

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GEORGE WILKINSON and KIMBERLY )  
WILKINSON, as parents and )  
natural guardians for ASHLEY C. )  
WILKINSON, a minor, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 00-4538N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
THOMAS J. ARMBRUSTER, M.D. and )  
SPRING HILL REGIONAL HOSPITAL, )  
INC., )  
 )  
Intervenors. )  
\_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a final hearing in the above-styled case on September 13, 2001, and November 15, 2001, by video teleconference, with sites in Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioners: Matthew S. Mudano, Esquire  
4144 North Armenia Avenue, Suite 300  
Tampa, Florida 33607

For Respondent: Kenneth J. Plante, Esquire  
Tana Duden Storey, Esquire  
Brewton, Plante & Plante, P.A.  
225 South Adams Street, Suite 250  
Tallahassee, Florida 32301

and

B. Forest Hamilton, Esquire  
Florida Birth-Related Neurological  
Injury Compensation Association  
1435 Piedmont Drive, East, Suite 102  
Post Office Box 14567  
Tallahassee, Florida 32312

For Intervenor Thomas J. Armbruster, M.D.:

Ronald H. Josepher, Esquire  
Josepher & Batteese, P.A.  
First Union Center, Suite 1190  
100 South Ashley Drive  
Tampa, Florida 36602

For Intervenor Spring Hill Regional Hospital, Inc.:

Merrilee A. Jobes, Esquire  
George, Hartz, Lundeen, Flagg, Fulmer,  
Johnstone, King & Stevens  
524 South Andrews Avenue  
Justice Building, East, Third Floor  
Fort Lauderdale, Florida 33301

#### STATEMENT OF THE ISSUE

At issue in the proceeding is whether Ashley Wilkinson, a minor, suffered an injury for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan.

#### PRELIMINARY STATEMENT

On November 2, 2000, George Wilkinson and Kimberly Wilkinson, as parents and natural guardians of

Ashley Wilkinson (Ashley), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on November 6, 2000, and on November 30, 2000, NICA gave notice that it had "determined that such claim is not a 'birth-related neurological injury' within the meaning of Section 766.302(2), Florida Statutes," and requested that "an order [be entered] setting a hearing in this case [on such issue]." Following intervention by Thomas J. Armbruster, M.D., and Spring Hill Regional Hospital, Inc., such a hearing was held on September 13, 2001, and November 15, 2001.

At hearing, Petitioners George Wilkinson and Kimberly Wilkinson testified on their own behalf, and offered additional testimony from Maryann Vause and Mary Pavan, M.D. (by video deposition). Petitioners' Exhibit 1 (the medical records filed with DOAH on November 2, 2000), Exhibit 2 (the deposition of Radhakishna Rao, M.D.), Exhibit 3A (the deposition of Mary Pavan, M.D.), Exhibit 3B (the video deposition of Mary Pavan, M.D.), Exhibit 4 (Physical Therapy Evaluation at All Children's Hospital, May 8, 2001), Exhibit 5 (Occupational Therapy Evaluation by Patricia Koltusz, dated July 13, 2001),

Exhibit 6 (Speech Language Evaluation by Joan E. Miesner, dated May 10, 2001), and Exhibit 7 (an affidavit of Radhakrishna, M.D., dated June 25, 2001) were received into evidence. Respondent called no witnesses; however, Respondent's Exhibit 1 (the deposition of Charles Kalstone, M.D.), Exhibit 2 (Neurological Evaluation Report by Michael Duchowny, M.D., dated May 24, 2001), and Exhibit 3 (correspondence prepared by Michael Duchowny, M.D., dated July 18, 2001, with the exception of the last sentence of the second paragraph of the letter) were received into evidence. Intervenor Thomas J. Armbruster, M.D., testified on his own behalf, and also offered the testimony of Robert Yelverton, M.D. Intervenor Armbruster's Exhibit 1 (a report of Robert Yelverton, M.D., dated July 5, 2001, and the curriculum vitae of Robert Yelverton, M.D.) and Exhibit 2 (Spring Hill Regional Hospital medical records for Kimberly Wilkinson's admission of July 10, 1996) were received into evidence.<sup>1</sup> Intervenor Spring Hill Regional Hospital, Inc., called no witnesses and offered no exhibits.

