

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LATOYA JOHNSON, on behalf of and  
as parent and natural guardian  
of RHY'LEE WILSON, a minor,

Petitioner,

vs.

Case No. 16-3532N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

ORLANDO HEALTH, INC., d/b/a  
WINNIE PALMER HOSPITAL FOR WOMEN  
& BABIES; AND RONALD EASON,  
M.D.,

Intervenors.

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FINAL ORDER

A final hearing was held in this matter before W. David  
Watkins, a duly-appointed Administrative Law Judge (ALJ) of the  
Division of Administrative Hearings (DOAH), on January 18, 2018,  
in Orlando, Florida.

APPEARANCES

For Petitioner: No appearance

For Respondent: Brooke M. Gaffney, Esquire  
Smith, Stout, Bigman & Brock, P.A.  
444 Seabreeze Boulevard, Suite 900  
Daytona Beach, Florida 32118

For Intervenors: Andrea L. Diederich, Esquire  
Bradley P. Blystone, Esquire  
Marshall Dennehey Warner Coleman  
& Goggin  
Suite 550  
315 East Robinson Street  
Orlando, Florida 32801

STATEMENT OF THE ISSUES

Whether notice was accorded the patient, as contemplated by section 766.316, Florida Statutes (2017),<sup>1/</sup> or whether the failure to give notice was excused because the patient had an emergency medical condition, as defined in section 395.002(8), or the giving of notice was not practicable.

PRELIMINARY STATEMENT

On May 27, 2016, Latoya Johnson, on behalf of and as parent and natural guardian of Rhy'Lee Wilson, a minor, filed a Petition for Benefits (Petition) with DOAH alleging that Rhy'Lee Wilson suffered brain damage as a result of a birth-related neurological injury and requesting benefits available under section 766.301, et seq., Florida Statutes.

On July 29, 2016, Intervenors, Orlando Health, Inc. (OHI), and Ronald Eason, M.D. (Dr. Eason), filed a motion to intervene, which was granted by Order dated August 11, 2016.

On October 13, 2016, Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), responded to the Petition for Benefits. Therein, NICA asserted its determination that the claim was compensable, based upon the

opinions of Dr. Willis and Dr. Sigurdardottir, whose reports and expert medical opinions were provided therewith.

A Notice of Hearing was issued on December 1, 2016, scheduling the final hearing for June 1, 2017.

Following written discovery exchanged between the parties, NICA filed a Motion for Summary Final Order on March 8, 2017, seeking an order establishing that Rhy'Lee Wilson had suffered a birth-related neurological injury as defined by section 766.302(2). As Petitioner failed to timely disclose any expert(s) or opinions of expert(s) to rebut the opinions of NICA's experts and failed to timely respond to expert discovery served by NICA, Respondent also filed a Motion for Protective Order to prevent the depositions of NICA's experts (which had been requested by Petitioner's counsel) from going forward.

A motion hearing was held on March 15, 2017, and an Order on Pending Motions was subsequently issued by ALJ Barbara Staros on March 16, 2017. Said Order denied NICA's Motion for Protective Order (and required the depositions of NICA's experts to go forward), reserved ruling on NICA's Motion for Summary Final Order, and required Petitioner to "indicate whether or not she [would] be challenging the issue of compensability at the final hearing, and if so, . . . disclose the names(s) and business address(s) of any expert whose testimony and opinion she intend[ed] to rely on at hearing" no later than May 1, 2017.

Following the depositions of NICA's experts, Dr. Willis and Dr. Sigurdardottir, NICA filed a Renewed Motion for Summary Final Order, once again requesting an Order establishing that Rhy'Lee Wilson had suffered a birth-related neurological injury as defined by section 766.302(2). This motion was granted and a Partial Summary Final Order was entered on June 30, 2017. In the June 30, 2017 Order, the undersigned determined that Rhy'Lee Wilson was born on August 5, 2014, at Winnie Palmer Hospital, that Rhy'Lee Wilson weighed in excess of 2,500 grams at birth, and that Rhy'Lee Wilson was delivered by Dr. Eason, who was a plan-participating physician at the time of Rhy'Lee Wilson's birth. The undersigned also determined that based upon the credited and unrefuted opinions of Dr. Willis and Dr. Sigurdardottir, Rhy'Lee Wilson sustained an injury to her brain during labor, delivery, and continuing into the immediate post-delivery period due to oxygen deprivation, which resulted in brain injury rendering Rhy'Lee Wilson permanently and substantially mentally and physically impaired. Jurisdiction was reserved to determine whether the notice requirements of section 766.316 were satisfied and concerning the issue of an award pursuant to section 766.31. The Partial Summary Final Order is adopted by, and incorporated in, this Final Order as though restated in its entirety.

