

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JENNIFER CHAVEZ AND MARLON CHAVEZ,
AS PARENTS AND NATURAL GUARDIANS OF
GIANNA CHAVEZ, A MINOR,

Petitioners,

vs.

Case No. 18-4022N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

SHANDS JACKSONVILLE MEDICAL CENTER,
INC.; AND UNIVERSITY OF FLORIDA BOARD
OF TRUSTEES,

Intervenors.

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FINAL ORDER

Pursuant to notice, a final hearing was conducted by Zoom Conference on August 25, 2020, before Administrative Law Judge (ALJ) Todd P. Resavage of the Division of Administrative Hearings (DOAH).

APPEARANCES

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For Respondent: M. Mark Bajalia, Esquire
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For Intervenors Shands Jacksonville Medical Center:

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For Intervenors University of Florida Board of Trustees:

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STATEMENT OF THE ISSUE

For the purpose of determining compensability, 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; and 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), Florida Statutes, or the giving of notice was not practicable.

PRELIMINARY STATEMENT

On July 26, 2018, Petitioners filed (pro se) a Petition for Benefits Pursuant to Florida Statute Section 766.301 et. seq. (Petition), with DOAH for a determination of compensability under the Florida Birth-Related

Neurological Injury Compensation Plan (Plan). The matter was initially assigned to ALJ W. David Watkins.

The Petition named Stephanie Tootle, M.D., as the physician who provided obstetric services at the birth of Gianna Chavez (Gianna) on August 9, 2017, at Shands Jacksonville Medical Center d/b/a UF Health Jacksonville (Shands), in Jacksonville, Florida.

On August 8, 2018, DOAH mailed a copy of the Petition to Respondent, Dr. Tootle, and Shands by certified mail. Respondent was served with the Petition on August 9, 2018.

On October 17, 2018, Respondent filed its Response to the Petition. Respondent suggested that, based on its review of the claim, Gianna had not suffered a “birth-related neurological injury,” as defined in section 766.302(2) and, therefore, the claim was not compensable under the Plan. ALJ Watkins, issued an order requiring the parties to advise whether a hearing would be required.

On December 6, 2018, Petitions to Intervene were filed by the University of Florida Board of Trustees (UFBOT) and Shands. Said petitions were granted on January 3, 2019. On January 8, 2019, Intervenors filed a Joint Response to ALJ Watkins’ Order, and asserted that the claim is compensable, and requested a hearing to determine compensability.

On January 11, 2019, Petitioners’ counsel filed a notice of appearance. On February 4, 2019, the final hearing was scheduled for July 30, 2019. On February 19, 2019, Petitioners (now through counsel) filed an Amended Petition (under protest), asserting that Petitioners are not “claimants” and that the claim is not compensable under the Plan.

The final hearing scheduled for July 30, 2019, was continued on July 16, 2019, and rescheduled for September 26, 2019. On July 26, 2019, Petitioners filed a motion for a re-examination of Gianna by one of Respondent's medical experts, Laufey Sigurdardottir, M.D. Said motion was granted on August 20, 2019.

Following the filing of a Joint Stipulation of the Parties Regarding Hearing Date and Case Schedule, on September 16, 2019, the final hearing was continued to March 4, 2020.

As Dr. Sigurdardottir, M.D., was determined to be unavailable to conduct the reexamination, on November 21, 2019, an Order Granting Motion to Compel was issued, requiring Petitioners to make Gianna available for examination by Luis Bello-Espinosa, M.D. On January 17, 2020, subsequent to the examination by Dr. Bello-Espinosa, Respondent filed an Amended Response to Petition for Benefits, wherein it was asserted that Respondent was "now of the opinion that this claim is compensable," and requested a hearing to determine compensability.

On January 23, 2020, Intervenors filed a Motion for Continuance of Final Hearing and for an Amended Case Schedule. Said motion was granted, and the final hearing was rescheduled for August 25 and 26, 2020.

On July 15, 2020, this matter was reassigned to the undersigned for all further proceedings. On August 19, 2020, the parties' Pre-Hearing Stipulation and Notice of Filing Stipulated Record were filed.

The final hearing proceeded, as scheduled, via Zoom Conference, on August 25, 2020. At the final hearing, the parties moved, without objection, for admission of all exhibits in the previously filed Joint Stipulated Record

(Joint Exhibits A through MM). Said exhibits were admitted. The parties further mutually agreed to the admission of the stipulated facts as set forth in the paragraph E of the parties' Pre-Hearing Stipulation and stipulated that no additional proof at hearing would be required regarding said facts. In lieu of presenting live testimony, the parties stipulated and mutually agreed to the presentation of their respective cases solely by the admission of the aforementioned exhibits and the presentation of a closing argument.

