

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

NEIL HAYS AND COURTNEY HAYS, as  
CO-PERSONAL REPRESENTATIVES of  
the Estate of CIAN HAYS, their  
deceased minor son,

Petitioners,

vs.

Case No. 17-6497N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

HOLMES REGIONAL MEDICAL CENTER,  
INC.; MARK S. MCTAMMANY, M.D.;  
AND MEDICAL ASSOCIATES OF  
BREVARD, LLC,

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 October 18, 2018,  
and January 11, 2019, via video teleconference with sites in  
Sebastian and Tallahassee, Florida.

APPEARANCES

For Petitioners: Rosalyn S. Baker-Barnes, Esquire  
Jordan A. Dulcie, Esquire  
Searcy, Denney, Scarola, Barnhart and  
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For Respondent: Leanne B. Wagner, Esquire  
Frank, Weinberg and Black, P.L.  
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For Intervenor, Holmes Regional Medical Center, Inc.:

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Stacey J. Carlisle, Esquire  
McEwan, Martinez, Dukes & Hall, P.A.  
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For Intervenors, Mark S. McTammany, M.D.; and Medical  
Associates of Brevard, LLC:

Richards H. Ford, Esquire  
Patrick L. Mixson, Esquire  
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STATEMENT OF THE ISSUES

For purposes of determining compensability, the issues are whether the injury claimed is a birth-related neurological injury and whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital; and

Whether notice was accorded the patient, as contemplated by section 766.316, Florida Statutes (2018).

PRELIMINARY STATEMENT

On November 29, 2017, Petitioners, Neil Hays and Courtney Hays, as Co-Personal Representatives of the Estate of Cian Hays (Cian), their deceased minor son, filed a Petition for Determination of Availability of NICA Coverage (Petition) pursuant to section 766.301, et. seq., Florida Statutes. The Petition named Mark S. McTammany, M.D. (Dr. McTammany), as a physician providing obstetric services at the birth of Cian, at Holmes Regional Medical Center, Inc. (HRMC). On December 6, 2017, DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the Petition. Dr. McTammany, his associated medical group, Medical Associates of Brevard, LLC (Medical Associates), and HRMC were likewise served with a copy of the Petition. On January 30, 2018, HRMC filed a Motion to Intervene, which was granted by Order dated February 9, 2018. On February 6, 2018, Dr. McTammany and Medical Associates filed a Motion to Intervene, which was granted by Order dated February 21, 2018.

On March 22, 2018, a Notice of Hearing by Video Teleconference set a final hearing for this matter on October 18, 2018. On March 23, 2018, NICA filed a Motion for Partial Summary Judgment on the issue of compensability.

Through its Motion, NICA requested entry of a partial summary final order determining the claim is compensable under the Neurological Injury Compensation Association Plan (NICA Plan), as a matter of law. On April 6, 2018, Petitioners filed a Response, requesting the ALJ defer ruling or deny the Motion without prejudice, to allow time for discovery. On May 15, 2018, the undersigned issued an Order denying the Motion, without prejudice to be re-filed following the conclusion of discovery.

On September 24, 2018, NICA filed a Renewed Motion for Partial Summary Final Order, on the issue of compensability. On September 27, 2018, Petitioners filed a Response to Respondent's Renewed Motion (Renewed Motion), indicating no objection "only as it relates to whether Cian Hays suffered a birth-related neurological injury." On October 11, 2018, the parties filed a Joint Pre-hearing Stipulation, stipulating that "Cian Hays suffered a birth-related neurological injury."

The final hearing took place on October 18, 2018, but did not conclude. On November 16, 2018, a Notice of Hearing by Video Teleconference set a continuation of the final hearing on January 11, 2019. The continuation of the final hearing took place on January 11, 2019, and concluded on that day.

At the final hearing, Petitioners called Courtney Hays and Neil Hays as live witnesses, and presented excerpts of the

videotaped depositions of Dr. McTammany; Mary Hill; Rhea Delyea, RN; Heather Llorente, RN; Megan McClain, RN; Verla McFadden, RN; Colleen Shear, RN; and Diana Grazier, RN. Intervenor, HRMC, called Ms. Grazier as a live witness. Intervenors, Dr. McTammany and Medical Associates, called Dr. McTammany and Ms. Hill as live witnesses. Petitioners' Exhibits P-1 through P-5 were received in evidence. Intervenors, Dr. McTammany and Medical Associates' Exhibits M-1, M-7, M-22, and M-23 were received in evidence. Intervenor, HRMC's Exhibits 1 and 2 were received in evidence. NICA did not present witnesses or offer any exhibits.