On June 30, 2017, the undersigned also issued an Amended Notice of Hearing, which clarified that the issues to be heard at the hearing on October 10, 2017, were whether notice was accorded the patient, as contemplated by section 766.316, or whether the failure to give notice was excused because the patient had an emergency medical condition, as defined in section 395.002(8), or the giving of notice was not practicable.

On July 7, 2017, Petitioner filed a Motion for Reconsideration/Rehearing regarding the Partial Summary Final Order entered June 30, 2017, or in the alternative, a Motion to Set Aside the Partial Summary Final Order of June 30, 2017. Respondent filed its Response and Opposition to Petitioner's motion on July 14, 2017, and Petitioner filed a Reply to Respondent's Response and Opposition on July 24, 2017. By Order dated July 26, 2017, the undersigned denied Petitioner's Motion for Reconsideration. Petitioner then filed an appeal of the June 30, 2017, Order with the Fifth District Court of Appeal (DCA) on July 31, 2017. Said appeal was ultimately dismissed as premature by the Fifth DCA on September 19, 2017.

On August 28, 2017, Petitioner filed her Motion for Summary Final Order regarding Notice. Petitioner's motion was based upon the deposition testimony of Petitioner, that it was not her signature on the Notice of NICA participation by Orlando Health, Inc. (on its own behalf and on behalf of its employed

physicians, etc.), dated May 11, 2014. Intervenor filed a Response in Opposition to Petitioner's Motion for Summary Final Order on September 7, 2017, which Petitioner replied to on September 14, 2017. By Order dated September 19, 2017, Petitioner's Motion for Summary Final Order regarding Notice was denied.

Petitioner filed her Motion for Reconsideration of Order Denying Summary Judgment on September 27, 2017, and a Renewed Motion for Summary Final Order Regarding Notice on September 29, 2017. A motion hearing was held on October 3, 2017, and thereafter, on October 25, 2017, this Court entered an Order Denying Petitioner's Motion for Reconsideration of Order Denying Summary Judgment, and an Order Denying Petitioner's Renewed Motion for Summary Final Order. On that same date, the undersigned also entered an Order granting in part Petitioner's motion to permit the testimony of Thomas Vastrick at the final hearing and allowing Intervenors time to obtain a handwriting expert and to conduct discovery pertaining to Petitioner's handwriting expert.

A Notice of Hearing was issued on November 22, 2017. Said notice established that the final hearing would go forward on January 18, 2018, and that the issues to be determined were whether notice was accorded the patient, as contemplated by section 766.316, or whether the failure to give notice was

excused because the patient had an emergency medical condition, as defined in section 395.002(8), or the giving of notice was not practicable.

On December 22, 2017, Intervenor filed a Motion to Compel (Petitioner's) Expert Discovery (responses), a Motion to Compel Earlier Deposition of Thomas Vastrick, and a Motion to Strike Thomas Vastrick (as a witness for Petitioner). On December 26, 2017, Petitioner filed a Response in Opposition to Intervenor's Motion to Compel and Motion to Strike, as well as a Motion for Protective Order regarding Thomas Vastrick.

On January 5, 2018, Intervenor filed a Motion for Partial Summary Final Order as to Dr. Eason's Duty to Provide Notice and Supporting Memorandum of Law. NICA filed a Notice of Joinder in Intervenor's Motion for Partial Summary Final Order on January 19, 2018. In conjunction with Intervenor's Motion for Summary Final Order with regard to Dr. Eason, Intervenor also filed, inter alia, the Affidavit of Dr. Eason, EMS records of Petitioner, the transcript of the deposition of Petitioner taken August 9, 2017, and the deposition of Donald Willis, M.D.

On January 9, 2018, Petitioner filed a Motion for Continuance of the final hearing. That motion was denied by Order dated January 10, 2018. Petitioner filed an Emergency Motion for Continuance on January 12, 2018, and Intervenor filed a Response in Opposition to Petitioner's motion on January 12,

2018. NICA filed a Motion to Compel Petitioner's Counsel to Pay Dr. Willis for Deposition on January 12, 2018. Petitioner filed a Motion to Extend Time to Respond to Intervenor's Motion for Partial Summary Final Order and a Supplemental Motion for Continuance of the Final Hearing on January 16, 2018. Petitioner also filed a Reply in Response to Intervenor's Response in Opposition to Petitioner's Supplemental Motion for Continuance on January 16, 2018. The undersigned denied Petitioner's Emergency Motion for Continuance by Order entered January 16, 2018.