The transcript of the September 13, 2001, hearing was filed September 28, 2001, and the transcript of the November 15, 2001, hearing was filed December 12, 2001. Consequently, the parties were initially accorded 10 days from December 12, 2001, to file proposed final orders; however, at the request of Intervenor Armbruster, the time was subsequently extended so that his

proposal final order, filed January 7, 2001, could be considered. The parties' proposals have been duly considered.

#### FINDINGS OF FACT

##### Fundamental findings

1. Petitioners, George Wilkinson and Kimberly Wilkinson, are the parents and natural guardians of Ashley C. Wilkinson, a minor. Ashley was born a live infant on July 13, 1996, at Spring Hill Regional Hospital, a hospital located in Spring Hill, Florida, and her birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Ashley's birth was Thomas J. Armbruster, M.D., who, at all times material hereto, was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.

##### Mrs. Wilkinson's antepartum course and Ashley's birth

3. Mrs. Wilkinson's antepartum course was without significant complication until July 10, 1996, when, at 6:40 p.m., with the fetus at 38 and 4/7 weeks gestation (estimated date of delivery July 20, 1996), she presented at Spring Hill Regional Hospital complaining of "bleeding [and] low pressure," and was admitted to rule out labor.

4. At the time, external fetal monitoring revealed a reassuring fetal heart rate in the 130-beat per minute range, and no contractions. Vaginal examination revealed the cervix at

1 centimeter, effacement at 20 percent, and the fetus at station -3, with the membranes intact.

5. Dr. Armbruster was paged, and at 7:15 p.m., visited briefly with Mrs. Wilkinson. At that time, Dr. Armbruster instructed staff to watch for contractions for another 30 minutes and if none were observed, Mrs. Wilkinson could be discharged. Thereafter, at 8:45 p.m., there being no evidence of contractions or other change in status, Mrs. Wilkinson was discharged, with mother and fetus noted to be stable.

6. Insofar as the record reveals, Mrs. Wilkinson's antepartum course continued without apparent complication until approximately 12:01 a.m., July 13, 1996, when, while at home in bed, her membranes ruptured and, either contemporaneously or shortly thereafter, she evidenced seizure activity (possibly eclampic) and severe vaginal bleeding.<sup>2</sup> Mrs. Wilkinson's husband immediately called 911.

7. Pasco County Fire Rescue responded to the emergency call. On arrival, fire rescue personnel witnessed Mrs. Wilkinson thrashing about in bed, and observed a large amount of blood on the bed and in her vaginal area. The Pasco County Fire Rescue personnel further noted that:

. . . [Patient] combative, swinging arms [and] attempting to bite . . . ABD firm, soft. Restraints bilat[eral] wrists to protect [patient]. O<sub>2</sub> by NRB held near face. [Patient] remained combative, unable to

attempt IV. S[pring] H[ill] Reg[ional] ER  
called to advise of possible emergent C  
Section during response . . . .

8. Mrs. Wilkinson was transported by Pasco County Fire Rescue to the Spring Hill Regional Hospital emergency room (ER) where she arrived shortly after 1:00 a.m., July 13, 1996.<sup>3</sup> Upon arrival, Mrs. Wilkinson was described as combative (scratching, kicking and screaming), with no eye contact. At the time, heavy bright red vaginal bleeding was noted, and Mrs. Wilkinson's cervix was described as 1 to 2 centimeters dilated. Fetal monitoring (from approximately 1:10 a.m. to 1:20 a.m.) revealed a fetal heart rate of 120 to 130 beats per minute, with no accelerations, and no evidence of uterine contractions; however, because monitoring was sporadic and brief, the monitor strips provide no compelling evidence as to the well-being of the fetus or whether Mrs. Wilkinson was or was not in labor.

9. At approximately 1:20 a.m., ER personnel advised Dr. Ambruster by phone, at home, of Mrs. Wilkinson's status. Dr. Ambruster ordered that preparations be made for a stat cesarean section.

10. At 1:45 a.m., Mrs. Wilkinson was taken to the operating room, and at 2:11 a.m., Ashley was delivered by cesarean section. Pertinent to this case, Dr. Ambruster's operative report noted that:

. . . there appeared to be an approximately 30% abruptio placenta at the time of delivery and also that the amniotic fluid was port wine stained and that would be consistent with the abruptio placenta. Whether the cause be a straight abruptio or the eclampic seizure was unknown. Otherwise the uterus, tubes and ovaries were noted to be normal.

