IN THE SUPREME COURT OF FLORIDA

ROBERT AND TAMMY BENNETT, etc., et al.,

Petitioners,

CASE NO.: SC10-364
L.C. Nos.: 1D07-5557

vs.

ST. VINCENT'S MEDICAL CENTER, INC., et al.,

Respondents.
_____/

ANSWER BRIEF OF RESPONDENT, ST. VINCENT'S MEDICAL CENTER, INC.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT STATE OF FLORIDA

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PRELIMINARY STATEMENT

Throughout this brief, Respondent St. Vincent's Medical Center, Inc., will be referred to as SVMC. Respondents William H. Long, M.D., and North Florida Obstetrics and Gynecology, P.A., will be referred to both individually and collectively as Dr. Long or Respondents. Petitioners Robert and Tammy Bennett will be referred to individually or collectively as the Bennetts. The minor child, Tristan Bennett, will be referred to as Tristan. Petitioner Florida Birth-Related Neurological Compensation Association will be referred to as NICA.

Citations to the record in the District Court of Appeal, First District, will be designated as "R.," followed by the page number, e.g., R. 1-2. Citations to the transcript of the DOAH hearing will designated as "T.," followed by the page number, e.g., T. 3-4. Citations to the exhibits jointly submitted and received during the DOAH hearing will be designated as "Exhib.," followed by the exhibit number and the page number within that exhibit, if available, e.g., Exhib. 5. Citations to the record of the Florida Supreme Court will be designated as "SCR.," followed by the page number, e.g., SCR. 17.

STATEMENT OF THE CASE AND OF THE FACTS

At approximately 7:05 a.m. on September 26, 2001, Tammy Bennett was involved in a one-car motor vehicle accident near her home in Macclenny, Florida.

R. 1056. At that time Mrs. Bennett was 38+ weeks pregnant with Tristan Bennett, and already was scheduled for a Caesarean section delivery to be performed by William H. Long, M.D., of North Florida Obstetrics and Gynecology, P.A. on October 3, 2001 at SVMC. Id. After the accident, Mrs. Bennett was transported by ambulance to Ed Fraser Hospital in Macclenny, where she received her initial medical care. R. 1056-57. She remained at Ed Fraser Hospital for approximately two hours during which time she was evaluated and treated. At 9:41 a.m., Mrs. Bennett was transported by LifeFlight from Ed Fraser to SVMC in Jacksonville, Florida. She arrived at SVMC at approximately 9:59 a.m. R. 1060. Mrs. Bennett was admitted to the labor and delivery department under the care of Dr. Long. R. 1062.

While at SVMC, Mrs. Bennett developed and demonstrated a contraction pattern consistent with placental abruption. R. 1062. At approximately 12:45 p.m., Dr. Long determined that Mrs. Bennett was in renal failure. Exhib. 7. Given this development, Dr. Long made the decision to perform an emergency C-section delivery of the baby. R. 1062. The various monitors were turned off at 12:47 p.m. so that Mrs. Bennett could be taken to the operating room for the C-section. Tristan was ultimately delivered at 1:22 p.m. R. 1062-64. During a post-delivery examination of the placenta, Dr. Long found indications and evidence of a partial

abruption. R. 1064.

Subsequent to her delivery, Tristan did not cry. R. 1064. She had minimal respiratory effort. She required resuscitation with bulb suction, free flow oxygen, mechanical suction and ambu bag and mask. Id. Apgar scores of 6 and 8 were obtained at one minute and five minutes, respectively. Id. Arterial umbilical cord blood was obtained at delivery, revealing blood gases with a pH of 6.76, PCO^2 of 51.2, PO^2 of 17, and a base excess (BE) of -28. These findings establish that Tristan was suffering with a severe metabolic acidosis.[1] A second set of arterial blood gasses were obtained at 1:47 p.m. with the following results: pH of 7.14, PCO^2 of 31.7, PO^2 of 90 and a BE of -16.4. R. 1065. Although these blood gas results were improved, they still demonstrated the presence of a severe metabolic acidema. T.83-84.

Tristan was subsequently transferred from the Newborn Nursery to the Special Care Nursery for further monitoring and treatment. Id. During her first few days after delivery, Tristan is described in the nursery records as lethargic, irritable and noted on multiple occasions to have difficulty sucking. Exhib. 9. The nursery note for 8:00 a.m. on September 30, 2001, reflects that Tristan had

[1] Arterial umbilical blood reflects the condition of the baby, while the venous blood reflects more the condition of the placenta than the condition of the baby. T. 75.

"continued flailing of arms" and that one arm was restrained. Id. A progress note on October 1, 2001, describes Tristan as a "critically ill female newborn." Id. Progress notes from October 2, 2001, describe Tristan as a "critically ill infant w/renal failure," and "Asphyxia! Multiorgan failure." Exhib. 9, (emphasis in original).

In the period from her delivery to October 3, 2001, Tristan suffered from the following conditions: severe metabolic acidosis, renal failure, acute tubular necrosis (ATN), disseminated intravascular coagulation (DIC), oliguria, fluid retention, hyponatremia, respiratory distress and elevated liver enzymes. R. 1066. She was also placed on antibiotics for possible sepsis. Id. During this post-delivery period, no pediatric neurologist saw or was asked to consult on Tristan.

On the morning of October 3, 2001, Tristan experienced a pulmonary hemorrhage, with frank blood noted orally. R. 1067. She was found to be apneic, with a heart rate below 80 and decreasing oxygen saturation to the 40% range. R. 1067-68. She was intubated and given a blood transfusion. R. 1068. Later that day, Tristan's heart rate fell to 53 and her oxygen saturations decreased to 23%. Id. CPR was initiated and stopped after her heart rate returned to 77 and was observed to be increasing. Id. Oxygen saturations increased to 65%. Id. However, moments later, Tristan had another episode of low heart rate and decreased oxygen

saturations. Id. Tristan recovered, but she remained unstable throughout the rest of the day and evening of October 3, 2001. R. 1068-69.

On October 4, 2001, the physician progress notes document: "possible seizure last night ... #10 CNS: Had no obvious CNS dysfunction till last night." R. 1069. On October 5, 2001, Tristan was seen for the first time by a pediatric neurologist, Dr. Carlos Gama. R. 1069-70. Dr. Gama's consultation report from his examination that day describes Tristan's condition at delivery as follows:

> The baby was floppy with some gasping efforts but unable to sustain respirations ... The initial blood gases demonstrated pH 7.14, PO2 80, PCO2 32, base excess of -16.4 ...[2] [she] was continued to be monitored in the intensive care unit where she was noted to have initially appropriate urine output which declined progressively within the first day or two of life to the point that she was oliguric. With this the BUN and creatine have increased which suggest acute tubular necrosis.

Exhib. 10.

Tristan was also seen and examined by neonatologist Dr. Ronald Carzoli. In his discharge summary, Dr. Carzoli made the following the findings and conclusions:

> Hospital Course: "[I]n brief, this infant suffered **significant birth asphyxia**, it is suspected at the time of the motor vehicle accident.