Upon the conclusion of the final hearing, the parties stipulated to the submission of proposed final orders within 30 days of the filing of the transcript and to the issuance of the undersigned's Final Order on or before 60 days from the filing of the transcript. The Transcript was filed on September 23, 2020. The parties timely filed proposed final orders, which have been considered in the preparation of this Final Order.

FINDINGS OF FACT

Pursuant to the parties' Joint Pre-Hearing Stipulation, the Findings of Fact set forth, verbatim, in paragraphs 1 through 5 are stipulated to by the parties.

1. Gianna was alive at birth.
2. Gianna had a birthweight in excess of 2,500 grams.
3. Gianna suffered an injury to her brain caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period.
4. During the course of labor, delivery, or resuscitation in the immediate post-delivery period, obstetrical services for Jennifer Chavez, natural mother of Gianna were delivered by a Neurological Injury Compensation Association (NICA) participating physician as defined in section 766.302 and 766.309.
5. Jennifer Chavez signed NICA notices on the NICA notice documents in Joint Exhibit BB on the dates indicated on the documents.

6. Gianna was born on August 9, 2017, at Shands. It is undisputed that Shands is a “hospital,” as defined by section 766.302.

7. Benjamin F. Irby, M.D., a University of Florida attending obstetrician (OB); Leigha High, M.D., a University of Florida resident OB; and Stephanie Tootle, M.D., a University of Florida resident OB, were participating physicians, as defined in section 766.314, who delivered obstetrical services for Jennifer Chaves during the course of labor, delivery, or resuscitation in the immediate post-delivery period.

Compensability¹:

8. Respondent initially retained Laufey Sigurdardottir, M.D., a board certified child neurologist and epileptologist, to review the available medical records, conduct a neurological examination, and opine as to whether Gianna met the criteria for a birth-related neurological injury.

9. Dr. Sigurdardottir conducted her examination of Gianna on October 3, 2018, when Gianna was almost 14 months old. Dr. Sigurdardottir’s Independent Medical Examination report begins with a summary of the subject pregnancy and birth, and provides as follows:

Gianna was born at 40 weeks gestation to a G7P2 healthy female after normal pregnancy via acute cesarean section after failed VBAC complicated by terminal bradycardia. The infant was born with Apgar scores of 1 after one minute, 6 after 5 minutes and 6 at 10 minutes, 6 after 15 minutes. Cord gas: pH 6.86 pCO₂ 101 BE -26. Patient had respiratory distress and was admitted in critical condition to NICU UF Health Jacksonville. Birth weight 7 lb 11 oz, HC 34 cm (20th percentile). Neonatal course was pertinent for: neurologic

¹ Section (B) of the parties’ Pre-Hearing Stipulation, entitled “General Statement of Each Party’s Position,” provides that “Petitioners contend that the claim of Gianna Chavez is not compensable and that there was a lack of notice given to Jennifer Chavez.” Section (G) of the Pre-Hearing Stipulation, entitled “Issues of Fact Which Remain To Be Litigated,” provides, *inter alia*, “[w]hether Gianna Chavez suffers from a permanent and substantial mental impairment?”

depression. She completed cooling protocol, had 2 seizures and was treated with phenobarbital. EEGs showed a burst suppression pattern early on and improvements noted by dol 13 (8/22/2017) when EEG showed mild abnormalities with excessive multifocal sharp waves. No electrographic seizures were captured. Phenobarbital levels were initially (50) high but it was discontinued at age one week of life. MRI (8/14/2017) showed extensive damage: Diffusion weighted changes in bilateral pre and post central gyri, corpus callosum, thalami, pulvinar, globus pallidi and bilateral cerebral peduncles. Lactic acid elevation and elevated choline evels [sic] were seen in left thalamus and basal ganglia. All findings suggestive of an ischemic event. Patient had initial neurologic depression at birth but showed improvement until discharge on dol 14.

She went home with oral feeds but had FTT and was a very slow feeder resulting G tube placement at age 9 months.

10. Dr. Sigurdardottir's report memorialized Gianna's developmental history as follows:

Gianna has serious delays in motor milestones and carries diagnosis of cerebral palsy. The patient is non-ambulatory at this time. Developmental milestones have been as follows: smiled at three months, does not have full head control, she cannot roll over and not sit unassisted. She can hold toys briefly but not pass from left to right or back. She will drop items from hands and can only pull toys towards mouth for brief period. She says 2-3 words. She smiles and enjoys her parents and siblings. She will get excited if mother says: "Daddy's home." She is in Speech therapy at Nemours Jacksonville and a recently completed standardized language assessment (REEL) resulted in normal emerging language abilities, with standard score of 93 and an age equivalent of 12 months at her current age of 14 months.