On February 5, 2019, the official Transcript (Volumes I through III) of the final hearing was filed. Thereafter, all parties, with the exception of NICA, filed Proposed Final Orders, each of which has been carefully considered in the preparation of this Final Order.

All references to Florida Statutes are to the 2018 version unless indicated otherwise.

#### FINDINGS OF FACT

Based upon the parties' stipulations, 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. Neil Hays and Courtney Hays are the natural parents of Cian Hays, deceased.

2. Cian was born at HRMC, a licensed Florida hospital, in Melbourne, Florida, on September 25, 2015.

3. The physician providing obstetrical services at Cian's birth was Mark S. McTammany, M.D., a licensed Florida physician in the active practice of obstetrics and gynecology. At all times material, Dr. McTammany was a "participating physician" as defined in section 766.302(7). Under the circumstances described in greater detail below, Dr. McTammany provided obstetrical services to Mrs. Hays in the course of labor, delivery, and resuscitation in the immediately post-delivery period of Cian's birth.

4. The circumstances of the labor, delivery, and birth of Cian are reflected in the medical records of HRMC submitted with the Petition, and admitted into evidence as Petitioners' Exhibit P-5.

#### Compensability of the Claim

5. NICA retained Donald Willis, M.D. (Dr. Willis), as its medical expert specializing in maternal-fetal medicine and pediatric neurology. Upon examination of the pertinent medical records, Dr. Willis opined:

In summary, uterine rupture occurred during an attempted vaginal birth after two prior Cesarean section deliveries. The uterine

rupture caused placental abruption. The baby was depressed at birth and never stabilized. Neurologic status continued to deteriorate with MRI and EEG's consistent with HIE. Life support was withdrawn due to cerebral silence by EEG. Death occurred 24 days after birth. Autopsy identified both significant injury to the brain and spinal cord related to oxygen deprivation.

Dr. Willis's medical report is attached to his affidavit. His Affidavit reflects his ultimate opinion that:

There was an obstetrical event that resulted in loss of oxygen to the baby's brain and spinal cord during labor, delivery and continuing into the immediate post delivery period. The oxygen deprivation resulted in severe brain and spinal cord injury, resulting in death.

6. No expert opinions were filed that are contrary to the opinion of Dr. Willis. Additionally, no objection to his testimony was filed by any party; rather, the parties stipulated that Cian suffered a birth-related neurological injury. The opinion of Dr. Willis that Cian did suffer an obstetrical event that resulted in loss of oxygen to the baby's brain and spinal cord during labor, delivery, and continuing into the immediate post-delivery period, which resulted in severe brain and spinal cord injury, and ultimately in death, is credited.

Dr. McTammany and Medical Associates' Compliance with NICA Notice Requirements

7. Prior to Cian's birth, Mrs. Hays received prenatal care from Dr. McTammany, beginning on August 4, 2015. Dr. McTammany

had staff privileges at HRMC, and it is undisputed that HRMC is the only hospital at which Dr. McTammany delivered babies in 2015.

8. The professional relationship between Dr. McTammany and Mrs. Hays, relating to this pregnancy, began when Mrs. Hays presented to Dr. McTammany's office for her first obstetrical visit on August 4, 2015. Mrs. Hays was at that time 32 weeks pregnant.

9. Mrs. Hays testified that she recalled this first visit with Dr. McTammany. She described the office building, the waiting area, and examination rooms, and she recalled the events that occurred at the first visit, including being taken back by the intake nurse, being weighed, giving a urine sample, and being taken to an examination room. She recalled discussing her birth plan with Dr. McTammany, which included Dr. McTammany's assurances that he could safely perform a vaginal delivery after caesarian section (VBAC) after Mrs. Hays' two previous caesarean sections. Mrs. Hays testified that she was advised at this visit that Dr. McTammany only delivered at HRMC, and that while she did not recall pre-registering at the hospital, it was her understanding that Dr. McTammany's office would schedule her delivery at HRMC. Mrs. Hays unequivocally testified that she was not given any notice of Dr. McTammany's participation in



NICA, and that she did not sign any form, nor did she receive any brochure regarding NICA.