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[2] These "initial blood gasses" are, in reality, the second set obtained at 1:47 p.m. in the special care nursery (although the PO^2 was "90" and not "80" as stated by Dr. Gama).

> Overall, the infant had a very unstable hospital course which involved **clear signs of asphyxia with acute renal failure, liver damage, seizures, and obvious neurologic damage**. She also had pulmonary hemorrhages during the hospitalization as well as thrombocytopenia and coagulopathy, **all consistent with asphyxia**."
>
> Respiratory: that the "initial metabolic acidosis and mild respiratory distress" were treated and "**appeared** to resolve fairly quickly."
>
> Renal: that Tristan showed signs of "acute renal failure shortly after delivery [and] decreased urine output and increased fluid retention, leading to hyponatremia and other electrolyte abnormalities."

Exhib. 9 (emphasis added).

Tristan was discharged home on November 14, 2001, with follow-up appointments scheduled with her primary care physician, a nephrologist, a neurologist, and physical and occupational therapists. R. 1071. Dr. Gama continued to see Tristan after her discharge from SVMC. In an office note for the visit of November 27, 2001, Dr. Gama described this child's condition at delivery as:

> [H]owever, at delivery, the baby had no respiratory effort and required to be bagged and ventilated.... Following this, she had moderate respiratory distress.... [S]he was noted to be acidotic. The baby had to be maintained on a respirator because of [her] respiratory distress syndrome and asphyxia. She was unstable initially and developed acute renal failure, liver damage and posteriorly seizure activity for which neurological consultation was performed.

R. 1071. In the same note, Dr. Gama's assessment of Tristan was as follows:

> In general, it is my opinion that Tristan is status post severe perinatal

> distress with hypoxic ischemic encephalopathy, metabolic acidosis, associated with coagulopathy and complicated with one cardiac arrest requiring resuscitation while at the special care nursery. The result of **all of these complications is culminated** with what appears to be a severe hypoxic ischemic encephalopathy with multi-cystic encephalomalacia and seizure disorder. The seizures seem to be stable. Family is aware of findings by CT scan and implications with regard to the baby's overall future development, seizure risk, cerebral palsy risk and neurological sequelae.

Id. (emphasis added).

On May 16, 2002, Tristan was seen for the first time by pediatric neurologist Dr. David Hammond. After reviewing the medical records and examining her, Dr. Hammond reported his findings in a letter to the referring pediatrician, stating as follows:

> Highly complex child with a number of problems.
>
> 1. Difficult neonatal course including birth asphyxia (suspected at the time of the motor vehicle accident), **other indications of asphyxia with acute renal failure, liver damage, seizures, neurologic damage**, and pulmonary hemorrhage. Thrombocytopenia and coagulopathy also noted consistent with asphyxia according to the available NICU records.

Exhib. 11 (emphasis added). In July 2006, Dr. Hammond's impression was static encephalopathy, quadriplegic cerebral palsy, complex-partial epilepsy, stable global developmental delay. Id.

On April 2, 2004, the Bennetts filed an Amended Complaint in Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida. The complaint

named as defendants Dr. Long, North Florida Ob/Gyn, SVMC and fourteen other defendants. The complaint alleged that the various defendants were negligent in their care and treatment of Mrs. Bennett and Tristan.

On July 30, 2004, Dr. Long and North Florida Ob/Gyn moved to abate the circuit court action pending a determination by the Division of Administrative Hearings ("DOAH"), regarding the compensability of the injuries under the Florida Birth-Related Neurological Injury Compensation Association Plan (NICA) and Section 766.301, *et seq.* Florida Statutes. On September 28, 2004, SVMC joined in this motion. On November 16, 2004, the circuit court entered an order abating the circuit action which further required that this matter be heard by an Administrative Law Judge ("ALJ").

On July 12, 2006, the Bennetts, individually and as parents and natural guardians of Tristan, filed a petition with DOAH, requesting a "determination of whether Tristan Bennett's injuries [were] qualifying injuries under the NICA Plan." R. 5-14, 11. The Bennetts requested, *inter alia*, that neither SVMC nor any other health care provider be entitled to NICA immunity for any injuries or damages that Tristan suffered that did not occur during labor, delivery, or the immediate post-delivery resuscitative period. R. 12. In addition, the Bennetts requested that if the injuries were determined to be qualifying injuries, that the ALJ also determine

that Dr. Long and SVMC did not have NICA immunity either because of their failure to provide pre-delivery notice to the Petitioners or because their pre-delivery notice was inadequate. R. 11-12.

On July 12, 2006, DOAH served NICA with a copy of the Bennetts' petition. R. 1054. NICA responded to the petition, giving notice that it was of the view that Tristan did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes. Id. NICA requested a hearing be held to resolve the issue. Id. Dr. Long and SVMC were given leave to intervene in the DOAH proceeding on August 1, 2006 and October 4, 2006, respectively. R. 36-37, 79-80, 1054. North Florida Ob/Gyn, was subsequently given leave to intervene on January 10, 2007. R. 246-48, 1054. A hearing was scheduled before Administrative Law Judge William J. Kendrick. R. 1055.

Prior to the hearing, the parties entered into a Pre-Hearing Stipulation in which, among other things, it was stipulated and agreed that Tristan had suffered an injury to the brain "caused by oxygen deprivation, which rendered [Tristan] permanently and substantially mentally and physically impaired." R. 833-48, 1072. Thus, the only issues before the ALJ were: (1) whether Tristan's brain injury occurred in the course of labor, delivery, or resuscitation in the immediate postdelivery period and (2) whether Dr. Long, North Florida Ob/Gyn, and SVMC

provided sufficient notice to the Bennetts of their NICA participation. T. 4-5; R. 1072, 1078.

On July 5, 2007 the parties also filed a stipulated record, which was subsequently received into evidence. R.857-60, 861-64, 1055; T. 7. Dr. Long submitted three additional exhibits at the hearing and SVMC submitted one. R. 868, 1055. The record included, *inter alia*, medical records of Mrs. Bennett and Tristan, depositions of the parties, depositions of Mrs. Bennett's and Tristan's medical providers, and depositions of each parties' experts.

The DOAH hearing was held on July 9, 2007. At the outset, the ALJ confirmed the parties' stipulation that Tristan had suffered "an injury to the brain caused by oxygen deprivation that rendered Tristan permanently and substantially, mentally and physically impaired." T. 4-5. The ALJ also confirmed that the only issues to be determined were the timing of the neurological injury and whether Dr. Long, North Florida Ob/Gyn, and SVMC gave adequate notice to the Bennetts. Id.

Only two witnesses testified live at the hearing: Tammy Bennett, for the Petitioners, and Gary Hankins, M.D., for Dr. Long, North Florida Ob/Gyn and SVMC. Neither the Bennetts nor NICA presented any live expert testimony at the hearing.