On January 16, 2018, Petitioner filed the following with the Fifth DCA: a Petition for Writ of Certiorari; an Emergency Motion for Review of Order Denying Stay Pending Certiorari Review; and Petitioner's Emergency Motion for Stay Pending Certiorari Review. On January 17, 2018, Petitioner filed herein a Motion for Stay Pending Certiorari Review and a Motion to Disqualify and/or Recuse the Honorable W. David Watkins. Intervenor's filed a Response in Opposition to Petitioner's Motion to Extend Time to Respond to Intervenor's Motion for Partial Summary Final Order and a Motion to Strike Thomas Vastrick on January 17, 2018.

Petitioner's Motion for Stay Pending Certiorari Review was denied by the undersigned by Order entered January 17, 2018, and Petitioner's Motion to Disqualify and/or Recuse the Honorable



W. David Watkins was also denied by the undersigned that same day.

The Fifth DCA denied Petitioner's Emergency Motion for Stay Pending Certiorari Review and Emergency Motion for Review of Order Denying Stay Pending Certiorari by Order dated January 17, 2018. The Fifth DCA also dismissed Petitioner's Writ of Certiorari, by Order dated February 8, 2018.

Given the rulings by the appellate court, the formal hearing went forward on the issue of notice on January 18, 2018, as scheduled. Despite having notice of the final hearing, neither Petitioner, her counsel, nor any representative thereof appeared. At hearing, the undersigned received into evidence Intervenor's exhibits, and heard the sworn testimony of Dean Ritchey, Ronald Eason, M.D., Marlene Wooley, Theresa Dean, Bridget Walters, and Donald Willis, M.D. Specifically relevant to the issue of an emergency medical condition excusing notice of NICA participation by Dr. Eason, the undersigned heard the live testimony of Dr. Eason, and the deposition testimony of Dr. Willis was published in the record.

At hearing the undersigned also heard argument of counsel on Intervenors' Motion to Strike Thomas Vastrick, Intervenors' Motion for Summary Final Order on Notice with regard to Dr. Eason, and Respondent's Motion to Compel Petitioner's counsel to pay Dr. Willis for his deposition.

As to the Motion for Summary Final Order on Notice with regard to Dr. Eason, Intervenors argue that although a health care provider is required to provide notice of his or her participation in NICA, an exception exists under section 766.316 when a patient has an emergency medical condition as defined by section 395.002(8)(b) or when notice is not practicable. Respondent contends that based upon the medical records of Petitioner, the deposition testimony of Petitioner, the deposition testimony of Dr. Willis, and the hearing testimony of Dr. Eason, at the time Petitioner presented to the hospital on August 5, 2014, an emergency medical condition existed which excused Dr. Eason's provision of notice of his participation in NICA. Although Respondent takes no position on the factual issue of whether notice of participation in NICA was given to Petitioner, Respondent agrees with Intervenor that provision of notice to Petitioner of Dr. Eason's participation in NICA should be excused due to an emergency medical condition.

At hearing the undersigned ruled that Intervenors' Motion to Strike Thomas Vastrick was rendered moot since Thomas Vastrick was not called to testify at the hearing by Petitioner or Petitioner's counsel. Ruling was reserved on Intervenors' Motion for Summary Final Order with regard to Dr. Eason and Respondent's Motion to Compel.

The undersigned issued a Notice of Right to File Proposed Final Orders on January 19, 2018. The Transcript of the final hearing was filed by Respondent on February 9, 2018.

Thereafter, on January 19, 2018, both Respondent and Intervenor filed Proposed Final Orders. Petitioner did not file a proposed final order.

#### FINDINGS OF FACT

Based upon the demeanor and credibility of the witnesses, other evidence presented at the final hearing, and on the entire record of this proceeding, the following Findings of Fact are made:

1. Petitioner, Latoya Johnson, is the mother/natural guardian of Rhy'Lee Wilson.
2. Rhy'Lee was born at Winnie Palmer Hospital for Women & Babies, a licensed Florida hospital, in Orlando, Florida, on August 5, 2011.
3. The physician providing obstetric services at the time of birth was Ronald Eason, M.D.
4. Rhy'Lee was delivered via stat cesarean-section, necessitated by a placental abruption.
5. Rhy'Lee suffered from oxygen deprivation prior to delivery, during delivery, and in the immediate post-delivery resuscitative period, as determined pursuant to the undersigned's June 30, 2017, Partial Summary Final Order.