10. Mary Hill (Ms. Hill) was a medical assistant in Dr. McTammany's office on August 4, 2015. When a patient such as Mrs. Hays presented for their first obstetrical visit to the practice, Ms. Hill was responsible for providing the patient with the NICA notice form and brochure, ensuring that the patient signed the form, witnessing the form with her signature as the person in the practice that provided notice and placing the form into a box at the office to be scanned into the patient's medical chart. Ms. Hill also testified that the electronic medical record system allowed her to check a box in the patient's electronic chart confirming that NICA notice was provided, that automatically populated into the medical record.

11. Ms. Hill had no recollection of Mrs. Hays, or any of the details of her interaction with her. Ms. Hill testified that based upon her review of the medical chart, she was the medical assistant responsible for providing NICA notice to Mrs. Hays, although she has no memory of doing so.

12. Although Ms. Hill testified that it was her custom and practice to provide the patient with the form to sign along with the brochure, leave the room, and then return to witness the document, and that she would have followed this practice with Mrs. Hays, Dr. McTammany has not produced any signed, witnessed

NICA notice form, and no such form is scanned into Mrs. Hays' medical chart. Further, although Ms. Hill testified that she would have checked the NICA box in Mrs. Hays' electronic medical record, there are no references to NICA in Mrs. Hays' medical chart, and no documentation confirming that notice was provided.

13. Ms. Hill admitted that the medical records did confirm that in other areas of Mrs. Hays' chart on that visit, where she checked an automated box in the electronic record, such as references to fetal movement, vitamins, and patient instructions, that information automatically populated and appeared in Mrs. Hays' final written record. Importantly, nothing relating to NICA auto-populated in Mrs. Hays' electronic record.

14. Dr. McTammany admits that he personally did not provide NICA notice to Mrs. Hays at any time, but testified that his office policy required his staff members to ensure that the signed, witnessed NICA notice form was scanned into the patient's chart. Although it would have been practicable to do so either through a narrative entry or checking the preset NICA checkbox in the electronic medical chart, neither Dr. McTammany nor Ms. Hill made any entries in Mrs. Hays' medical chart confirming that NICA notice was provided.

15. On direct examination, Dr. McTammany testified that he was unsure whether the NICA checkbox translated to the patient's

written medical record. However, on cross-examination, Dr. McTammany admitted to the following:

Q: You mentioned in some of your earlier testimony about these checkboxes that can be checked regarding the - providing NICA notice to your patients. Do you remember that?

A: Yes.

Q: Is there anything preventing you or anyone in your staff from entering verbal sentences or typing in sentences, "I provided NICA brochure or consent to the patient?"

A: Nothing preventing that, but it usually would be the checkbox that would translate to the written document.

Q: Again, there's nothing in your record that reflects a checkbox that stated you provided NICA notice, isn't that correct?

A: Correct. (T., P.364, L2-16)

16. Notably, although Ms. Hill testified as to her custom and practice of providing NICA notice to every patient, the greater weight of the evidence compels the conclusion that the custom and practice was not followed here, where there is no scanned form, no checked NICA box, and no reference at all in Mrs. Hays' medical chart to NICA. The undersigned further notes Ms. Hill's testimony that she was responsible for 55-60 patients per day, five days per week, and had no specific recall of Mrs. Hays or any interaction with her. Finally, when asked whether she could provide any explanation as to why, if in fact

the custom and practice was followed, no NICA notice form was scanned into Mr. Hays' chart, Ms. Hill could not provide any explanation.

17. Conversely, the undersigned finds Mrs. Hays' testimony to be credible and consistent with the medical records of Dr. McTammany, which do not contain a NICA notice form or any reference to NICA at all. Mrs. Hays did recall her first visit, was able to give details about the office, as well as her interaction with both the nurse and Dr. McTammany. Accordingly, the undersigned finds that Dr. McTammany did not provide NICA notice to Mrs. Hays.