Mom feels she is stronger on the left but she will preferentially use the right hand.

11. While conducting her examination, Dr. Sigurdardottir documented several findings of relevance to the issue of Gianna's mental condition. First, it was noted that Gianna was appropriately apprehensive during the examination, and looked towards her parents for comfort and was easily consoled by them. Second, although she was babbling in conversational tone, she was not uttering understandable words. Third, she noted that Gianna has "normal saccades and pursuit and will identify target in VF swiftly and accurately."² Specifically, with respect to Gianna's mental status, Dr. Sigurdardottir documented that she was "[a]wake, alert and engaged. Babbling, drooling."

12. In summary, Dr. Sigurdardottir found Gianna to have "substantial delays in motor abilities with emerging spastic quadriplegia but only minimal delays in language development in recent standardized testing." Her report concluded as follows:

In light of evidence presented, I believe Gianna does not fulfill criteria of a substantial mental impairment at this time but that her physical impairment is permanent and substantial. I do not feel that Gianna should be included in the NICA program due to her having preserved language development. I am available for any additional questions, or to review additional medical records if needed.

13. Based on the above discussed findings and opinions, Respondent's initial Response to the Petition suggested that, based on its review of the claim, Gianna had not suffered a "birth-related neurological injury" as

² Dr. Sigurdardottir explained that "normal saccades" means that she will follow something that is moving in front of her eyes and when the object is brought into the visual field she will accurately look to the object and identify that it is entering the visual field.

defined in section 766.302(2) and, therefore, the claim was not compensable under the Plan.

14. Dr. Sigurdardottir was deposed on August 3, 2020, and testified that the findings and opinions contained in her report were accurate at the time of the examination and, as she had not subsequently examined Gianna, she had no reason to dispute or alter the same. When questioned concerning her opinion that Gianna did not fulfill the criteria of a substantial mental impairment, she was asked to define the term “substantial.” The following exchange transpired:

Q. What does the term “substantial” mean in this context as a pediatric neurologist?

A. Substantial is not a word that we use in medical language usually, so -- we would use mild, moderate, and severe, and I would -- I would say that substantial is severe.

* * *

Q. Are those the terms that are used in the literature by peer-reviewed articles distributed in Europe and the United States?

A. Yes. We would use the word “disability,” so we have -- we tend to have more than just a single word to -- to describe. I think we would want more information. We would want to know if the person were below what we consider borderline and normal, and normal is a pretty broad -- like on IQ scores and -- and like the developmental quotient that she got in her language, 85 to 115 would be completely normal, and then we have a borderline from 70 to 85, and then below 70 we talk about a disability and within the disability range, we have mild, moderate, severe, and profound.

Q. Okay. And just so I understand, based on your examination and the test results that you reviewed, this child’s mental function, at the time of your

exam, was actually in the normal range; is that correct?

A. So the – the standardized testing was found to be completely in the normal range at that time.

Q. And you didn't –

A. I didn't find anything on my exam that told me that wasn't true.

15. Dr. Sigurdardottir further credibly testified that not every child who has less than normal function in a particular domain will fall within the category of one who has a severe or substantial impairment.

16. In formulating her opinions, Dr. Sigurdardottir relied, in part, upon Gianna's results from a previously administered receptive-expressive emergent language (REEL) evaluation. Dr. Sigurdardottir testified that the REEL evaluation is "the best we have." She explained that Gianna's score of 93 was within "normal limits."

17. Given Gianna's age at the time of examination, and her lack of subsequent contact with Gianna, Dr. Sigurdardottir credibly testified that she would defer to others concerning the subsequent trajectory of Gianna's injury or development. The undersigned finds that Dr. Sigurdardottir possesses significant education, training, and expertise and is well-qualified and credentialed to render the above-noted opinions. The undersigned finds her opinions as stated above to be credible.

18. On January 10, 2020, when Gianna was 29 months old, she was examined by Louis Bello-Espinosa, M.D. Dr. Bello-Espinosa is board certified in child neurology and neurology; epilepsy; clinical neurophysiology and epilepsy monitoring. Dr. Bello-Espinosa was tasked with reviewing the available medical records and conducting an examination to determine whether Gianna suffers from a permanent and substantial mental and physical impairment; and, if so, whether the impairment was consistent with

a neurological injury to the brain or spinal cord acquired due to oxygen deprivation or mechanical injury.

