's Illustrated Medical Dictionary © 1994, as

> plexus: a network or tangle: a general term for a network of lymphatic vessels, nerve, or veins. Brachial plexus: a plexus originating from the ventral branches of the last four cervical spinal nerves and most of the ventral branch of the first thoracic spinal nerves. Situated partly in the neck and partly in the axilla. . . .

29. Given the record, there is no genuine issue as to any material fact concerning either the running of the statute of limitations prior to the filing of the initial petition/claim herein or as to the claim's non-compensability. Specifically, there is no dispute that the petition herein was filed beyond the statute of limitations for NICA claims or that Rafael Ayala did not sustain a statutorily-defined compensable injury. Accordingly, NICA's Motion for Summary Final Order is, for reasons appearing more fully in the Conclusions of Law, well-founded.

30. When, as here, the "moving party presents evidence to support the claimed non-existence of a material issue, he . . . [is] entitled to a summary judgment unless the opposing party comes forward with some evidence which will change that result; that is, evidence to generate an issue of a material fact. It is not sufficient for an opposing party merely to assert that an issue does exist." Turner Produce Co., Inc. v. Lake Shore Growers Coop. Ass'n, 217 So. 2d 856, 861 (Fla. 4th DCA 1969). Accord, Roberts v. Stokley, 388 So. 2d 1267 (Fla. 2d DCA 1980); Perry v. Langstaff, 383 So. 2d 1104 (Fla. 5th DCA 1980).

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 766.301-766.316, Fla. Stat.

32. As a threshold jurisdictional issue, this cause, as against NICA, is barred by section 766.313, which provides that: "[a]ny claim for compensation under ss. 766.301-766.316 that is filed more than 5 years after the birth of an infant alleged to have a birth-related neurological injury shall be barred."

33. It is an undisputed fact that Rafael was born on June 27, 2003, and that the claim/petition was filed at DOAH on August 27, 2010. Therefore, factually, the claim was not filed until more than two years after the statute had run, and the claim is barred. Respondent NICA is entitled to a final order

which resolves that, notwithstanding that the claim may be compensable, Petitioners may not pursue or recover an award of benefits under the Plan.

34. However, since Plan immunity may be a viable defense to a civil suit and the ALJ has exclusive jurisdiction to resolve whether a claim is compensable, it is necessary in the posture of this case, to resolve whether the claim is compensable. See §§ 766.301(1)(d), 766.303(2), and 766.304, Fla. Stat., and O'Leary v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 757 So. 2d 624 (Fla. 5th DCA 2000).

35. In Green v. Fla. Birth-Related Neurological Injury Comp. Ass'n and Henricks et al., Case No. 02-2213N (Fla. DOAH Apr. 24, 2003), per curiam aff'd, Green v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 871 So. 2d 223 (Fla. 2d DCA 2004), the ALJ ruled that he was obligated to determine Plan compensability even though the statute of limitations barred Petitioner's NICA claim so that Petitioner could not pursue or recover an award of benefits from NICA. To the same effect are Expositio v. Fla. Birth-Related neurological Injury Comp. Ass'n., Case No. 10-10320 (Fla. DOAH May 20, 2011), currently on appeal to the Third District Court of Appeal; Bautista v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case No. 10-3208N (Fla. DOAH Dec. 17, 2010); Romero v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case No. 05-1901N (Fla. DOAH

Aug. 31, 2005); and Foott v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case No. 02-4344N (Fla. DOAH Aug. 11, 2003).

36. The ruling in Green was based, in part, upon the participation in that NICA case of intervenors who were seeking to determine the "notice" issue. Petitioners, herein, have raised the notice issue, but the notice issue need not be decided if the claim is found non-compensable. See Bautista v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case No. 10-3208N (Fla. DOAH Dec. 17, 2010), supra.