On the issue of the timing of Tristan's neurological injury, Dr. Long and

SVMC took the position and argued that the statutory presumption of Section 766.309(1)(a), Florida Statutes, applied in this case. That statute provides, in effect, that when it is demonstrated that the infant suffered a permanent and substantial mental and physical impairment, the injury is "presumed" to be birth-related neurological injury. T. 215-16, 238; R. 930-31, 1035-36, 1074. In support of this argument, SVMC cited to Orlando Reg'l Healthcare Sys., Inc. v. Alexander, 909 So. 2d 582 (Fla. 5th DCA 2005).

At the hearing, Dr. Long and SVMC offered Dr. Hankins as their medical expert. Dr. Hankins is double board-certified in obstetrics and gynecology as well as in maternal fetal medicine. T. 40. He is a member of the American College of Obstetricians and Gynecologists ("ACOG"). T. 42. Dr. Hankins has chaired many ACOG committees including a task force on neonatal encephalopathy and cerebral palsy ("NECP"). T. 42-43. One of the issues the NECP task force examined was the timing of hypoxic ischemic events occurring during the intrapartum period (i.e., the period surrounding delivery). T. 45.

Dr. Hankins testified that Tristan suffered a hypoxic ischemic event on September 26, 2001, between 12:47 p.m., when the monitors were turned off, and delivery at 1:22 p.m. According to Dr. Hankins, this hypoxic ischemic event caused Tristan to be born in a condition of severe metabolic acidosis, as

demonstrated by the cord blood gasses, in particular, a pH of 6.76 and BE of -28.[3] T. 79; Exhib. 27, pp. 84-86; Exhib. 23, p. 67.

In discussing the Apgar scores, Dr. Hankins explained and opined that they were "assisted" in that Tristan was given oxygen during the immediate post-delivery period. T. 81. Dr. Hankins noted that the second Apgars were comparatively better than the first, but still confirmed that Tristan continued to suffer from severe metabolic acidemia. T. 83-84. He also testified that there is a poor correlation between Apgar scores and ultimate neurological outcomes. Exhib. 27, pp. 84-86. According to Dr. Hankins, Tristan's condition at delivery, in combination with her subsequent hospital course and an ultimate diagnosis of cerebral palsy, established that she had suffered oxygen deprivation and injury to her brain shortly before delivery. T. 79-80.

The ALJ issued his Final Order on October 3, 2007, denying NICA compensability. R. 1052-99. Regarding the statutory presumption contained in Section 766.309(1)(a), the ALJ rejected SVMC's argument, concluding, without citation to any authority, that: "The presumption is for Petitioners' (Claimants')

[3] The Bennett's Ob/Gyn expert, Dr. Richard Fields, testified by deposition to the severity of Tristan's condition at birth, stating that a baby born with a pH of 6.76 would be unable to survive for more than "five minutes or so." *Exhib. 23, pp. 43-46, 52.*

benefit, and is not available to aid other parties in satisfying their burden to establish that Tristan's brain injury occurred in the course of labor, delivery, or resuscitation." R. 1075-76. The ALJ added that there was credible evidence produced to "support a contrary conclusion, and to require resolution of the issue without regard to the presumption." R. 1076.

On the issue of the timing of Tristan's brain injury, the ALJ found that although Tristan suffered a multi-system failure as a result of oxygen deprivation between 12:47 p.m., and the time of birth, she did "not suffer a brain injury or substantial neurologic impairment until after she experienced profound episodes of oxygen deprivation on October 3, 2001, following the onset of pulmonary hemorrhaging and pulmonary arrest." R. 1077. Accordingly, the ALJ concluded that Tristan's injuries did not qualify for coverage under the NICA Plan.[4]

Dr. Long and SVMC appealed the ALJ's ruling to the District Court of Appeal for the First District. On appeal, the First District reversed, holding that the ALJ erred as a matter of law in failing to apply the rebuttable presumption provided by section 766.309(1)(a). St. Vincent's Medical Center v. Bennett, 27 So. 3d 65, 66 (Fla. 1st DCA 2009). Specifically, the First District held:

[4] As to the notice issue, which is not involved in this appeal, the ALJ concluded that Dr. Long and SVMC had demonstrated and established compliance with the notice provisions of the NICA Plan. R. 1092-93.

> As noted, the parties stipulated that Tristan is permanently and substantially mentally and physically impaired. Further, the ALJ found that the injury was a neurological one; that is, it involved the brain or the spinal cord. There was no dispute below concerning whether Tristan has sustained a neurological injury. Given the stipulation and the ALJ's findings of fact, we hold that the ALJ erred as a matter of law in not applying the presumption of compensability.

Id. at 70.

The Bennetts moved for rehearing, rehearing en banc, clarification and certification. SCR. 18-81. The First District denied the Bennetts' motion. SCR. 135. The First District clarified, however, that the ALJ was "to enter an order finding that the claim filed by the Bennetts is subject to compensation under the NICA Plan." Id.

The Bennetts sought discretionary jurisdiction in this Court based on alleged direct and express conflict with another district court of appeal under Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. The Court accepted jurisdiction of the case by order dated May 11, 2010.

SUMMARY OF THE ARGUMENT

The First District correctly interpreted the statutory presumption of a "birth-related neurological injury," consistent with the statutory language and the Legislature's intent. Section 766.309(1)(a), Florida Statute, provides as follows:

> 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. 766.302(2).

§ 766.309(1)(a), Fla. Stat. (Emphasis added).

All of the parties, including the Bennetts, stipulated that Tristan "did suffer an injury to the brain caused by oxygen deprivation that rendered [her] permanently and substantially, mentally and physically impaired." In his final order, the ALJ accepted this stipulation, finding that it was "undisputed that Tristan suffered brain injury, caused by oxygen deprivation, which rendered her permanently and substantially mentally and physically impaired."

Given the fact that the Bennetts, as claimants, participated in this stipulation and the stipulation was accepted by the ALJ, the statutory presumption attached and the ALJ had no choice but to apply the rebuttable presumption that the injury to Tristan was "a birth-related neurological injury." There is no principle of statutory construction which would permit the ALJ to depart from the requirements of Section 766.309(1)(a), either because the healthcare providers ask that it be applied or because the claimants would prefer that it not be applied. Accordingly, the ALJ had no option under the applicable statutes but to apply the presumption and, in turn,

conclude that the injury to Tristan was "a birth-related neurological injury as defined in Section 766.302(2)." It was from this premise that the ALJ was obligated to start his analysis and evaluation of the evidence presented. He failed to do so, and the First District correctly found this to be reversible error.

The First District also correctly found that the application of the statutory rebuttable presumption required a finding of compensability in this case. The ALJ's conclusion that Tristan's injury was not a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, is not supported by competent substantial evidence. Furthermore, the evidence upon which the ALJ did rely upon in reaching his conclusion that Tristan had not suffered a birth-related neurological injury was not expert medical evidence. The question of when Tristan's injury neurological injury occurred is not one which can be answered by lay evidence alone. Given the complicated and complex medical nature of this issue, expert medical testimony was required. Yet, in concluding that Tristan's undisputed neurological impairment occurred on October 3, 2007, the ALJ did not rely upon or cite to or reference any expert medical testimony.