6. Rhy'Lee is substantially and permanently mentally and physically impaired, as determined pursuant to the undersigned's June 30, 2017, Partial Summary Final Order.

7. Intervenors, OHI and Ronald Eason, M.D., are NICA participants.

Facts Relating to OHI's Compliance with NICA Notice Requirements

8. On May 11, 2014, Ms. Johnson presented to the Emergency Department of Winnie Palmer Hospital for Women and Babies with complaints of vaginal pain with swelling. She was noted to be 24.1 weeks pregnant.

9. During the May 11, 2014, visit, Ms. Johnson signed the NICA acknowledgement form dated May 11, 2014. The form, entitled "Florida Birth-Related Neurological Injury Compensation Plan Acknowledgement of Patient Receipt of Notice Hospital," provided the following acknowledgement:

I have been advised that Orlando Health, Inc. and its employed physicians, residents, mid-wives and physician assistants, as well as any participating physician on our medical staff credentialed to provide obstetrical services, are members in the Florida Birth-Related Neurological Injury Compensation Plan (NICA). This Plan provides that certain limited compensation is available in the event certain birth-related neurological injuries may occur during labor, delivery or post-delivery resuscitation, irrespective of fault. For specifics on the Plan, I understand I can contact the Florida Birth-Related Neurological Injury Compensation Association (NICA), Post Office Box 14567, Tallahassee,

FL 32317-4567, 904.488.8191 /800.398.2129.  
I further acknowledge I have received from Orlando Health, Inc., a copy of the form brochure regarding the Plan. The form brochure is prepared and furnished by the Florida Birth-Related Neurological Injury Compensation Association (NICA).

10. Ms. Johnson's signature and initials on the NICA acknowledgement form, dated May 11, 2014, were witnessed by Marlene Woolley. At the time, Ms. Woolley was a financial counselor employed by OHI. Her job was to handle the preregistration of patients for upcoming surgeries and for emergency registrations.

11. During Ms. Woolley's deposition, she testified that she did not recall the night that she witnessed Ms. Johnson's signature. Nevertheless, she testified that she definitively was present while Ms. Johnson signed the NICA acknowledgement form, and that the signature on the form belonged to Ms. Johnson, because Ms. Woolley's signature appears on the form under the witness line. Ms. Woolley further testified as follows regarding her encounter with Ms. Johnson and her routine practice at Winnie Palmer Hospital:

- On May 11, 2014, at 9:07 p.m., the NICA acknowledgement form was printed by the financial counselor in triage, prior to it being presented to Ms. Johnson for signature.
- At 9:15 p.m., Ms. Woolley went to see Ms. Johnson. She walked into her room and verified that she was Ms. Johnson by

asking for her name. A copy of Ms. Johnson's driver's license had been previously collected by triage.

- Ms. Woolley is typically in the patient's room for two to three minutes, so she knows that Ms. Johnson signed the NICA acknowledgement form within two to three minutes of 9:15 p.m.
- After Ms. Johnson signed the NICA acknowledgement form, Ms. Woolley went to the back room, put the documents next to her computer, and then went to see the next patient.
- No one else would have handled the documents containing Ms. Johnson's signature while Ms. Woolley was seeing other patients, and no one else would have handled the documents from the time they were signed by Ms. Johnson at approximately 9:15 p.m. until Ms. Woolley scanned and then shredded the documents at approximately 11:20 p.m.
- At 11:20 p.m., Ms. Woolley entered her account notes into the computer stating that Ms. Johnson signed the NICA form and that Ms. Woolley sent the scanned forms to Health Information Management.
- Ms. Woolley had no reason to doubt that the signature which appears on the NICA acknowledgement form belongs to a patient by the name of Latoya Johnson, and she was confident that the signature was Ms. Johnson's signature because Ms. Woolley was there, she witnessed it, and her own signature was there. Ms. Woolley would actually hold the clipboard while the patients signed the forms, so she would literally watch them sign while she was there. Her eyes would be on the patient while signing.

- If a patient refused to sign the NICA acknowledgement form, Ms. Woolley would write "refused to sign" on the form and it would get scanned into the system. She would also note in the account notes that the patient refused to sign. The fact that Ms. Woolley's account notes state that the patient signed means that she accepted the NICA pamphlet.