19. Dr. Bello-Espinosa's examination report concludes with the following summary:

Gianna is a 2-year 5-month old girl with a history of severe hypoxic-ischemic encephalopathy of birth. She was documented in the NICU to have acute electrographic seizures, as well as MRI of the brain obtained on day 4th of life which were all indicative of an acute hypoxic-ischemic injury. On here [sic] examination is evident Gianna has severe neurological sequela. At 2-year 5-month of age, she was slow smiling and tracking. She has mild axial hypotonia, and significant hypertonia in both arms and legs, including sustained fishing, which is indicative of spastic quadriparetic cerebral palsy. She continues receiving therapies.

Results as of question 1:

Gianna is found to have substantial physical and mental impairment at this time.

Results as of question 2:

In reviewing all the available documents, the evolution of her symptoms, the acute brain MRI changes, her acute neonatal seizures, it is evident that she had an acute hypoxic event perinatally. The injury felt to be acquired due to oxygen deprivation of the brain. The injuries are felt to be birth related.

20. While conducting the examination, Dr. Bello-Espinosa documented several findings of relevance to the issue of Gianna's mental condition.

Concerning her developmental history, he documented the following:

She only started with support only at 18-month only [sic]. She has never crawled. She has never walked independently. She only says about 10-

words. Rarely combines mom and dad. She appears to understand simple command. She smiles and engages when parents play and communicate with her.

21. Dr. Bello-Espinosa documented that, on neurological examination, Gianna “was awake, she smiled and tracked, albeit slowly. She did not say words during the examination. She did not follow directions.” Based on Dr. Bello-Espinosa’s examination and report, Respondent filed an Amended Response to Petition for Benefits, now asserting that Petitioners’ claim was compensable under the Plan.

22. Dr. Bello-Espinosa was deposed on June 19, 2020. His ultimate opinion is that Gianna does have a substantial and permanent mental and physical impairment. In support of his opinion with respect to mental impairment he testified that during the examination he could not assess Gianna’s ability to learn or her memory skills because she did not communicate. Her language ability, or lack thereof, was assessed by her failure to respond to or follow directions and her lack of communication. As Gianna had not increased her verbal ability since examined by Dr. Sigurdardottir, he opined that she was not making progress verbally and that her language skills were not continuing at a pace consistent with her age.

23. Based on his review of the medical records, Dr. Bello-Espinosa credibly testified that Gianna had suffered various and deficient “restriction[s] involving the motor areas of the brain.” Specifically, he opined that she sustained injuries to the thalamus, the basal ganglia, the pulvinar and cerebral peduncles, as well as microhemorrhages on the bilateral precentral gyrus. Those injuries, in his opinion, can affect both the motor and cognitive functions of a child.

24. Dr. Bello-Espinosa further testified that Gianna has been diagnosed with severe cerebral palsy. As a result, he opined that she is more likely than

not to continue to have mental impairment or functioning in the future. In support of this position, Dr. Bello-Espinosa testified that “[a]ll of the studies that have been done in patients with severe hypoxic ischemic injury with severe cerebral palsy have also been found to have in a great majority severe intellectual disabilities.”

25. Dr. Bello-Espinosa credibly testified that, as a pediatric neurologist, he does not perform intellectual assessments on his patients, as that is outside of his specialty and falls within the area ambit of a neuropsychologist or child psychologist. He conceded that he could not provide a percentile range for the level of cognitive impairment that Gianna had, as compared to other children. Dr. Bello-Espinosa further testified as follows:

Based upon the clinical spheres of training of 35 years, I can see when a child, based upon what they are doing. Whether they have substantial impairment or not. So that was the basis for my assessment. A child who has severe cerebral palsy and based upon the clinical evidence of scientific studies that almost all of them have severe -- injury bilaterally, they will have substantial mental impairment. So the positive predictor value of those based upon the examination has been proven to be the case as enough for them to be classified as having substantial mental impairment.

26. When questioned concerning his opinion that Gianna sustained a substantial mental impairment, Dr. Bello-Espinosa was asked to define his use of the term “substantial.” He defines the term “substantial” as any level of impairment less than normal or optimal. Specifically, Dr. Bello-Espinosa testified as follows:

Q. Now, in the report you also noted that there were, in your words, “substantial mental impairment,” correct?

A. Yes.

Q. Okay. And how do you define substantial?

A. Anything that is below the expected – the optimal. Let me rephrase the answer. She'll be up to – the substantial should be the optimal cognitive function for her age.