11. On delivery, Ashley was handed off to Dr. Mari Doherty, the pediatrician in attendance. Dr. Doherty's progress notes include the following observations:

. . . [On delivery, the baby] was bathed in blood. [S]uctioned blood from mouth [and] nares. Baby delivered [and] placed under radiant warmer [and] because of no respirations [and] limp, the baby was given PPV [with] 100 [percent] BVM for about 4-5 min[utes] intermittently . . . Baby's breathing was labored [and] grunting; more suctioning and chest PT improved the baby. Suctioning done in between breaths . . . Baby transported from the OR to the Nursery [with] O<sub>2</sub> by mask . . . .

Apgars scores were recorded as 4, 7, and 8, at one, five, and ten minutes respectively.

12. The Apgar scores assigned to Ashley are a numerical expression of the condition of a newborn infant, and reflect the sum points gained on assessment of heart rate, respiratory effort, muscle tone, reflex/irritability, and color, with each category being assigned a score ranging from the lowest score of 0 through a maximum score of 2. As noted, at one minute, Ashley's Apgar score totaled 4, with heart rate being graded at 2, muscle tone and reflex/irritability being graded at 1 each,

and respiratory effort and color being graded at 0 each. At five minutes, Ashley's Apgar score totaled 7, with heart rate and reflex/irritability being graded at 2 each, and respiratory effort, muscle tone, and color (with her body pink, but extremities blue) being graded at 1 each.<sup>4</sup>

13. At 2:30 a.m., Ashley was transported from the operating room to the nursery. On admission, Ashley was placed on an EKG/Apnea monitor; ABG, blood culture, and blood sugar testing was ordered; and IV was started. At 2:45 a.m., when her oxygen saturation levels were noted to fall, Ashley was deep suctioned and given increased oxygen.

14. Between 2:45 a.m., and 7:55 a.m., Ashley's oxygen saturation levels continued to drop periodically, and she was noted to be cyanotic on occasion. At 5:30 a.m., Ashley was again suctioned, producing approximately 5cc of bloody mucus, and during the early morning hours was noted to be very jittery and irritable, with occasional arching of the back and stiff extremities, and was medicated with Phenobarbital. Given her condition, Ashley was transferred, at or about 7:55 a.m., to All Children's Hospital where she was reportedly in a coma for two weeks.<sup>5</sup> Currently, Ashley presents with static encephalopathy (status post hypoxic ischemic encephalopathy), characterized by spastic quadriplegia, global developmental delay, and seizure disorder, as well as gastroesophageal reflux.

Coverage under the Plan

15. Pertinent to this case, coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as an "injury to the brain . . . caused by oxygen deprivation . . . occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired." Sections 766.302(2) and 766.309(1)(a), Florida Statutes.

16. Here, there is no serious dispute that Ashley suffered an injury to the brain, caused by oxygen deprivation, secondary to placental abruption. There is likewise no serious dispute that the injury Ashley suffered rendered her permanently and substantially mentally and physically impaired.<sup>6</sup> What is at issue, is whether the asphyxia which precipitated her injury occurred "in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital," as required to qualify for coverage under the Plan.

17. To address the issue, the parties offered selected medical records relating to Mrs. Wilkinson's antepartum course, as well as those associated with Ashley's birth and subsequent development. Additionally, Petitioners offered the deposition testimony of Radhakrishna Rao, M.D., a pediatric neurologist (board-eligible in pediatrics and pediatric neurology).

Petitioners also offered the testimony of Mrs. Wilkinson which, if credited, would demonstrate that commencing at or about noon, July 12, 1996, she began to experience regular uterine contractions approximately 10 minutes apart, and that the contractions continued throughout the day progressing to approximately 8 minutes apart by 3:30 p.m., and approximately 6 minutes apart by 7:30 p.m. Respondent offered the deposition testimony of Charles Kalstone, M.D., a physician board-certified in obstetrics and gynecology, and Intervenor Armbruster offered his own testimony, as well as the testimony of Robert Yelverton, M.D., a physician board-certified in obstetrics and gynecology.