The ALJ's failure to rely upon any expert medical testimony, in effect, placed himself in the role of the "medical expert." In doing so, the ALJ reached beyond the facts as established by the medical records and medical experts, to make factual

conclusions as to the meaning and significance of the information contained in the medical records and testimony of the medical experts.

More importantly, the ALJ did not take into account the testimony of the only medical expert on the subject: Dr. Hankins. It was Dr. Hankins testimony that Tristan's neurological injury, the cerebral palsy, was "absolutely consistent" with her condition at birth. As a result, the ALJ's conclusion regarding the compensability of this claim was not based upon competent and substantial evidence.

The First District correctly found that the birth-related injury to the infant's brain was compensable regardless of when the damages manifested. There is no express and direct conflict between the First District's opinion in the instant case and the Fourth District Court of Appeal's decision in Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 813 So.2d 155 (Fla. 4th DCA 2002) as to the timing of a compensable injury. Petitioners contend that Nagy held that neurological damage based on oxygen deprivation which occurred within the NICA statutory period is only compensable if the damage manifests during that same statutory period. However, Nagy included no such holding. The issue in Nagy was whether there was a sufficient causal link between a mechanical injury which occurred during the statutory period, and a later injury to the brain. In the instant

case, the First District was faced with a situation in which the causal link was clear, and therefore its holding as to compensability is consistent with the analysis in Nagy.

Finally, the First District correctly interpreted the phrase "immediate postdelivery period," and there is no conflict with the Fifth District in Orlando Regional Healthcare System, Inc. v. Florida Birth-Related Neurological, 997 So. 2d 426 (Fla. 5th DCA 2008) as to the interpretation of that phrase. The First District's observation concerning that phrase was merely that it has been construed to include "an extended period of days when a baby is delivered with a life-threatening condition and requires close supervision." Id. The First District correctly cited to Orlando Regional as an example of such a situation. The interpretation of the phrase "immediate postdelivery period" must be determined on a case-by-case basis, and nothing in Orlando Regional mandated that the First District reach the conclusion urged by Petitioners.

STANDARD OF REVIEW

The standard of review for an ALJ's interpretation of the NICA statutes is de novo. Orlando Reg'l Healthcare Sys., Inc. v. Alexander, 909 So. 2d 582, 586 (Fla. 5th DCA 2005). An ALJ's order will be reversed by the appellate court when the ALJ's interpretation of the law is clearly erroneous. See Schur v. Florida

Birth-Related Neurological Injury Comp. Ass'n, 832 So. 2d 188, 191 (Fla. 1st DCA 2002). The Florida Supreme Court reviews the district courts' interpretation of a statute de novo. See Fla. Birth-Related Neurological Injury Comp. Ass'n v. Dep't of Admin. Hearings, 29 So. 3d 992 (Fla. 2010)

An ALJ's findings of fact are reversible on appeal when they are not supported by competent substantial evidence in the record. See Nagy v. Fla. Birth-Related Neurological Injury Comp. Assoc., 813 So. 2d 155 (Fla. 4th DCA 2002); see also §120.68(10), Fla. Stat. (The appellate court shall "set aside agency action if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record.").

ARGUMENT

I. The First District correctly interpreted the statutory presumption of a "birth-related neurological injury," consistent with the statutory language and the Legislature's intent.

Section 766.309(1)(a) provides, in part, that in a NICA proceeding the ALJ shall make certain factual determinations "based upon all available evidence." With respect to the factual issue of whether an injury is a "birth-related neurological injury" the statute further provides, that in making this determination:

> 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. 766.302(2).

§ 766.309(1)(a), Fla. Stat. (Emphasis added).

In this case, in the lower tribunal proceedings, all of the parties, including the Bennetts, stipulated that Tristan "did suffer an injury to the brain caused by oxygen deprivation that rendered [her] permanently and substantially, mentally and physically impaired." R. 4-5, 833, 836, 841-42. In his final order, the ALJ accepted this stipulation, finding that it was "undisputed that Tristan suffered brain injury, caused by oxygen deprivation, which rendered her permanently and substantially mentally and physically impaired." R. 1072.

Given that the Bennetts, the claimants, participated in this stipulation and that the stipulation was accepted by the ALJ, it clearly must follow that the content of that stipulation was demonstrated to the satisfaction of the ALJ. As such, the ALJ had no choice but to apply the rebuttable presumption that the injury to Tristan was "a birth-related neurological injury." The First District correctly found that the ALJ erred by not applying the presumption. There is no principle of statutory construction which would permit the ALJ to depart from the requirements of Section 766.309(1)(a) either because the healthcare providers ask that it be applied or because the claimants would prefer that it not be applied.

Accordingly, the ALJ had no option under the applicable statutes but to apply

the presumption and, in turn, conclude that the injury to Tristan was "a birth-related neurological injury as defined in Section 766.302(2)." It was from this premise that the ALJ was obligated to start his analysis and evaluation of the evidence presented.

Instead, the ALJ did not take into account the clear and unambiguous language of Section 766.309(1)(a). In order to do so, without citation to any case or statutory authority, the ALJ concluded:

> [T]he language chosen by the legislative [sic] is clear and unambiguous. The presumption is for the Petitioners' (Claimants') benefit, and is not available to aid other parties in satisfying their burden to establish that Tristan's brain injury occurred in the course of labor, delivery, or resuscitation."

R. 1075-76.

This conclusion is without any legal basis and, therefore error. Accordingly, the First District correctly reversed it.

It is true that the language chosen by the Florida Legislature and used in Section 766.309(1)(a) is clear and ambiguous. Absent from the statutory language is any provision, phrase or other suggestion that once the presumption attaches and is in place that it is intended exclusively for the benefit of any particular party to the proceeding. Also omitted is any language, provision or suggestion which would permit a party, once the presumption has attached and is in place, to waive or otherwise disavow its application in an effort to defeat coverage by NICA and deny

NICA immunity to parties such as SVMC. The statute simply, clearly and without any ambiguity provides that once the required demonstration is made, a rebuttable presumption ***shall*** arise that the injury is a birth-related neurological injury as defined in s. 766.302(2). It is a well-established principle that where the language of a statute is clear and unambiguous and conveys a clear meaning, the statute must be given its plain and ordinary meaning and there is no occasion for resorting to the rules of statutory interpretation and construction. Rollins v. Pizzarelli, 761 So. 2d 294, 297 (Fla. 2000); Aetna Casualty & Surety Co. v. Huntington Nat'l Bank, 609 So. 2d 1315, 1317 (Fla. 1992) (noting the legislature is presumed to know the meaning of the words used in the statute and to have expressed its intent by the use of words found in the statute.).