12. Bridget Walters, OHI's corporate director of Patient Accounting, was deposed as OHI's corporate representative on the issue of notice. During Ms. Walter's deposition, she testified as follows regarding OHI's routine practices for providing NICA notice to patients at Winnie Palmer Hospital in 2014:

- The hospital (Winnie Palmer Hospital) requires that all pregnant patients sign the NICA form even if they state that they are not going to deliver at Winnie Palmer Hospital.
- If the patient refuses to sign the form, another team member would witness that the patient refused to sign.
- Ms. Walters is not aware of any instance in which a patient's signature has been forged by anyone at OHI.
- Ms. Walters has no reason to believe that the signature on the May 11, 2014, NICA acknowledgement form was forged.
- OHI team members are trained to enter notes into the patient's account after they have completed the registration with the patient.
- In this case, the account notes of 11:20 p.m. on May 11, 2014, reflect that the patient signed the NICA form and that

it was sent to Health Information Management.

13. Intervenors also presented the testimony of their forensic handwriting expert, Theresa Dean, via video conference. Ms. Dean is qualified to render opinions as a forensic handwriting expert by virtue of her training through the Secret Service basic and advanced training programs, the North Carolina Justice Academy's training program in document forensics, the Bradley document forensics training program, and the International Graphoanalysis Society's course of study in graphoanalytic technique. Ms. Dean's full credentials are summarized in her Curriculum Vitae, which was received in evidence.

14. Ms. Dean testified that she was retained by counsel for Intervenors to look at the questioned document, which was described as the NICA acknowledgment form dated May 11, 2014, and to determine whether or not the handwritten signature on that document was written by Ms. Johnson. In addition to reviewing the NICA acknowledgment form dated May 11, 2014, Ms. Dean reviewed 77 other documents which were identified as documents containing the signatures of Ms. Johnson from April of 2013 through December of 2015. Ms. Dean also reviewed portions of Ms. Johnson's deposition transcript.



15. Ms. Dean created two comparison charts to assist with her analysis of the signatures. The comparison charts allow for a side-by-side comparison of the similarities and dissimilarities of the signatures.

16. Ms. Dean offered the following opinions based on her review:

- Based on a reasonable degree of certainty, it is highly probable that the NICA acknowledgement form dated May 11, 2014, was signed by Ms. Johnson.
- Ms. Johnson has "quite a range of variation" when she signs her signature, and at least five different signature styles were identified in the writings dating from 2013 through 2015.
- The most common of the five signature styles was the one used on the NICA acknowledgement form dated May 11, 2014. The signature style contains a clockwise motion in the initial stroke.
- Several factors can cause variation in a person's signature, including stress level, their position, emotional upset or trauma.
- The signature on the May 11, 2014, NICA acknowledgement form would have been very difficult to duplicate by a forger. The signature contains no indications of a forgery such as evidence of hesitation, a drawn look to the writing, or tremors. Rather, the signature has smooth directional changes and the lower loop is nice and smooth. There is no blotching or blobs of ink, or pooling of ink, or any angularity that would call into question the authenticity of the signature.

17. The un rebutted credible evidence of record established that Ms. Johnson signed the NICA acknowledgement form sometime between 9:07 p.m. and 11:20 p.m., on May 11, 2014.

Dr. Eason's Excusal from Providing Notice due to Emergency Circumstances:

18. Dr. Eason is a board-certified obstetrician/gynecologist, who joined the medical education group at OHI in 2007. As evidenced by NICA Certificate No. 25687, Dr. Eason was a participant in the Florida Birth-Related Neurological Injury Compensation Plan from January 1, 2014, to December 31, 2014.

19. On August 5, 2014, Ms. Johnson became Dr. Eason's patient during her admission to Winnie Palmer Hospital. Ms. Johnson was admitted to Winnie Palmer Hospital at 12:23 a.m., on August 5, 2014.

20. Ms. Johnson's complaints at the time of admission were extreme pain, weakness and some nausea. She had low blood pressure and the fetal heart rate was determined to be extremely low. It appeared Ms. Johnson was suffering a placental separation or placental abruption. She was admitted and quickly transferred to an operating room for an emergency cesarean section.

21. Placental abruption is the premature separation of the placenta from its attachment to the inside wall of the uterus,

which compromises the blood flow to the baby and thereby compromises oxygen to the baby and creates an urgent fetal distress condition.

22. A normal heart rate for an unborn, late-term baby is between 110 and 160 beats per minute. In Ms. Johnson's case, hospital clinicians were initially unable to find the fetal heart rate, and when it was found it was between 30 and 60 beats per minute, which is dangerously low.