18. The medical records and the testimony of the physicians and other witnesses offered by the parties have been carefully considered. So considered, it must be concluded, by application of the presumption established by Section 766.309(1)(a), Florida Statutes, or otherwise, that the brain injury suffered by Ashley was caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital.<sup>7</sup>

19. In reaching such conclusion, it has been helpful to initially identify those matters on which the medical experts share a commonality of opinion. Such matters include an opinion that Ashley's brain injury was caused by oxygen deprivation, secondary to placental abruption; that such deprivation started

at some time following abruption and continued until she was resuscitated, following delivery; and that, given the record in this case, one cannot resolve where on that time line (whether at the onset of the abruption or at some other definitive point through resuscitation) hypoxia of a sufficient magnitude occurred to account for the severe brain injury Ashley suffered. The experts are also in agreement that the hospital records relating to Ashley's birth provide little or no help in resolving the issue of whether Mrs. Wilkinson was in labor at the time of placental abruption or thereafter. In this regard, it is noted that there is no serious disagreement that the fetal monitoring which occurred following Mrs. Wilkinson's arrival at the emergency room (from approximately 1:10 a.m. to 1:20 a.m.) was inadequate to provide any compelling evidence as to whether Mrs. Wilkinson was or was not in labor. Moreover, it is worthy of note that the experts agree that, given the emergent nature of Mrs. Wilkinson's presentation, it was not pertinent to her clinical management to resolve whether she was in labor but, rather, to delivery Ashley as soon as possible. Consequently, the absence of evidence in the hospital records regarding labor is not meaningful.<sup>8</sup>

20. Having explored the areas on which the experts are in agreement, it is timely to consider, without reference to Mrs. Wilkinson's testimony regarding the onset of labor, the

opinions of the experts offered on behalf of Intervenor Armbruster regarding the onset of labor, contrasted with the opinions of the expert offered by Respondent.<sup>9</sup> As will be noted, there is little in the testimony of these physicians to credibly resolve, without reference to Mrs. Wilkinson's testimony, when, if ever Mrs. Wilkinson entered labor.

21. Dr. Yelverton, an expert called by Intervenor Armbruster, expressed his opinion on the question of labor, as follows:

Q. Did you find any evidence in the record, Dr. Yelverton, that the patient was in labor with respect to any of the health care providers that had been treating her at the hospital?

\* \* \*

A. There's one comment on the summary of the labor and delivery which states that the patient was in labor and the labor began 0001 hours on July 13th, 1996. This was a summary of the labor and delivery record that was recorded by a registered nurse whose name is illegible to me.<sup>[10]</sup>

\* \* \*

Q. In addition to the nurse's note that you've pointed out to Judge Kendrick about labor, did you find any other evidence in the record that the mother was in labor, including the fact that she had an abruptio placenta?

A. Well, I think given a more likely than not scenario in this case, when events of this nature occur at home, or even in the hospital, and they result in a spontaneous

rupture of membranes with a great deal of blood present at the time, either there were some contractions that disrupted the placenta or a spontaneous rupture in the membrane which resulted in the contraction of the uterus itself which resulted in the abruption.

Either way, more likely than not, there was some uterine activity that resulted in either spontaneous rupture of the membranes or the abruption itself.

Q. Do you have an opinion within reasonable medical probability or more likely than not, based upon your background, training and experience and your review of the materials about whether or not Ms. Wilkinson was, in fact, in labor?

A. I think more likely than not, she was in labor. I failed to mention also that she was two centimeters dilated when she arrived at the hospital with ruptured membrane, vaginal bleeding. It would be very unusual to find that particular scenario with a patient not having uterine contractions.

[Transcript of September 13, 2001, hearing, at pages 48, 49, 52 and 53.]

22. Dr. Yelverton's opinion that, without consideration of Mrs. Wilkinson's testimony, Mrs. Wilkinson was in labor at the time of abruption is not persuasive. First, it is noted that at admission to the ER, Mrs. Wilkinson was not noted to be 2 centimeters dilated but, rather 1 to 2 centimeters dilated. Given that she was 1 centimeter dilated on July 10, 1996, and not in labor; the subjective nature of the examination; the circumstances under which it was done; and the fact that the

examination of July 13, 1996, noting a range of 1 to 2 centimeters was apparently made by a different person than the one who made the observation on July 10, 1996; the difference in dilations is not compelling evidence of labor. Second, Dr. Yelverton's suggestion that "some uterine activity" must have "resulted in either spontaneous rupture of the membranes or the abruption itself," is hardly persuasive evidence of labor (the onset of regular uterine contractions), and ignores, inter alia, the equally plausible alternative that the abruption was spontaneous or that it was precipitated by the seizure Mrs. Wilkinson suffered.

23. Dr. Armbruster, who testified on behalf of himself, expressed his opinion on the question of labor, as follows:

Q. . . . [W]as there any evidence in the records that you're aware of that . . . indicate[d] that . . . the mother . . . was in labor, or have you had a chance to re-review the records recently?