Had the legislature intended to limit the presumption or to limit the benefits of the presumption to a certain party or parties, presumably it would have said so in the statute. The preeminent canon of statutory interpretation requires a court "to presume that the legislature says in a statute what it means and means in a statute what it says there." Broz v. Rodriguez, 891 So. 2d 1205, 1207 (Fla. 4th DCA 2005). Section 766.309(1)(a) provides simply, and without any limitation or restriction, that upon the required showing having been made, the presumption shall arise that the neurological injury is birth-related.

Furthermore, applying the presumption without regard to whether it favors any particular party is consistent with legislative intent. Consideration must be accorded not only to the literal and usual meaning of a statute's words, but also to their meaning and effect on the objectives and purposes to the statute's enactment. Fla. Birth-Related Neurological Injury Comp. Assoc. v. Fla. Div. Of Admin. Hearings, 686 So. 2d 1349, 1354 (Fla. 1997) ; Fla. State Racing Comm'n v. McLaughlin, 102 So. 2d 574 (Fla. 1958). Indeed, "it is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided in construing enactments of the legislature." State v. Webb, 398 So. 2d 820, 824 (Fla. 1981).

As a part of establishing the NICA system, the Florida Legislature made the following findings:

> a) Physicians practicing obstetrics are high-risk medical specialists for whom malpractice insurance premiums are very costly, and recent increases in such premiums have been greater for such physicians than for other physicians.
>
> b) Any birth other than a normal birth frequently leads to a claim against the attending physician; consequently, such physicians are among the physicians most severely affected by current medical malpractice problems.
>
> c) Because obstetric services are essential, it is incumbent upon the Legislature to provide a plan designed to result in the stabilization and reduction of malpractice insurance premiums for providers of such services in Florida.

> d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault. The issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding.

§ 766.301(1)(a)-(d), Fla. Stat.

The Legislature further stated that it was its intent "to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation. This plan shall apply only to birth-related neurological injuries." § 766.301(2), Fla. Stat. Applying the presumption without regard to whether it favors any particular party advances that goal.

In declining to apply the presumption, the ALJ incorrectly relieved the Bennetts and NICA of their initial burden of presenting evidence sufficient to overcome and otherwise rebut it. Cf. Tabb v. Fla. Birth-Related Neurological Injury Comp. Assoc., 880 So. 2d 1253 (Fla. 1st DCA 2004) (holding that the ALJ reversibly erred in applying the notice presumption of Section 766.316 and shifting the burden to petitioner to prove the contrary of the presumption). While it is conceivable that SVMC might have ultimately been required to produce evidence establishing that Tristan's injury was birth-related, such an obligation would not have been triggered until such time as the Bennetts rebutted Section 766.309(1)(a)'s

presumption with competent evidence. See Alexander, 909 So. 2d at 586-87

As will be argued in the following section of this brief, there was not competent substantial evidence offered at the hearing to rebut the properly applied presumption. As a result, the First District correctly reversed the ALJ's order and remanded the matter for entry of an order finding the injury compensable.

II. The First District correctly found that the application of the rebuttable presumption required a finding of compensability in this case.

Petitioners argue that, even if the statutory rebuttable presumption applies, the ALJ's finding that the injury was not compensable was supported by competent substantial evidence. The First District appropriately found that this was incorrect, and that application of the presumption, given the evidence developed at the proceedings below, requires finding that the injury is compensable.

Findings of fact made by an ALJ on the question of whether an injury is a birth-related neurological injury must be supported by competent substantial evidence. Alexander, 909 So. 2d at 586-87. Accordingly, an ALJ's findings of fact are reversible on appeal only when they are not supported by competent substantial evidence in the record. Nagy v. Florida Birth-Related Neurological Injury Comp. Assoc., 813 So. 2d 155 (Fla. 4th DCA 2002); § 120.68(10), Fla. Stat.; § 120.68(1), Fla. Stat. (The appellate court shall "set aside agency action if it finds that the agency's action depends on any finding of fact that is not supported by

competent substantial evidence in the record.").

In the context of the standard of review for an appellate court, "competent substantial evidence" means "legally sufficient evidence," which is evidence that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." Florida Bd. Medicine v. Florida Acad. of Cosmetic Surgery, Inc., 808 So. 2d 243, 257 (Fla. 1st DCA 2002); De Groot v. Sheffield, 95 So. 2d 912 (Fla. 1957); C.D. v. Dep't of Children and Families, 974 So. 2d 495, 502 (Fla. 1st DCA 2008) (holding that "whether evidence in a particular case is competent and substantial depends both on the nature of the evidence and its relationship to the applicable legal standards.").

The ALJ's finding on non-compensability was not supported by competent substantial evidence. Florida law defines a "birth-related neurological injury" as one which occurs "in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital." § 766.302(2), Fla. Stat. In determining whether the claimed injury is a birth-related neurological injury, an ALJ must consider "all available evidence." § 766.309(1), Fla. Stat.

The parties stipulated and agreed that Tristan had suffered a "permanent and substantial mental and physical neurological injury." As a result, the only issue to be decided by the ALJ was when that injury occurred. To wit, did Tristan's

neurological injury occur on September 26, 2001 during the course of labor, delivery, or resuscitation in the immediate postdelivery period, or did it occur during the second hypoxic ischemic insult of October 3, 2001? In addressing this question, the ALJ wrote:

> [W]hile Tristan's metabolic acidosis and multi-organ system failure support the conclusion she suffered a hypoxic ischemic insult before, during, and likely immediately following delivery, physician progress notes during the days following her delivery repeatedly document the absence of neurologic involvement or neurologic damage.

R. 1066.

The ALJ further found:

> The medical records, as well as the testimony of the physicians and other witnesses, have been thoroughly reviewed. Having done so, it must be resolved that the record developed in this case compels the conclusion that, more likely than not, Tristan suffered multi-system failure as a consequence of the oxygen deprivation she suffered between 12:47 p.m. (when the fetal monitoring was disconnected and Mrs. Bennett was moved to the operating room) and 1:22 p.m. (when Tristan was delivered), that likely continued during the immediate postdelivery resuscitative period. It is unlikely Tristan suffered a brain injury or substantial neurologic impairment until after she experienced profound episodes of oxygen deprivation on October 3, 2001, following the onset of pulmonary hemorrhaging and pulmonary arrest.

R. 1077.

The ALJ made these findings despite the fact that not one physician who treated Tristan made any statement or expressed any opinion in his or her medical

entries (or anywhere else) regarding the timing of Tristan's neurological injury and, more specifically, that it did not occur until October 3, 2001.

In reaching the conclusion that Tristan's neurological impairment occurred on October 3, 2001, the ALJ did not rely upon, or cite to, any expert medical testimony.[5] Moreover, the ALJ did not take into account the testimony of the only qualified and competent medical expert on the subject, Dr. Hankins. Dr. Hankins opined clearly and unequivocally that Tristan's neurological injury, i.e., cerebral palsy, was "absolutely consistent" with her condition at birth. T. 110-11.