#### HRMC's Compliance with NICA Notice Requirements

##### The August 30, 2015 Visit

18. On August 30, 2015, Mrs. Hays presented to HRMC with concerns that she might be in labor. Her medical record from this visit reflects that she was 36 weeks pregnant, and reporting contractions and 10/10 pain. After a brief (non-physician) evaluation in the HRMC emergency room, Mrs. Hays was transferred to the labor and delivery unit, where she was seen and treated in the obstetrical outpatient unit. The Obstetrical Outpatient Evaluation Record for this visit reflects "labor" as the stated reason for the visit, and the admitting diagnosis is "RO (rule out) labor." Mrs. Hays was required to register before receiving treatment, and in fact signed consent to

treatment paperwork, advance directive paperwork, provided demographical information, insurance information, and her medical history. Mrs. Hays advised the staff that her obstetrician was Dr. McTammany and that she intended to deliver her baby at HRMC, as that was the only hospital at which he delivered babies.

19. During this visit Mrs. Hays was taken to an examination room and connected to monitors to evaluate both her contractions and the baby's vital signs. She was documented to have mild contractions, she was administered Demerol for pain, phenergan for nausea, and IV fluids for hydration. She was examined by an on-call obstetrician, Dr. Duke, who determined that she was not in labor. The undersigned finds that the August 30, 2015, visit was related to Mrs. Hays' pregnancy, and as such, the professional relationship between HRMC and Mrs. Hays, relating to this pregnancy, began at that time.

20. Following a determination that she was not in labor, Mrs. Hays was discharged with instructions to return to HRMC if her contraction pattern became more frequent, or if her water broke. The NICA notice forms and brochures are kept on the labor and delivery floor where Mrs. Hays received treatment. It is undisputed, and the undersigned finds, that Mrs. Hays was not provided with NICA notice, as contemplated by section 766.316,

during the visit of August 30, 2015, although it would have been practicable to do so.

The September 6, 2015 Visit

21. On September 6, 2015, Mrs. Hays presented directly to HRMC's Labor & Delivery unit, reporting nausea and vomiting, and concerns that she may be in labor. Mrs. Hays was again seen and treated in the obstetrical outpatient unit. She was required to register before receiving treatment, and in fact signed consent to treatment paperwork, advance directive paperwork, and provided demographical information, insurance information, and her medical history. Mrs. Hays again advised the staff that her obstetrician was Dr. McTammany and that she intended to deliver her baby at HRMC, as that was the only hospital at which he delivered babies. Mrs. Hays was noted to be 37 weeks pregnant at this time.

22. Mrs. Hays was taken to an examination room where she was connected to monitors to evaluate both her contractions and the baby's vital signs. She was documented to have irregular contractions. Dr. McTammany was contacted by the nursing staff, and shortly thereafter, arrived at HRMC and personally examined Mrs. Hays in the labor and delivery department. The undersigned finds that on September 6, 2015, Mrs. Hays again had a professional relationship with HRMC relating to this pregnancy.

23. Following a determination that she was not in labor, Mrs. Hays was again discharged with instructions to return to HRMC if her contraction pattern became more frequent or if her water broke. It is undisputed, and the undersigned finds, that Mrs. Hays was not provided with any form of NICA notice, as required by section 766.316, during the visit of September 6, 2015, although it would have been practicable to do so.

The September 24, 2015 Visit

24. On September 24, 2015, at 1:14 p.m., Dr. McTammany submitted electronic Orders to HRMC, scheduling Mrs. Hays for a cesarean section at HRMC on September 28, 2015, if she did not deliver sooner.

25. On September 24, 2015, at approximately 9:31 p.m., Mrs. Hays again presented directly to HRMC's labor and delivery unit, with concerns that she might be in labor. She advised the nurse that she was having contractions, and the admission record documents her as being 40.1 weeks pregnant. Mrs. Hays was again seen and treated in the obstetrical outpatient unit. She was required to register before receiving treatment, and in fact signed consent to treatment paperwork, advance directive paperwork, and provided demographical information, insurance information, and her medical history. Mrs. Hays again advised the staff that her obstetrician was Dr. McTammany and that she

intended to deliver her baby at HRMC, as that was the only hospital at which he delivered babies.

26. Mrs. Hays was taken to an examination room where she was connected to monitors to evaluate both her contractions and the baby's vital signs. She was documented to have mild to moderate contractions, every 9.5 minutes, and noted to be in severe pain. Her cervix was closed and her water had not yet broken. Dr. McTammany was contacted by telephone and advised of Mrs. Hays' status, whereupon he gave orders for her treatment.