* * *

Q. Now, earlier, you – you used the word – withdrawn. Earlier you said that the mental impairments were substantial because it was below optimal. Am I understanding you right?

A. Yes.

Q. All right. Is everyone who falls below optimal in your view considered to have a substantial mental impairment?

A. Yes.

Q. Okay. Now, does optimal represent the normal intellectual function of a child of the same age as the infant petitioner in this case?

A. Could you repeat the question? Sorry.

Q. So is it your definition – withdrawn. Does optimal to you in this case mean a person who is the infant, Plaintiff's age two years and five months as of the time of your examination who does not have any mental deficits at all?

A. Just, pardon me, I don't understand the – the – what the question was. Optimal means that it's suspected to have the normal function for a two years and a five-month old.

Q. Okay. So anybody who doesn't have normal function in a two year five month old child would be less than optimal? Is that what you're saying?

A. Yes.

Mr. D'Alesio: Objection.

Q. And that that [sic] person would also, in your opinion, have a substantial impairment? Is that what you're saying?

A. Yes.

Q. All right. Now, certainly some kids are below optimal to a greater degree than others, correct?

A. Yes.

Q. But it's your testimony that they all still fall within the category of substantial no matter how severe the delays are. Is that your testimony?

A. Yes.

Q. Now, are you able to quantify for me in any more precise terms than substantial or less than optimal the severity of the defect in mental functioning that you believe the infant petitioner in this case based on your examination?

A. No.

27. The undersigned finds that Dr. Bello-Espinosa possesses significant education, training, and expertise and is well-qualified and credentialed to render the above-noted opinions. His opinion that Gianna sustained injury to the brain caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital is credited. His opinion that the injury rendered Gianna permanently and substantially physically impaired is also credited. With respect to mental impairment, the undersigned credits his opinion that Gianna has sustained a permanent mental impairment. The undersigned, however, finds his opinion with respect whether Gianna sustained a

significant mental impairment to be less persuasive and of limited value due to his overly inclusive definition of the term “substantial.”

28. On February 10, 2020, Gianna, now 30 months old, presented to Robyn J. Cohen, Ph.D., a clinical/developmental neuropsychologist, for an independent neuropsychological evaluation to determine if she was permanently and substantially mentally and physically impaired due to a birth-related neurological injury. No testimony from Dr. Cohen was admitted; however, her report was admitted without objection. Pursuant to her report, Dr. Cohen reviewed the birth-related medical documentation, reviewed Gianna’s early development history, conducted a clinical interview with Petitioners, and administered the Wechsler Preschool and Primary Scale of Intelligence, 4th Edition (WPPSI-IV).³ With respect to the Gianna’s results from the WPPSI-IV, Dr. Cohen’s report documented the following:

On this administration of the WPPSI-IV, Gianna attained a Full Scale IQ of 91, which is in the average range for her age. Her true IQ score is estimated to range between 86 (low average) and 97 (average). Her lowest score on the WPPSI-IV was on a task of receptive vocabulary (9th percentile), and her highest score was on a task of picture memory (63rd percentile). Motor delays and expressive language delays affected testing, and as improvements are made in these domains, intellectual assessment may be more reliable. Indeed, intellectual assessment in any child 2.5 years is usually interpreted with caution.

29. Dr. Cohen’s conclusion, as set forth in the report, provides that Gianna’s overall cognitive and intellectual ability was estimated to be within the average range; however, she cautioned that, at the present time, it could not be concluded as to whether she has sustained a substantial and

³ As part of the evaluation, Jennifer Chavez also completed the Developmental Profile, Third Edition and the Adaptive Behavior Assessment Scales, Third Edition.

permanent mental impairment. Specifically, she concluded her report as follows:

Results of the current evaluation found impaired motor and expressive language, but her overall cognitive/intellectual ability was estimated to be within the average range.

Unfortunately, many of Gianna's adaptive skills are delayed, which are partially reflective of her motor-skill deficits associated with Cerebral Palsy. Furthermore, her expressive language delays likely also reflect, at least in part, some oral-motor deficits. Gianna is quite young, and many cognitive abilities have not yet come online for typical two-year olds (e.g., executive functioning). Further, other cognitive skills (e.g., processing speed) are not yet able to be measured in children so young. It is the opinion of this examiner that at the present time, *it cannot be concluded that Gianna has a substantial and permanent mental impairment; however, this possibility cannot be ruled out either at such a young age.* Repeat testing in 2-4 years would have much better predictive validity in answering this question of the severity and/or permanence of her mental impairment.