The actions of the ALJ in failing to rely upon any expert medical testimony, impermissibly and improperly placed the ALJ in the role of the "medical expert."

[5] To the extent it may be argued that the ALJ considered or relied upon the deposition testimony of Norman Pryor, M.D., the Bennetts' expert pediatric nephrologist, although there is no indication in the Final Order that this is, in fact, the case, it must be remembered: (1) Dr. Pryor is a pediatric nephrologist, not a pediatric neurologist; (2) Dr. Pryor's testimony was admitted over the objections of SVMC as if he were a pediatric neurologist (Exhib. 29, pp 36-47); (3) Dr. Pryor's alleged "neurological opinions" consisted of nothing more than him reading selected entries from the SVMC records; (4) Dr. Pryor admitted on cross-examination that he had no education or training in neurology or pediatric neurology (other than standard medical school courses); (5) Dr. Pryor is not a neurologist or pediatric neurologist; (6) Dr. Pryor has never practiced neurology or pediatric neurology; (7) Dr. Pryor was not qualified to render neurological opinions; and (8) Dr. Pryor admitted that he would defer to neurologists or pediatric neurologists on neurology issues. Id. at pp. 49-51; 64-65. As a result, Dr. Pryor was not qualified or competent to give neurological or pediatric neurology expert opinions and the ALJ could not rely on Dr. Pryor's alleged "neurological opinions."

In this new role, the ALJ proceeded beyond the facts as contained in the medical records and independently made factual conclusions as to the meaning and significance of the information in the medical records. The finding in the Final Order that Tristan's neurological injury did not occur until October 3, 2001 is without any supporting expert medical testimony and in direct contradiction to the only qualified and competent expert testimony presented from Dr. Hankins. As a result, it follows that the ALJ's conclusion regarding the timing of the injury and, in turn, the compensability of this claim are not based on competent and substantial evidence.

That result is consistent with the analyses of courts that have discussed the vital role that expert testimony plays in permitting a finder of fact to reach a conclusion in similar contexts. For example, Florida courts will look to the "administrative scheme" of Florida's workers' compensation law when resolving NICA claims. McKaughan, 668 So. 2d at 976; Romine v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 842 So. 2d 148, 154 (Fla. 5th DCA 2003) ("[B]ecause NICA has long been compared to the workers' compensation system, cases construing the workers' compensation statutes provide us with guidance.").

In a workers' compensation claim, a "claimant must prove the existence of a causal connection between the employment and the injury for which benefits are

sought, and the existence of causation must be based upon reasonable medical probability." Crest Products v. Louise, 593 So. 2d 1075, 1077 (Fla. 1st DCA 1992) (quoting Thomas v. Salvation Army, 562 So. 2d 746, 749 (Fla. 1st DCA 1990)); see also Brasington Cadillac-Oldsmobile v. Martin, 641 So. 2d 442, 444 (Fla. 1st DCA 1994) (expert testimony required to establish causal relationship between incident and resulting conditions where they are beyond observation or not readily accessible to lay persons).

In medical malpractice cases, similarly, a plaintiff must prove, among other things, that the injuries being claimed were proximately caused by the defendant's breach of a duty. Gooding v. Univ. Hosp. Building, Inc., 445 So. 2d 1015, 1018 (Fla. 1984). It is generally necessary to present expert medical testimony in order to prove medical proximate cause. Sasser v. Humana of Florida, Inc., 404 So. 2d 856, 857 (Fla. 1st DCA 1981); Simmons-Russ v. Emko, 928 So. 2d 397 (Fla. 1st DCA 2006); Meyer v. Caruso, 731 So. 2d 118, 122 (Fla. 4th DCA 1999) (expert opinion is "indispensable" in medical negligence cases). It is the exceptional case where expert testimony on the issue of causation will be unnecessary. Atkins v. Humes, 110 So. 2d 663, 666 (Fla. 1959).

In creating the NICA, the Legislature's intent was, in part, "to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries. . . ."

§766.301(2), Fla. Stat. While NICA cases do not involve determinations or findings of fault or negligence on the part of the involved healthcare providers and their medical care and treatment, such claims do still involve and require determinations of the traditional issue of proximate cause, a concept implicit in the question of whether an injury is "birth-related." The resolution of the question of proximate cause and when a neurologic injury occurred cannot be resolved on medical records alone. It is an issue which requires, except in the most rare of cases such as is not before this Court, expert medical testimony to establish proximate causation.

Here, the Bennetts and NICA failed to offer any qualified expert medical testimony regarding the timing of Tristan's undisputed neurological injury. The ALJ failed to cite any expert medical testimony in support of his conclusion that Tristan's undisputed neurological injury did not occur before, during or immediately after delivery on September 26, 2001.

In fact, the only qualified medical expert testimony concerning the timing of Tristan's undisputed neurological injury came from SVMC's expert, Dr. Hankins. Despite this fact, the ALJ's order, while mentioning Dr. Hankins, does not address, reject, or accept, the substance of his testimony. This was error. While the factfinder has the discretion to accept the opinion of one physician over that of

another, the factfinder may not reject unrefuted medical testimony without a reasonable explanation or basis for doing so. Lindsay v. TVS Trucking Co., Claims Center, 565 So. 2d 864, 866 (Fla. 1st DCA 1990); Andrews v. C.B.S. Division, Maule Industries, 118 So. 2d, 206, 212 (Fla. 1960) (holding that a hearing officer may not elect to believe one witness over another without "some logical reason for doing so" as the "reviewing tribunal cannot determine the correctness of the conclusions of the deputy commissioner unless he makes proper findings and explains his reasons for rejecting or accepting the testimony of one medical expert over that of another").

Dr. Hankins' testimony regarding Tristan's condition in the postdelivery time frame reveals that Tristan's condition between birth and October 3, 2001, was not without problems but rather was worsening. This is evidenced by the results of the first and second sets of arterial blood gasses which were obtained. Dr. Hankins explained that not only was Tristan's condition worsening in the postdelivery period as a result of the severe metabolic acidemia, but that this worsening and detiorating condition was the result of the brain injury suffered during delivery. Specifically, during the hearing Dr. Hankins testified:

> Q And how does this metabolic acidemia impact on Tristan's organs?
>
> A Well, the acidemia is there as a result of deprivation of oxygen.