A. Yes. One, she did complain of abdominal pain, which, of course, is associated with labor, and, two, her cervix had dilated. She was two centimeters from one centimeter when she came in two days prior, and she had effaced. Her cervix had thinned out from 20 percent to 80 percent, therefore, some sort of labor had to be going on during the two intervening days.

Q. Would you explain that in a little bit more detail by the progression of cervical dilatation and progression of effacement in the face of contractions indicating to you that labor was ongoing?

A. All right. We have many definitions of what labor is or we discuss what labor is, but most doctors agree true labor is the changing of a cervix in dilatation and the effacing or thinning out of a cervix. So most doctors or most obstetrician/gynecologists will agree upon the fact that if there is a change in the cervix, whether it be effacement or dilatation, that is the definition of labor.

In this case, Ms. Wilkinson showed both a change in dilatation and effacement.

Q. Do you have an opinion within a reasonable medical probability, based upon your background, training and experience, your involvement with this patient and your review of the records about whether or not Ms. Wilkinson was in true labor from the time that the abruptio placenta occurred up through the delivery of the child?

A. In my opinion, she was in labor from the time of the abruptio to the time I did the C section, both with the pain she showed and also the change in the cervix and with effacement and dilatation, that is correct.

\* \* \*

Q. But based upon the records alone, do you believe that she was in labor?

A. Without a doubt, I believe she was in labor at the time of the abruption of the placenta.

Q. And regardless of the records, just based on your own experience with patients with abruptio placentas and the consequent bleeding causing uterine irritability and contraction, do you believe she was in labor based on that experience?

A. I believe that she was in labor for two reasons, and I've stated them prior: One, she did complain of abdominal pain, and; two, that there was a change in the cervix with both -- in change of dilatation and effacement . . . .

[Transcript of September 13, 2001, hearing, pages 89-92.]

24. Dr. Armbruster's opinion that, without consideration of Mrs. Wilkinson's testimony, Mrs. Wilkinson was in labor at the time of abruption is also not persuasive. First, Mrs. Wilkinson was not, as Dr. Armbruster states, 2 centimeters dilated when she presented to the ER on July 13, 1996, and, for reasons heretofore noted, the change in dilation noted is not persuasive proof of labor. Second, Dr. Armbruster's testimony that on presentation to the ER on July 13, 1996, "[h]er cervix had thinned out from 20 percent [noted on July 10, 1996] to 80 percent" finds no record support, and his testimony that he has a clear recollection of her effacement on July 13, 1996, without benefit of any contemporaneous notation of such observation, is improbable and unworthy of belief.<sup>11</sup>

25. Dr. Kalstone, who testified on behalf of NICA, expressed his opinion on the question of labor, as follows:

Q. . . . Doctor, based upon your training and experience and review of this file, were you able to reach any conclusions whether or not the records demonstrated to you that Ashley Wilkinson sustained . . . oxygen deprivation during the course of her delivery or immediate resuscitation?

A. Yes. My opinion was that she was not in labor, essentially, and therefore, she didn't suffer from oxygen deprivation during labor, and certainly during labor or resuscitation in the immediate post-delivery period.

Q. Doctor, please explain the basis for that opinion.

A. The patient was at approximately 39 weeks pregnant and her husband woke up to find her having a major seizure, it sounds like, in bed, and simultaneously her membranes ruptured spontaneously.

She had severe hemorrhage from the vagina, which later turned out to be proven to be from a placental abruption.

There is no mention that the patient was in labor or that she was having contractions, by anyone that took care of her or was with her.

She was transported in a timely way to Spring Hill Regional Hospital where the nurse who admitted her noticed that she was actively bleeding and that she was agitated and combative.

She was prepared for an emergency cesarean section.

\* \* \*

Now, in the doctor's written and dictated notes, including the summary, there doesn't seem to be any mention or consideration that she was in labor, and there was nothing in the nurses' notes that would lead me to believe that she was in labor, either.

The doctor said that the cervix was one to two centimeters dilated when checked in the emergency room.

She had one previous vaginal delivery and one to two centimeters doesn't mean necessarily that the patient was in labor.

There is no mention as to whether the cervix was effaced.

\* \* \*

So, in reviewing all this information, there was no reason to suggest that the patient was in labor.