30. Avrum Pollock, M.D., who is board certified in neuroradiology and diagnostic radiology, was retained by Intervenor to review the medical records and opine as to whether Gianna sustained an injury to her brain caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital. Dr. Pollock reviewed the medical records, including a head ultrasound obtained on August 10, 2017, an MRI of the brain obtained on August 14, 2017, and an MRI of the brain obtained on January 4, 2018.

31. In his deposition testimony, Dr. Pollock opined that Gianna sustained a profound hypoxic (lack of oxygen) ischemic (lack of blood flow) injury to the brain. He further opined that to a reasonable degree of medical probability,

the injury occurred “within a 24-hour period of delivery on either side.” Additionally, he opined that the brain injury is permanent. Dr. Pollock, however, had no opinion as to the relationship between the injury and how the injury has manifested or will manifest with Gianna from a clinical perspective. Indeed, when questioned as to whether the injury is permanent, Dr. Pollock testified as follows:

Uhm, yes. But, again, I’m – I’m loath to try and correlate the imaging with the clinical outcome only because, uhm, I have been wrong as many times as I have been right, and I can tell you from experience that I’ve looked at cases that look fairly mild and the child is neuro-devastated and I’ve seen cases that look horrible and the child may just have ADD or – or – or, uhm, learning disabilities, so it’s difficult.

As I said, there’s –there’s not really a one-to-one relationship with these cases. Some children are wheelchair-bound and have cerebral palsy and other children just have learning disabilities, so that’s why I’m –that’s swimming way out of my area of expertise and that’s why I don’t – I don’t try and correlate the two, ‘cause I will be wrong more than I’m right.

32. Dr. Pollock’s opinions as set forth above are credited.

Notice⁴:

33. As stipulated by the parties, “Jennifer Chavez signed NICA notices on the NICA notice documents in Joint Exhibit BB on the dates indicated on the documents.” The referenced documents are Shands forms containing two

⁴ Section (B) of the parties’ Pre-Hearing Stipulation, entitled “General Statement of Each Party’s Position,” provides that “Petitioners contend that the claim of Gianna Chavez is not compensable and that there was a lack of notice given to Jennifer Chavez.” Section (G) of the Pre-Hearing Stipulation, entitled “Issues of Fact Which Remain To Be Litigated,” provides, *inter alia*, “[w]hether Jennifer Chavez was provided a NICA brochure during her prenatal and hospital visits during her pregnancy?” Although Petitioners do not raise the notice issue in their proposed final order, in compliance with section 766.309(1)(d), the undersigned shall address the issue.

sections: a “Hospital Notice to Obstetric Patient” section, and a “Physician Notice to Obstetric Patient” section. The forms are identical in content and are dated June 20, 2017; July 27, 2017; August 5, 2017; and August 8, 2017, respectively. Each form provides the following:

**HOSPITAL NOTICE TO OBSTETRIC
PATIENT**

(See Section 766.316, Florida Statutes)

I have been furnished information prepared by the Florida Birth-Related Neurological Injury Compensation Association (NICA) on behalf of Shands Jacksonville Medical Center, Inc. For specifics on the program, I understand I can contact the Florida Birth-Related Neurological Injury Compensation Association (NICA), Post Office Box 14567, Tallahassee, Florida, 32317-4567, 1-800-398-2129. I specifically acknowledge that I have received a copy of the brochure prepared by NICA.

**PHYSICIAN NOTICE TO OBSTETRIC
PATIENT**

(See Section 766.316, Florida Statutes)

I have been furnished information prepared by the Florida Birth-Related Neurological Injury Compensation Association (NICA) on behalf of ALL physicians and nurse midwives including University of Florida College of Medicine physicians and nurse midwives, who practice obstetrics or perform obstetric services at this facility. I have also been advised that the above physicians and nurse midwives are participants in the NICA program, and that limited compensation is available in the event certain neurological injury may occur during labor, delivery or resuscitation. For specifics on the program, I understand I can contact the Florida Birth-Related Neurological Injury Compensation Association (NICA), Post Office Box 14567, Tallahassee, Florida, 32317-4567, 1-800-398-2129. I specifically acknowledge that I

have received a copy of the brochure prepared by NICA.

34. On each of the four forms, Jennifer Chavez printed her name above the “Printed Patient Name” line; printed her social security number above the “Patient Social Security Number” line; and signed her name above the “Signature of Patient” line. The handwritten date and time on each section, as well as the signature above the “Witness” line, were written by the registration clerks who registered Jennifer Chavez during her initial prenatal visit on June 20, 2017, and on her three subsequent hospital visits on July 27, 2017; and August 5 and 8, 2017.