> You cannot make energy in any cells without oxygen and fuel, glucose. So absent either of them, you make no energy. If you don't gave glucose, you can't do it, if you don't have oxygen, you can't do it. So what this is showing is the tissues have had to go into what's called anaerobic or nonoxygen metabolism and all the tissues are susceptible to being injured, not just the brain, but all tissues. If you shut down the energy capacity to cells to pump water out and sodium in and potassium, you shut down all those mechanisms, there's going to be cells everywhere. That's why when we talk about intrapartum hypoxic ischemia and encephalopathy, if you're going to have this happen to the baby in his brain, you're almost always going to have other working systems that are affected.
>
> It doesn't have to be all of them, but almost always you'll get at least the kidney or the liver or nuclear rib cells or the baby will develop a coagulopathy. Or the baby will have things like syndrome inappropriate ADH which is a central nervous system injury. It's a brain injury from the hypoxia and it's going to manifest through inappropriate ADH at the level of the kidney and the inability of the baby to retain sodium and in turn the baby develops hyponatremia. Easy to get that confused because it's kidney electrolytes, but it's really more of a brain injury to the system responding to what the brain is doing wrong.

T. 77-78.

Additionally, Dr. Hankins testified regarding other indications of Tristan's worsening condition during the postdelivery period:

> This baby's sodium is 107. The glucose was measured at 15 and 18. Now, I don't take care of babies, but even the lab had those as panic values and annotated in the record they needed to call back and alert the nurse on the floor of these panic values. They don't do that for nothing. Panic values should mean something to labs. So in the context of a sodium of 107, the **only way** that baby got a sodium of 107

is SIADH.[6]

T. 109-10 (emphasis added).

Dr. Hankins' testimony demonstrates that Tristan was not neurologically "normal" until October 3, 2001 as apparently was found by the ALJ. Dr. Hankins testified that "a baby that has gone through what this baby has had happen to it deserves a detailed neurologic examination, and that the preferred specialist 'would be a pediatric neurologist.'" T. 109, 111. However, Tristan was not seen by a pediatric neurologist until she was seen by Dr. Gama for the first time on October 5, 2001, nine days after she was born and two days after the pulmonary hemorrhage on October 3, 2001. Dr. Hankins further explained that the fact that Tristan's condition worsened on October 3, 2001, or that a "second injury" may have occurred on that date, does not mean that an "existing injury" had not already occurred. Id.

With respect to the causal connection between Tristan's condition at birth and her neurological injury, Dr. Hankins testified:

> Q Is it your understanding in this case that Tristan was ultimately diagnosed with cerebral palsy?
> A Yes, sir.
>
> Q Is that consistent with the type of intrapartum hypoxic ischemic event or insult that you have been describing here this morning?
> A Yes.

6 SIADH is Syndrome inappropriate ADH. See infra p. 42.

T. 80-81.

Dr. Hankins also testified, during cross-examination by the Bennetts' attorney, that Tristan's condition at birth was "absolutely consistent with what we see when babies have long-term neurologic injuries, specifically cerebral palsy of a spastic or disconnect type, plus or minus mental retardation developmental delays, wheelchair bound, the need of feeding tubes ...." Id. at 110-11.

Addressing the alleged absence of documentation of neurologic involvement or neurologic damage, upon which the ALJ appears to have placed much reliance, Dr. Hankins testified during cross-examination by the Bennetts' counsel:

> I would not expect a competent person to not find neurologic abnormalities. I would have expected that if you look at this record closely, you can find feeding abnormalities or other issues that would preclude this as being a cold stone normal neurologic examination. I also say this, and this is not -- I am not an expert here, but when I look at the levels of sodium this baby had, when I look at the levels of severe hypoglycemia this baby had, I would personally be astounded that the neurologic examination is completely normal.
>
> Now, if it's grossly intact, what exactly does that mean? How much of an examination occurs to say grossly intact? I would submit to you that a baby that had gone through what this baby has had happen to it deserves a detailed neurologic examination. Probably by a specialist, all right. Not by the nurse practitioner, not by the obstetrician, but a specialist who knows how to elicit a neurologic examination to get the findings and to make a determination of normal or abnormal. This baby's sodium is 107. The glucose was measured at 15 and 18. Now, I don't take care of babies, but even the lab had those as panic values and annotated in the record they needed to call back and alert the nurse on the floor of these panic values. They don't do that for

> nothing. Panic values should mean something to labs. So in the context of a sodium of 107, the only way that baby got a sodium of 107 is SIADH.
>
> THE COURT: Which is?
>
> THE WITNESS: Syndrome inappropriate ADH when the primary brain injury in this baby is sustained. So what I would submit is grossly normal doesn't perhaps mean very much. But again, please take this in the context of an obstetrician trying to integrate this into what happened.
>
> If one wants to say that Tristan would have come through all of this being cold stone normal but for, I would be heavily reliant upon the people that addressed what did happen with the cardiac arrest, the pulmonary hemorrhage. Because there's nothing to say that I cannot superimpose a second injury on the existing injury. We all must figure that out. Just because I've got one injury doesn't mean I can't get a second hit. And I am not the person that can decipher all those things. What I can tell you is that this baby's metabolic condition, the early organ system injury to this baby manifests, except for the, quote, "relatively normal neurological examinations," is absolutely consistent with what we see when babies have long-term neurologic injuries, specifically cerebral palsy of a spastic or disconnect type, plus or minus mental retardation, developmental delays, wheelchair bound, the need of feeding tubes, the life that we would hope that no child would be subjected to.

T. 109-11.

This testimony from Dr. Hankins demonstrates there is no significance to the timing issue of the alleged absence of documentation of neurologic involvement or neurologic damage. Accordingly, the ALJ's reliance upon the alleged absence of documentation as the only support for his findings regarding the timing of Tristan's

undisputed neurological injury cannot be sustained, and the First District correctly concluded that this was not competent substantial evidence sufficient to defeat the statutory presumption of compensability.

The conclusion that Tristan's undisputed neurological injury occurred during or immediately after delivery on September 26, 2001 is further supported by the documentation of the doctors who saw her after October 3, 2001. For example, Dr. Gama saw Tristan for the first time on October 5, 2001, after she had suffered a pulmonary arrest and the second episode of severe metabolic acidemia. In his report of that same date, Dr. Gama described Tristan's condition at delivery as "floppy with some gasping efforts but unable to sustain respirations," that her urine output "declined progressively within the first day or two of life to the point that she was oliguric," and that "her BUN and creatinine have increased which suggest acute tubular necrosis." Exhib. 10. Dr. Gama attributed the "new onset seizures" she began experiencing on October 3, 2001, to multiple factors including, but not limited to, the pulmonary hemorrhage and hypoxic ischemia which occurred on October 3, 2001, acute tubular necrosis secondary to hypotension, metabolic acidosis and possible hypoxemia, liver dysfunction, DIC, the motor vehicle accident and resulting trauma. Id.

Dr. Gama continued to see Tristan after her discharge from SVMC. On

November 27, 2001, he noted that at delivery she was placed on a respirator for "respiratory distress syndrome and asphyxia." Exhib. 10. In his report of November 27, 2001, Dr. Gama concluded that "all of these complications culminated with what appears to be a severe hypoxic ischemic encephalopathy with multicystic encephalomalacia and seizure disorder." Id. Although no definitive diagnosis of cerebral palsy had been made as of November 2001, Dr. Gama commented that he had discussed the risk of cerebral palsy with the family in light of the findings and implications of the CT scan. Id.