23. Ms. Johnson was very quickly transported upstairs for an emergency cesarean section which was performed by Dr. Eason at 12:55 a.m. on August 5, 2014. The baby was breach and was delivered quickly and appeared very flaccid with lack of tone and no respiratory effort. The baby was quickly handed to the neonatal respiratory team which was in the operating room. The team initiated resuscitation efforts. The cesarean-section confirmed the initial diagnosis of placental abruption.

24. Ms. Johnson presented to Dr. Eason with an emergency medical condition on August 5, 2014, and there was inadequate time to have effected a safe transfer to another hospital prior to delivery. Emergency treatment was indicated and it would have been medically inappropriate to transfer her to another facility. According to the credible testimony of Dr. Eason, had a transfer been attempted, it would have caused a threat to the health and safety of Ms. Johnson and her fetus. With a high

degree of probability, the baby would have died, and quite possibly the patient would have succumbed to the hemorrhage.

25. Dr. Eason was not Ms. Johnson's private obstetrician and he did not provide her with any prenatal care prior to his first encounter with her on August 5, 2014.

26. It would not have been practicable for Dr. Eason to provide notice to Ms. Johnson of his participation in NICA on August 5, 2014, because of her emergency situation when time was of the essence and the primary focus was on getting care for the patient and her unborn baby as quickly as possible.

27. It would not have been practicable for Dr. Eason to provide notice to Ms. Johnson of his participation in NICA prior to August 5, 2014, because he did not know her as a patient prior to her emergency presentation in the emergency department.

Payment of Dr. Willis's Deposition Fee

28. By letter dated December 29, 2016, Petitioner's counsel requested to take the deposition of Dr. Willis. Thereafter the deposition of Dr. Willis was coordinated with all counsel, and Petitioner's counsel issued a Notice of Taking Deposition Duces Tecum of Dr. Willis on January 31, 2017, and again on March 15, 2017. There is no indication that the matter of payment for Dr. Willis's time for his deposition was broached by counsel for Respondent.

29. After the deposition went forward as noticed on March 16, 2017, Dr. Willis sent Petitioner's counsel his invoice for his time for his deposition in the amount of \$500.00. Having received no payment from Petitioner's counsel, Dr. Willis subsequently reissued his \$500 invoice to Petitioner's counsel on June 15, 2017; July 26, 2017; and November 3, 2017. Counsel for Respondent also resubmitted Dr. Willis's \$500 invoice to counsel for Petitioner on November 15, 2017, and December 1, 2017.

30. There is no evidence of record, or allegation in Respondent's Motion to Compel Payment, that there was any advance agreement between Petitioner and Respondent for the payment of Dr. Willis's invoice. It also appears that there was ample time for such agreement to be reached from the time Dr. Willis was first noticed for deposition, and when his deposition was actually taken.

#### CONCLUSIONS OF LAW

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

32. The Florida Birth-Related Neurological Injury Compensation Plan (Plan) was established by the legislature "for the purpose of providing compensation, irrespective of fault,

for birth-related neurological injury claims" relating to births occurring on or after January 1, 1989. § 766.301(1), Fla. Stat.

33. The injured "infant, his personal representatives, parents, dependents and next of kin" may seek compensation under the Plan by filing a claim for compensation with DOAH within five (5) years of the infant's birth. §§ 766.302(3), 766.303(2), 766.305(1), and 766.313, Fla. Stat. NICA, which administers the Plan, has "forty-five (45) days from the date of service of a complete claim . . . in which to file a response to the Petition and to submit relevant information relating to the issue of whether the injury is a birth-related neurological injury." § 766.305(3), Fla. Stat.

34. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, it may award compensation to the Claimant, provided that the award is approved by the ALJ to which the claim has been assigned. § 766.305(6), Fla. Stat. The ALJ has exclusive jurisdiction to determine whether a claim filed under the Plan is compensable. § 766.304, Fla. Stat.

35. In discharging this responsibility, the ALJ must make the following determinations based upon the available evidence:

- Whether the injury claimed is a birth-related neurological injury. If the Claimant has demonstrated, to the satisfaction of the ALJ, 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 § 766.302(2).

- 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 mid-wife 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.
- Whether, if raised by the Claimant or other party, the factual determinations regarding the notice requirements in § 766.316 are satisfied. The ALJ has the exclusive jurisdiction to make these factual determinations.

§ 766.309(1), Fla. Stat.

36. The only issue to be determined at the final hearing was whether notice was provided by OHI and Dr. Eason, or whether the requirement to provide notice was excused, pursuant to section 766.316, which provides:

Notice to obstetrical patients of participation in the plan.--Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients as to the limited no-fault

alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when notice is not practicable.