35. The handwritten information on the forms is immediately below the above-quoted passage that provides “I specifically acknowledge that I have received a copy of the brochure prepared by NICA.” The NICA brochures are entitled “Peace of Mind for an Unexpected Problem.”

36. In Petitioners’ Answer to Intervenors’ Request for Admissions 11 and 12, filed at DOAH on May 15, 2018, Petitioners admitted receiving the NICA brochure on June 20, 2017 and admitted receipt of a NICA brochure on August 8, 2017, after Gianna was born. At Ms. Chavez’s deposition, conducted on July 12, 2019, however, she testified that she never received a NICA brochure, or otherwise could not recall receiving one until after Gianna was born.

37. Ms. Chavez’s testimony that, despite her signature on the form, she did not receive the NICA brochure on four separate occasions, is contradicted by the testimony of three registration clerks, who consistently and credibly testified that during Ms. Chavez’s prenatal visit and her subsequent hospital visits, they followed the customary, habitual, and routine practice in providing NICA brochures to patients upon registration at the clinic and hospital.

38. The undersigned finds, based upon the totality of credible evidence, that it is more likely than not that Ms. Chavez was provided a NICA

brochure during her prenatal clinic visit of June 20, 2017, and on each of her hospital visits on July 27, 2017; August 5, 2017; and August 8, 2017. The undersigned further finds that Intervenors provided notice to Petitioners of their participation in the Plan.

CONCLUSIONS OF LAW

39. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. §§ 766.301-766.316, Fla. Stat.

40. The 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.

41. Section 766.301(2) provides that it is “the intent of the Legislature to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation.”

42. 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), and 766.305(1), 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.

43. If Respondent determines that the injury alleged is a claim that 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, Respondent disputes the claims, as here, 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.

44. In its present posture, the undersigned is required to make the following threshold determinations 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.

* * *

(d) Whether, if raised by the claimant or other party, the factual determinations regarding the notice requirements in s. 766.316 are satisfied. The administrative law judge has the exclusive jurisdiction to make these factual determinations.

§ 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. . . .”

§ 766.31(1), Fla. Stat.

45. The term “birth-related neurological injury” is defined in section 766.302(2) as follows:

“Birth-related neurological injury” means injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired.

46. The phrase “substantial mental impairment” is neither defined by statute nor present rule. In *Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administration Hearings*, 686 So. 2d 1348 (Fla. 1997) [hereinafter *Birnie*], the court was asked to resolve the certified question as to whether, under the Plan, an infant must suffer both substantial mental and physical impairment, or can the definition be construed to require only substantial impairment, mental and/or physical. In resolving the question, the *Birnie* court explained that “[w]here, as here, the legislature has not defined the words used in a phrase, the language should usually be given its plain and ordinary meaning.” *Birnie*, at 1354, citing *Southeastern Fisheries Ass’n, Inc. v. Dep’t Nat. Res.*, 453 So. 2d 1351 (Fla. 1984). “Nevertheless, consideration must be accorded not only to the literal and usual meaning of the words, but also to their meaning and effect on the objectives and purposes of the statute’s enactment.” *Id.*

47. The *Birnie* court concluded that the NICA statute is written in the conjunctive and requires a permanent and substantial impairment to both the physical and mental elements. *Id.* at 1356. The *Birnie* court did not establish a definition or test for the determination of “substantial mental impairment,” but found that the underlying decision by the ALJ must be supported by competent and substantial evidence.

48. In *Adventist Health System / Sunbelt, Inc. v. Florida Birth-Related Neurological Injury*, 865 So. 2d 561 (5th DCA 2004) [hereinafter *Shoaf*], the Fifth District Court of Appeals likewise rejected setting forth a formulaic approach to the resolution of the term “substantial mental impairment.” Addressing the argument that *Birnie* had created a definition, the *Shoaf* court countered:

It is apparent, however, that the *Birnie* court did not define or redefine “substantial mental impairment.” They simply said that the decision of the ALJ was supported by competent substantial evidence. All this language in *Birnie* suggests is that, under NICA, the identification of a substantial mental impairment may include not only significant cognitive deficiencies but can include, in a proper case, additional circumstances such as significant barriers to learning and social development.

Shoaf, at 567.

49. The *Shoaf* court again reiterated that, as the legislature did not define the terms used in the test for NICA qualification, these terms are to be given their ordinary meanings. *Id.* at 568. Indeed, the *Shoaf* court further directed that:

The legislature left the application of the terms they used to the administrative law judges designated by statute to hear these claims and to apply the expertise they develop in carrying out this task to determine from the evidence adduced in each case whether these for NICA is met.