\* \* \*

Q. Doctor, did you have an occasion to review the fetal monitor strips?

A. Yes. On the fetal monitoring strips -- they start monitoring shortly before 1:10 a.m., and ended shortly before 1:20.

On the fetal monitor strips the fetal heart wasn't recorded continuously.

The rate was around 120 to 130. There were no accelerations, but the fetus was monitored for a short period of time. So, I can't really tell if that tracing is normal or abnormal.

In regards to the uterine-activity part of the tracing, that was monitored for part of that time and I didn't see any evidence of uterine contractions that were recorded on these fetal monitor strips for the time that the patient was on the monitor.

Q. Doctor, do you believe that the abruption of the placenta occurred before Mrs. Wilkinson commenced labor?

A. Yes. I don't think she really commenced labor.

The placenta definitely abrupted at home. It was a sudden event, catastrophic event that

occurred while she was in bed, maybe concomitant with when the membranes ruptured, that they both happened about the same time.

Placentas do abrupt during labor, but they can also abrupt without labor, and it is my opinion that this patient went to bed fine, essentially, and then had two major things happen to her.

One, she had a seizure; and two, her placenta abrupted. Simultaneously, the membranes ruptured . . .

\* \* \*

Q. Based upon your review of the records, more likely than not did the baby's mother actually go into labor at all before she was born?

\* \* \*

As I said before, there is really no evidence that I can see from nursing notes, the doctor's dictation or the patient history that was obtained, through the husband mostly, I think, to suggest that labor was the culprit or that she was in labor . . . .

[Respondent's Exhibit 1, pages 7-12]

26. Dr. Kalstone's opinion that, based on the available antepartum records, Mrs. Wilkinson was not in labor when she presented at Spring Hill Regional Hospital is credible; however, given that the records are limited in scope, given the emergent nature of Mrs. Wilkinson's presentation, and given the absence of any reason to document labor, any opinion based on those records is inadequate to rebut the presumption of labor established by Section 766.309(1)(a), Florida Statutes.

27. Finally, addressing Mrs. Wilkinson's testimony regarding the onset of labor at or about noon, July 12, 1996, it must be resolved, contrary to Respondent's contention, that there is no compelling reason to reject her testimony as less than credible. Consequently, it may be said that the record supports the conclusion that, by application of the presumption established by Section 766.309(1)(a), Florida Statutes, or otherwise, that the brain injury Ashley suffered was caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital.

#### CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, this proceeding. Section 766.301, et seq., Florida Statutes.

29. The Florida Birth-Related Neurological Injury Compensation Plan (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. Section 766.303(1), Florida Statutes.

30. The injured "infant, his personal representative, parents, dependents, and next of kin," may seek compensation under the Plan by filing a claim for compensation with the

Division of Administrative Hearings. Sections 766.302(3), 766.303(2), 766.305(1), and 766.313, Florida Statutes. The Florida Birth-Related Neurological Injury Compensation Association (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." Section 766.305(3), Florida Statutes.

31. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the administrative law judge to whom the claim has been assigned. Section 766.305(6), Florida Statutes. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned administrative law judge in accordance with the provisions of Chapter 120, Florida Statutes. Sections 766.304, 766.307, 766.309, and 766.31, Florida Statutes.

32. In discharging this responsibility, the administrative law judge must make the following determination based upon the available evidence:

- (a) Whether the injury claimed is a birth-related neurological injury. If the claimant has demonstrated, to the satisfaction of the

administrative law judge, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.303(2).

(b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.

Section 766.309(1), Florida Statutes. An award may be sustained only if the administrative law judge concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth." Section 766.31(1), Florida Statutes.

33. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes, to mean:

. . . injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth 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, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include

disability or death caused by genetic or congenital abnormality.

34. As the claimants, the burden rested on Petitioners to demonstrate entitlement to compensation. Section 766.309(1)(a), Florida Statutes. See also Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977), ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.")

35. Here, it has been established that the physician who provided obstetrical services at birth was a "participating physician," as that term is defined by the Plan, and that Ashley suffered a "birth-related neurological injury," as that term is defined by the Plan. Consequently, Ashley qualifies for coverage under the Plan. Section 766.309, Florida Statutes.<sup>12</sup>

36. Where, as here, the administrative law judge determines that "the infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth," the administrative law judge is required to make a determination as to "how much compensation, if any, is to be awarded pursuant to s. 766.31." Section 766.309(1)(c), Florida Statutes. In this case, the issues of compensability and the amount of compensation to be awarded were bifurcated. Accordingly, absent agreement by the parties, a

further hearing will be necessary to resolve any existing disputes regarding "actual expenses," the amount and manner of payment of "an award to the parents or natural guardians," and the "reasonable expenses incurred in connection with the filing of the claim." Section 766.31(1), Florida Statutes.