37. Section 766.309(1)(d) provides in relevant part:

(1) The administrative law judge shall make the following determinations based upon all available evidence:

\* \* \*

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

38. Petitioner contends that OHI did not give notice pursuant to section 766.316. Intervenor, OHI, contends that it provided sufficient notice pursuant to section 766.316. Intervenor, Dr. Eason, contends that the requirement to provide notice was excused due to the emergency medical condition exception. As the proponents of the proposition that appropriate notice was given or that notice was not required,



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

39. Although Ms. Woolley did not independently remember her encounter with Ms. Johnson on May 11, 2014, she follows her normal routine and practice when registering obstetrical patients, which includes giving the NICA brochure to the patient and having the patient sign the acknowledgment form. "Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove the conduct of the organization on a particular occasion was in conformity with routine practice." § 90.406, Fla. Stat.; see also Tabb, 880 So. 2d at 1259. Ms. Woolley's Account Notes of May 11, 2014, further corroborate the fact that Ms. Johnson was provided with a NICA brochure during that visit and that Ms. Johnson signed the acknowledgment form.

40. Although Petitioner denies having been given a NICA brochure at any time, her signature on the NICA acknowledgment form dated May 11, 2014, raises the statutory rebuttable presumption provided by section 766.316 that she not only received the NICA brochure provided to her on that date, but also that the notice requirements of section 766.316 were met by OHI. Based upon the totality of the evidence admitted, the

undersigned finds by a preponderance of the evidence that Petitioner has not rebutted the statutory presumption.

41. In Weeks v. Florida Birth-Related Neurological Injury Compensation Association, 977 So. 2d 616, 618-619 (Fla. 5th DCA 2008), the court stated:

[T]he formation of the provider-obstetrical patient relationship is what triggers the obligation to furnish the notice. The determination of when this relationship commences is a question of fact. Once the relationship commences, because [section 766.316] is silent on the time period within which notice must be furnished, under well-established principles of statutory construction, the law implies that notice must be given within a reasonable time." Burnsed v. Seaboard Coastline R. Co., 290 So. 2d 13, 19 (Fla. 1974); Concerned Citizens of Putnam County v. St. Johns River Water Mgmt. Dist., 622 So. 2d 520, 523 (Fla. 5th DCA 1993). The determination depends on the circumstances, but a central consideration should be whether the patient received the notice in sufficient time to make a meaningful choice of whether to select another provider prior to delivery, which is the primary purpose of the notice requirement.

42. In this case, Ms. Johnson received notice of OHI's participation in NICA nearly three months prior to her delivery, which provided her with more than sufficient time to select a different hospital prior to delivery, had she wished to do so.

43. The signature of Ms. Johnson on the form acknowledging receipt of the NICA brochure raises a rebuttable presumption

that the notice requirements of NICA have been met. See  
§ 766.316, Fla. Stat.

44. In addition to the presumption, the facts as found herein support the conclusion that Ms. Johnson was appropriately provided predelivery notice of NICA participation by OHI. As such, Petitioner did not overcome the rebuttable presumption in favor of OHI that the NICA notice requirements were met.

45. As to Dr. Eason, the unrefuted evidence supports a finding that providing notice of his participation in NICA was not practicable during his only encounter with Ms. Johnson on August 5, 2014, or any time prior, as Ms. Johnson presented with a clear emergency medical condition, a placental abruption resulting in the continuous loss of oxygen to the fetus. The clear emergency resulted in inadequate time to transfer the patient to another facility prior to delivery, as severe harm or death to Ms. Johnson and her fetus would have resulted had a transfer to another facility been attempted.

46. While chapter 766 does not define "emergency medical condition," section 395.002(8)(b) defines "emergency medical condition" with respect to a pregnant woman as follows:

1. That there is inadequate time to effect safe transfer to another hospital prior to delivery;
  2. That a transfer may pose a threat to the health and safety of the patient or fetus;
- or

3. That there is evidence of the onset and persistence of uterine contractions or rupture of the membranes.

47. Dr. Eason did not provide care to Ms. Johnson during her May 11, 2014, visit to OHI, and he did not establish a physician-patient relationship with Ms. Johnson until he first came in contact with her on August 5, 2014, less than 32 minutes prior to the emergent delivery of Rhy'Lee Wilson. During these brief minutes, Ms. Johnson presented with a statutorily defined "emergency medical condition." Delivery was imminent and necessary to prevent the death of the fetus in utero and to prevent severe injury to Ms. Johnson. Ms. Johnson could not have been safely transferred to another hospital for delivery by a new obstetrician.