37. Moreover, where, as here, it is concluded, as a matter of law, that the child's injury is not compensable under the Plan because it is not a "birth-related neurological injury," the notice issue is rendered moot. See Orlando Reg'l Healthcare Sys. v. Gwyn, 53 So. 3d 385 (Fla. 5th DCA 2011), holding " . . . NICA cannot be found to afford the [parents] their exclusive remedy for the simple reason that, as a matter of law, the [parents] do not have a compensable claim under NICA."

38. 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.

39. 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 DOAH. §§ 766.302(3), 766.303(2), 766.305(1), and 766.313, Fla. Stat. NICA, 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.

40. 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 ALJ 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 ALJ in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

41. In discharging this responsibility, the ALJ 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 ALJ 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.

42. 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. (emphasis added).

43. Here, indisputably, Rafael Ayala did not sustain an injury by oxygen deprivation or mechanical injury to the brain or spinal cord during the statutory period. Consequently, given

the provisions of section 766.302(2), he does not qualify for coverage under the Plan. See also Humana of Fla., 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, Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996).

44. Where, as here, the ALJ determines that ". . . the injury alleged is not a birth-related neurological injury . . . she or he shall enter an order [to such effect] and shall 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.

45. So long as both compensability and notice (or lack thereof) remain at issue, they should be heard together by the ALJ. See § 766.309(4), Fla. Stat. However, once non-compensability has been determined, notice is irrelevant. The claim herein has been determined to be non-compensable under the Plan, and accordingly all issues of notice are irrelevant.[6/] Therefore, and for the reasons aforesaid, it is not necessary for this Summary Final Order to address any issue of notice.[7/]

It is ORDERED:

1. This claim/petition against NICA is barred by the statute of limitations.

2. This claim is not compensable under the Florida Birth-Related Neurological Injury Compensation Plan.

3. The final hearing scheduled for September 21, 2011, is hereby cancelled.

4. This claim is dismissed with prejudice.

DONE AND ORDERED this 25th day of August, 2011, 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 25th day of August, 2011.

ENDNOTES

1/ Nonetheless, it has become customary in some circuits for malpractice actions to be filed in circuit court and abated until the NICA case is resolved at DOAH. Here, Petitioner(s) apparently filed a notice of intent to initiate malpractice action against all or some of the ultimate Intervenors.

2/ The ALJ has authority to enter a summary final order. See Section 120.57(1)(h), Fla. Stat. and Fla. Admin. Code R. 28-106.204 (4).

3/ Per Florida Administrative Code Rules 28-106.103 and 28-106.204, the last date for responses to NICA's Motion for Summary Final Order would normally have been April 13, 2011. At oral argument, counsel for Winter Haven Hospital, Inc., stated the hospital would be filing a motion for extension to April 26, 2011, which it did. (See Paragraph 8 of this Order).

4/ Petitioners' counsel had apparently misapprehended which Intervenor had noticed the deposition in question.

5/ This obviously inadvertent misspelling of the mother's name is not fatal to the Motion for Summary Final Order, because the name is correctly spelled in the accompanying affidavit, made under oath, and the report itself bears the correct name and birth date for this child, "Rafael Ayala DOB 06/27/03."

6/ See § 766.304, providing that "If the administrative law judge determines that the claimant is entitled to compensation from the association, . . . no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s 766.304. If it is determined that a claim filed under this act is not compensable, neither the doctrine of collateral estoppel nor res judicata shall prohibit the claimant from pursuing any and all civil remedies available under common law and statutory law. . . ."

7/ All issues of compensability and notice are the exclusive jurisdiction of the ALJ. O'Leary v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 757 So. 2d 624 (Fla. 5th DCA 2000). All issues of immunity from suit in circuit court are within the jurisdiction of the circuit judge (and not the ALJ). Depart v. Macri, 902 So. 2d 271 (Fla. 1st DCA 2005); Gugelmin v. Division of Admin. Hearings, 815 So. 2d 764 (Fla. 4th DCA 2002).

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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 § 766.311, Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n 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.