CONCLUSION

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

ORDERED that the petition for compensation filed by George Wilkinson and Kimberly Wilkinson, as parents and natural guardians of Ashley Wilkinson, a minor, be and the same is hereby approved.

IT IS FURTHER ORDERED that:

1. NICA shall make immediate payment for all expenses previously incurred and all future expenses as incurred.

2. George Wilkinson and Kimberly Wilkinson, as parents and natural guardians of Ashley Wilkinson, a minor, are entitled to an award of up to \$100,000. The parties are accorded 45 days from the date of this order to resolve, subject to approval by the administrative law judge, the amount and manner in which the award should be paid. If not resolved within such period, the parties will so advise the administrative law judge, and a hearing will be scheduled to resolve such issue.

3. Petitioners are entitled to an award of reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees. The parties are accorded 45 days from the date of this order to resolve, subject to approval by the administrative law judge, the amount of such award. If not resolved within such period, the parties will so advise the administrative law judge, and a hearing will be scheduled to resolve such issue.

IT IS FURTHER ORDERED that pursuant to Section 766.312, Florida Statutes, jurisdiction is reserved to resolve any disputes, should they arise, regarding the parties' compliance with the terms of this Final Order.

DONE AND ORDERED this 23rd day of January, 2002, in Tallahassee, Leon County, Florida.

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WILLIAM J. KENDRICK  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
[www.doah.state.fl.us](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of January, 2002.

## ENDNOTES

1/ Intervenor Armbruster's Exhibit 2 was received into evidence by Order of October 25, 2001.

2/ The record is conflicting as to the timing of these events. According to Mr. and Mrs. Wilkinson's testimony, the events occurred between 11:00 p.m., and 11:30 p.m., July 12, 1996; however, the Delivery Record at Spring Hill Regional Hospital dates rupture of membranes at 12:01 a.m., July 13, 1996. The Pasco County Fire Rescue report does not reflect either the time that the emergency call was received or the time that the emergency unit arrived at Petitioners' home. Here, given the rapid response of the Pasco County Fire unit, the emergent nature of the situation, the brevity of time the unit spent at Petitioners' house, and the proximity of Petitioners' house to the hospital, it is more likely that the events occurred at 12:01 a.m., July 13, 1996, as noted in the hospital records.

3/ The Delivery Record reflects a time of admission of 1:20 a.m.; however, that was the time at which Mrs. Wilkinson was formally admitted to the obstetrics unit and does not represent the time she initially presented at the hospital.

4/ The record does not disclose the grading of Ashley's ten minute Apgar score.

5/ On discharge from Spring Hill Regional Hospital, diagnoses included infant of diabetic mother, respiratory distress syndrome, respiratory depression, hypoglycemia, metabolic acidosis, and neonatal abstinence syndrome.

6/ The medical records and expert testimony presented in this case demonstrate that Ashley suffered an injury to the brain, caused by oxygen deprivation, secondary to placental abruption, which rendered her permanently and substantially mentally and physically impaired. Respondent concedes it presented no evidence that would suggest otherwise. (Respondent's proposed final order, paragraphs 3 and 4).

7/ Where, as here, the proof demonstrates that the infant suffered an injury to the brain caused by oxygen deprivation that rendered the infant permanently and substantially mentally and physically impaired, the claimants are entitled to the benefit of a rebuttable presumption that the injury is a "birth-related neurological injury." Section 766.309(1)(a), Florida Statutes. Essentially, the presumption is that the injury was caused by

oxygen deprivation "occurring in the course of labor, delivery, or resuscitation in the immediately post-delivery period in a hospital."

8/ The only direct reference to labor in the hospital records is contained on the Delivery Record. There, in a chronology apparently written by an attending nurse at delivery, labor is noted to have begun at 12:01 a.m., July 13, 1996, contemporaneously with rupture of the membranes. Under the circumstances of this case, and there being no explanation regarding the assumptions or information on which it was based, such entry is of little value in resolving the issue of when, if ever, Mrs. Wilkinson was in labor.