48. In this case, the evidence proved that Dr. Eason had not established a physician-patient relationship with Ms. Johnson until Ms. Johnson presented with an emergency medical condition on August 5, 2015. Thus, Dr. Eason was excused from providing notice of his NICA participation.

49. Finally, with regard to the payment of Dr. Willis's invoice for time spent giving a deposition, Florida Rule of Civil Procedure 1.390 provides in pertinent part:

(c) Fee. An expert or skilled witness whose deposition is taken shall be allowed a witness fee in such reasonable amount as the court may determine. The court shall also determine a reasonable time within which

payment must be made, if the deponent and party cannot agree. All parties and the deponent shall be served with notice of any hearing to determine the fee. Any reasonable fee paid to an expert or skilled witness may be taxed as costs.

50. While the above provision authorizes the payment of an expert witness fee for deposition, it also implicitly recognizes that there must be coordination between the parties with respect to arrangements for the payment of the fee. There is no indication that such discussions took place in this instance.

51. Respondent cites a DOAH Order entered in Jimenez and Franco v. Florida Birth-Related Neurological Injury Compensation Association, et al., DOAH Case No. 16-3531N, in support of its motion to compel payment. However, in ordering that the requesting party must pay the deposition fee of an expert (Dr. Willis), ALJ Todd Resavage was informed by Respondent in that case that:

During the scheduling process, and prior to taking the deposition, the undersigned counsel's office specifically notified all other counsel, and in particular counsel for the Petitioners, that Petitioners' counsel office needed to contact the doctors regarding their fees for deposition [see attached email dated April 4, 2017, attached hereto as Exhibit "1"]. Thereafter, a second email was sent to Petitioners' counsel on April 17th, specifically referencing that Dr. Willis's fees for services would be \$500.00 an hour, and as a courtesy, he would not require payment up front [see attached email dated April 17, attached hereto as Exhibit "2"]. Following

that notification, Counsel for the Petitioners sent a confirming email on April 18th, and served a Notice of Deposition [see attached email dated April 18th, attached hereto as Composite Exhibit "3"].<sup>[2/]</sup>

(Motion to Compel Petitioners' Counsel to Pay Dr. Willis for Deposition, para. 4, November 10, 2017).

52. Thus, in the Jimenez case, unlike the matter sub judice, Petitioners were notified in advance that they would be responsible for the payment of Dr. Willis's deposition fee, and were informed of his hourly rate for giving a deposition. Having been put on notice that Petitioners would be responsible for Dr. Willis's deposition fee, and standing silent as to their responsibility for, and the amount of the fee, Petitioners became obliged to pay the fee when they went forward and took the deposition. Those circumstances are not present in this case.

#### ORDER

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

1. The claim for compensation filed by Petitioner, as parent and natural guardian of Rhy'Lee Wilson, a minor, is compensable and is APPROVED.<sup>3/</sup>

2. Intervenor, OHI, complied with the statutory Notice requirements of the NICA plan pursuant to section 766.316, Florida Statutes.


3. Intervenor, Dr. Eason, was excused from the statutory Notice requirements of the NICA Plan pursuant to section 766.316, Florida Statutes, due to the emergency medical condition exception.

4. Respondent's Motion to Compel Petitioner's Counsel to Pay Dr. Willis for Deposition is DENIED.

5. Within thirty (30) days of the date of this Order, Petitioner shall inform the undersigned in writing whether Petitioner accepts an award of NICA benefits.

6. If Petitioner accepts an award for NICA benefits, and absent a stipulation of the parties, a separate hearing will be scheduled to determine the amount and terms of the award pursuant to section 766.31, Florida Statutes.

DONE AND ORDERED this 25th day of April, 2018, in  
Tallahassee, Leon County, Florida.



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W. DAVID WATKINS  
Administrative Law Judge  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 25th day of April, 2018.

ENDNOTES

<sup>1/</sup> Statutory references herein are to the 2017 version of the Florida Statutes.

<sup>2/</sup> In its Response to the Motion to Compel, Petitioners did not deny that they were informed that they would be responsible for payment of Dr. Willis's fee, should they elect to go forward with his deposition.

<sup>3/</sup> Compensability of the claim was previously found and determined by this Court's Partial Summary Final Order of June 30, 2017.



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NOTICE OF RIGHT TO JUDICIAL REVIEW

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