* * *

In cases such as the one before us, the ALJ, as fact finder, brings his own background, training, experience and expertise to the task of weighing and evaluating very sophisticated evidence. The child’s advocate likewise brings his own communication and strategic skills to the fact-

finding process; and finally, the evidence in each case will vary in its power to persuade. This will be especially true in cases where the opinions of experts are concerned.

Id. at 568-569.

50. Finally, the *Shoaf* court, in concluding that the underlying decision by the ALJ was supported by competent substantial evidence, advised that the term “substantial mental impairment” is broad enough to encompass more than just damage to cognitive capacity and more than merely the inability to translate cognitive capabilities into adequate learning in a normal manner or impairment of social and vocational development. *Id.* at 569.

51. Here, Petitioners are not seeking compensation under the Plan, but instead are seeking to establish the right to sue in a court of law, and, therefore, are not claimants. *Bennett v. St. Vincent’s Med. Ctr.*, 71 So. 3d 828, 844 (Fla. 2011). As the proponents that Petitioners’ claim is compensable, Respondent and Intervenors carry the burden of proof.

52. The undersigned concludes that sufficient evidence was presented, or otherwise stipulated or admitted by the parties to establish that Gianna was born a live infant on August 9, 2017, at Shands, a “hospital” as defined by section 766.302; that Gianna was a single gestation, weighing over 2,500 grams at birth; that she suffered an injury to her brain caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period; and that the injury to her brain rendered her permanently and substantially physically impaired, and permanently mentally impaired. No evidence was presented to suggest that Gianna’s injury was caused by genetic or congenital abnormality or due to infection.

53. The undersigned further concludes that sufficient evidence was presented to establish that during the course of labor, delivery, or resuscitation in the immediate post-delivery period, obstetrical services for

Jennifer Chavez were delivered by Dr. Irby, Dr. High, and Dr. Tootle, who were NICA participating physicians.

54. The parties to this proceeding presented one or more experts to support their respective position as to whether Gianna is substantially mentally impaired. All of the experts presented were well-qualified, credentialed, and possessed extensive and significant training and experience in their respective discipline or area of expertise. The undersigned, in considering whether Gianna sustained a substantial mental impairment, concludes, however, that Dr. Bello-Espinosa's interpretation of the term "substantial" as less than optimal or normal, is overly broad. In reaching the conclusion that Gianna is not substantially mentally impaired, the undersigned finds more persuasive Dr. Sigurdardottir's interpretation of the term and her opinion that Gianna had not sustained a substantial mental impairment.

55. Dr. Sigurdardottir's opinion is supported by Dr. Cohen, who after administering the WPPSI-IV, could not definitively conclude that Gianna has sustained a substantial mental impairment. Similarly, Dr. Pollock, notwithstanding the scope of the brain injury as shown on radiological film, could not opine as to whether Gianna has sustained a significant mental impairment.

56. Having thoroughly reviewed and weighed the considered expert opinions and evidence, the undersigned concludes that the better evidence supports the conclusion that Gianna's injury at issue, based on the Findings of Fact above, did not rendered her substantially mentally impaired. The undersigned concludes that Respondent and Intervenors failed to present sufficient evidence to establish that Gianna's brain injury is substantial.

57. During the course of this litigation, the issue was raised as to whether the notice requirements set forth in section 766.316 were met. With respect to the notice issue, as the proponents of the proposition that appropriate notice was given or that notice was not required, the burden on this issue of notice

is upon the Intervenor. *Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass'n.*, 880 So. 2d 1253, 1257 (Fla. 1st DCA 2004).

58. Section 766.316, entitled “Notice to obstetrical patients of participation in the plan,” provides as follows:

Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient’s rights and limitations under the plan. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when notice is not practicable.

59. Here, based on the Findings of Fact set forth above, the undersigned concludes that Intervenor has met their burden of establishing that the notice requirements of section 766.316 were satisfied.

CONCLUSION

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

1. Gianna did not sustain a “birth-related neurological injury,” as defined in section 766.302(2), and, therefore, Petitioners’ claim is not compensable under the Plan.

2. Intervenor satisfied the notice requirements of section 766.316.

DONE AND ORDERED this 17th day of November, 2020, in Tallahassee,
Leon County, Florida.



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NOTICE OF RIGHT TO JUDICIAL REVIEW

Review of a final order of an administrative law judge shall be by appeal to the District Court of Appeal pursuant to section 766.311(1), Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal. *See* § 766.311(1), Fla. Stat., and *Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras*, 598 So. 2d 299 (Fla. 1st DCA 1992).