9/ Petitioners also offered testimony through the deposition of Radhakrishna Rao, M.D., Ashley's treating pediatric neurologist, which included opinions with regard to the cause and severity of Ashley's brain injury, as well as whether Mrs. Wilkinson was in labor at the time of such injury. Dr. Rao's opinions regarding the cause and severity of Ashley's injury were persuasive and credible; however, his opinions regarding whether Mrs. Wilkinson was or was not in labor were less than compelling.

10/ Id., endnote 8.

11/ At the hearing of September 13, 2001, Dr. Armbruster testified that the records indicated that Mrs. Wilkinson's cervix had thinned out from 20 percent (on July 10, 1996) to 80 percent (on July 13, 1996). However, when challenged to identify any record support for his statement he was unable to do so, and thereafter testified (on November 15, 2001) that he had an independent recollection of such facts. As heretofore noted, Dr. Armbruster's testimony is inherently improbable (given his active practice and the passage of time) and unworthy of belief.

12/ In its proposed final order, NICA suggests that even were Mrs. Wilkinson in labor, that Ashley's brain injury was caused by oxygen deprivation suffered prior to admission to Spring Hill Regional Hospital and therefore was not a "birth-related neurological injury," as defined by the Plan. Pertinent to that argument, NICA points to the definition of "birth-related neurological injury" contained in Section 766.302(2), Florida Statutes, which defines a "birth-related neurological injury" as an "injury to the brain . . . caused by oxygen deprivation . . . occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital." Here, NICA suggests that such provision should be read to mean that if the

injury or its precipitating cause occur during labor, labor must occur in a hospital if the injury is to be covered by the Plan. NICA's interpretation of the statute is rejected. Telophase Society of Florida, Inc. v. State Board of Funeral Directors and Embalmers, 334 So. 2d 563 (Fla. 1976)(Word "or" when used in a statute is generally to be construed in the disjunctive), Rich Electronics, Inc. v. Southern Bell Tel. & Tel. Co., 523 So. 2d 670 (Fla. 3d DCA 1988)(Rule of statutory construction is that relative or qualifying phrase is to be construed as referring to its nearest antecedent), Kirksey v. State, 433 So. 2d 1236 (Fla. 1st DCA 1983)(Under "doctrine of last antecedent," relative and qualifying words, phrases and clauses are to be applied to words or phrases immediately preceding, and are not to be construed as extending to or including others more remote), and Brown v. Brown, 432 So. 2d 704 (Fla. 3d DCA 1983)(Relative or qualifying phrase is to be construed as referring to its nearest antecedent).

COPIES FURNISHED:  
(By certified mail)

Matthew S. Mudano, Esquire  
4144 North Armenia Avenue, Suite 300  
Tampa, Florida 33607

Lynn Larson, Executive Director  
Florida Birth-Related Neurological  
Injury Compensation Association  
1435 Piedmont Drive, East, Suite 101  
Post Office Box 14567  
Tallahassee, Florida 32312

B. Forest Hamilton, Esquire  
Florida Birth-Related Neurological  
Injury Compensation Association  
1435 Piedmont Drive, East, Suite 102  
Post Office Box 14567  
Tallahassee, Florida 32312

Kenneth J. Plante, Esquire  
Tana Duden Storey, Esquire  
Brewton, Plante & Plante, P.A.  
225 South Adams Street, Suite 250  
Tallahassee, Florida 32301

Ronald H. Josepher, Esquire  
Josepher & Batteese, P.A.  
First Union Center, Suite 1190  
100 South Ashley Drive  
Tampa, Florida 36602

Merrilee A. Jobes, Esquire  
George, Hartz, Lundeen, Flagg, Fulmer,  
Johnstone, King & Stevens  
524 South Andrews Avenue  
Justice Building, East, Third Floor  
Fort Lauderdale, Florida 33301

Thomas J. Armbruster, M.D.  
1250 Mariner Boulevard  
Spring Hill, Florida 34609

Spring Hill Regional Hospital  
10461 Quality Drive  
Spring Hill, Florida 34609

Ms. Charlene Willoughby  
Agency for Health Care Administration  
Consumer Services Unit  
Post Office Box 14000  
Tallahassee, Florida 32308

Mark Casteel, General Counsel  
Department of Insurance  
The Capitol, Lower Level 26  
Tallahassee, Florida 32399-0300

#### NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Sections 120.68 and 766.311, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 120.68(2), Florida Statutes, and Florida Birth-Related Neurological Injury Compensation Association v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992). The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.