Omitted from Dr. Gama's reports are any expression about or opinions regarding the timing of Tristan's injury. His reports cannot, for this reason, in and of themselves, provide the required and necessary expert medical testimony or competent substantial evidence upon which a factfinder could find that Tristan's neurological injury did not occur before, during or immediately after delivery. In fact, a plain reading of Dr. Gama's reports more reasonably suggest that Tristan's ultimate neurological injury cannot be confined or limited to a singular event or one moment in time. Rather it is the result of, or caused by, ***all*** of the events, conditions and complications described in the medical records. Such an interpretation is consistent with Dr. Hankins' testimony that a "second" brain injury on October 3, 2001 does not preclude or exclude the existence of a "first" brain injury which

occurred on September 26, 2001 before, during or immediately after delivery.

Based on the foregoing, the First District correctly concluded that the ALJ competent substantial evidence sufficient to defeat the statutory presumption of compensability.

III. The First District correctly found that the birth-related injury to the infant's brain was compensable regardless of when the damages manifested.

Petitioners argue that there is an express and direct conflict between the First District in the instant case and the Fourth District Court of Appeal's decision in Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 813 So. 2d 155 (Fla. 4th DCA 2002) as to the timing of a compensable injury. Petitioners' argument hinges on the idea that the Nagy court's interpretation of Section 766.302(2), Florida Statues, was based on an appropriately narrow view of the statute, while the First District's opinion was based on one inappropriately broad. This idea is without foundation.

The analysis in Nagy and in the instant case both include a determination as to whether the subject injury meets the statutory definition of "birth-related neurological injury" articulated in Section 766.302(2), which, in pertinent part, reads as follows:

> "Birth-related neurological injury" means injury to the brain or spinal cord . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate

> postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired.

§ 766.302(2), Fla. Stat.

Petitioners assert that the Nagy court rejected the idea that neurological damage could manifest at some point later than the time when the injury occurred. This is incorrect. The holding in Nagy was not based on an interpretation, narrow or otherwise, of the relative timing of events articulated in Section 766.302(2). Rather, it was based on a narrow interpretation of the phrase "caused by" in that same statutory definition.

In Nagy, it was established that the infant suffered a mechanical injury during the statutory period. However, that injury did not directly cause an injury to the infant's brain or spinal cord during that period. Instead, the mechanical injury led to bleeding between the skull and the scalp. That bleeding in turn eventually led to oxygen deprivation to the brain and therefore brain injury. Thus, the Nagy court held that that brain injury did not meet the statutory definition of "birth-related neurological injury."

Nagy does not hold that both the triggering event and the ultimate brain or spinal cord injury necessarily must both occur within a particular period. Nagy directly addresses the timing only of the initial triggering event, the oxygen deprivation or mechanical injury:

> According to the plain meaning of the words as written, the oxygen deprivation or mechanical injury to the brain must take place during labor or delivery or immediately afterward.

Nagy, 813 So. 2d at 160.

> 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 occur during labor or delivery.

Id.

Although under the facts in Nagy the ultimate injury to the infant's brain occurred after the statutory period, the timing of that event was not dispositive. As the following makes clear, the Nagy court was unwilling to find that infant's ultimate injury was birth-related when it occurred outside the statutory period *and* was not directly "caused by" a qualifying event during that period:

> The appellees would have us hold that the Plan applies, as long as oxygen deprivation or mechanical injury occurs during the prescribed time period - *no matter how remote the causal link* between the oxygen deprivation or mechanical injury and the brain injury or spinal cord injury.

Id. (emphasis added).

In short, the ultimate injury did not meet the statutory definition because it was not "caused by" the initial mechanical injury, but instead was caused by a sequela of that injury. The Nagy court narrowly construed the causation

requirement to reach its conclusion on the facts before it, but did not address a scenario in which the causal link between a triggering event and the ultimate injury was not "remote."

In the instant case, the First District was faced with a very different scenario. It is clearly established – through findings by the ALJ, stipulation by the parties, and a petition filed by the Bennetts themselves – that Tristan Bennett suffered oxygen deprivation during the statutory period and that such deprivation led directly to the ultimate neurological injury which simply manifested later. As such, the lower court's holding that Tristan suffered a birth-related neurological injury is not in conflict with Nagy.

IV. The First District correctly interpreted the phrase "immediate postdelivery period."

Petitioners are incorrect in their assertion that the First District's opinion in the instant case conflicts with that of the Fifth District in Orlando Regional Healthcare System, Inc. v. Florida Birth-Related Neurological, 997 So. 2d 426 (Fla. 5th DCA 2008) as to the phrase "immediate postdelivery period." As a preliminary matter, it is important to note that the First District's opinion in the instant case did not depend upon an interpretation of that phrase. As Petitioners note in their argument regarding an alleged conflict with Nagy, the First District held that the NICA plan does not require that neurological damage manifest during the statutory

period provided that it was caused by an injury that occurred during that period. St. Vincent's Med. Ctr., Inc. v. Bennett, 27 So. 3d 65, 70 (Fla. 1st 2009). The only discussion of the phrase "immediate postdelivery period" was a single-paragraph in which the First District noted that the result would have been the same even had it held differently as to when neurological damage must manifest. Id.

The First District's observation concerning that phrase was merely that it has been construed to include "an extended period of days when a baby is delivered with a life-threatening condition and requires close supervision." Id. The First District correctly cited to Orlando Regional as an example of such a situation. Id. Petitioners attempt to create a conflict by arguing that, unlike the infant involved in Orlando Regional, Tristan was not on continuous artificial respiration. Respondent does not suggest that the postdelivery medical condition of the child in Orlando Regional was the same as that of Tristan Bennett. Significantly, however, neither did the First District. More importantly, for purposes of determining if there truly is a conflict between the opinions, the Orlando Regional court never held that "uninterrupted resuscitation" is the sole measure of whether an injury occurred during the "immediate postdelivery period." Far from setting a minimum standard based on one infant's circumstances, the Orlando Regional court emphasized that "the application of this definition in determining plan compensability must be

applied on a case-by-case basis." Orlando Reg'l, 997 So. 2d at 430. In the instant case, the First District did just that. As such, the First District analysis is consistent with that of Orlando Regional. Moreover, given that the First District correctly found that Tristan's injuries fell within the statutory time period even without resort to determination of what constitutes "the immediate postdelivery period," the result below would be the same irrespective of that determination.

CONCLUSION

For the foregoing reasons, this court should affirm the First District's decision and order, thus requiring the ALJ to enter an order finding that the claim of the Bennetts is subject to compensation under the NICA Plan.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via United States Mail this 18th day of August 2010, to the parties listed on the attached Service List.

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I HEREBY CERTIFY that this Brief complies with the font requirement of Rule 9.210(a)(2), Florida Rules of Appellate Procedure, as it is a computer generated brief submitted in Times New Roman 14-Point font.

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