27. Following a determination that she was not in labor, Mrs. Hays was discharged at approximately 1:00 a.m. on September 25, 2015, with instructions to return to HRMC when her contractions became stronger or if her water broke. It is undisputed, and the undersigned finds, that Mrs. Hays was not provided with NICA notice, as contemplated by section 766.316, during the visit of September 24, 2015, although it would have been practicable to do so.

28. Mr. and Mrs. Hays returned home in the early morning hours of September 25, 2015, and Mrs. Hays continued to have painful contractions all night that were increasing in strength and frequency, preventing Mrs. Hays from sleeping during the overnight hours.



The September 25, 2015 Visit

29. At approximately 9:30 a.m., on September 25, 2015, Mrs. Hays presented to Dr. McTammany's office for a scheduled obstetric appointment. She was examined by Dr. McTammany and determined to be three centimeters dilated and was having persistent contractions. Dr. McTammany determined that Mrs. Hays was in labor and instructed Mrs. Hays to return to HRMC to be admitted for delivery.

30. Mrs. Hays presented to HRMC on September 25, 2015, at approximately 10:19 a.m. At approximately 11:00 a.m., she was examined by Diana Grazier, RN, who determined that Mrs. Hays was having contractions every seven minutes. Nurse Grazier noted that the contractions were moderate in strength, that Mrs. Hays was complaining of 7/10 pain, and that according to Dr. McTammany, Mrs. Hays was in labor. It was at this time that Nurse Grazier provided Mrs. Hays with NICA notice, and Mrs. Hays did in fact sign a NICA notice form, witnessed by Nurse Grazier.

31. At approximately 1:30 p.m., Mrs. Hays was administered an epidural and was not permitted to get out of her labor and delivery bed from that point forward. At approximately 4:00 p.m., Dr. McTammany ruptured Mrs. Hays' membranes.

32. The patient chart notes that Cian was delivered by Dr. McTammany via C-section on September 25, 2015, at approximately 11:55 p.m.

33. HRMC contends that based on the medical records and the testimony of HRMC employees, NICA notice was provided to Mrs. Hays on September 25, 2015, at approximately 11:00 a.m.; and further contends that although Mrs. Hays had the onset and persistence of contractions, and was three centimeters dilated, she did not deliver Cian until 11:55 p.m. HRMC contends that during that 12-hour period, Mrs. Hays could have requested to be disconnected from monitors, refused the epidural she received around 1:30 p.m., and selected a non-NICA participating doctor and hospital. Finally, HRMC contends that its policy in effect in 2015 was to provide NICA notice only at the time the obstetric patient is admitted to the hospital for delivery.

34. Mrs. Hays does not deny that her signature appears on the September 25, 2015, NICA Notice form, however, she contends that she signed the form while she was in labor, having persistent contractions and in pain, and had been in such condition for the entire night before her admission. She contends that NICA notice was not provided at a reasonable time prior to delivery, when she could act on the information and make an informed choice.

35. Based upon the medical records and testimony, the undersigned finds that Mrs. Hays was in labor and had the onset and persistence of contractions at the time HRMC provided her with NICA notice.

CONCLUSIONS OF LAW

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

37. The Plan was established by the Legislature "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims" relating to births occurring on or after January 1, 1989. § 766.303(1), Fla. Stat.

38. 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 years of the infant's birth. §§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat. NICA, which administers the Plan, has "45 days from the date of service of a complete claim . . . in which to file a response to the Petition and to submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury." § 766.305(3), Fla. Stat.

39. If NICA determines the injury alleged in a claim is a compensable birth-related neurological injury, it may award compensation to the claimant, provided the award is approved by the ALJ to whom the claim is 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.

40. 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 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).

Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital.

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

§ 766.309(1), Fla. Stat.

41. An award may be sustained only if the ALJ concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth." § 766.31(1), Fla. Stat. The term "birth-related neurological injury" is defined as:

injury to the brain or spinal cord of a live infant . . . 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.

42. The evidence, which is not refuted, established that Cian sustained an injury to the brain and spinal cord caused by oxygen deprivation occurring during the course of labor and delivery, and continuing into the immediate postdelivery period, which resulted in death. Thus, Cian sustained a birth-related neurological injury and his estate is eligible for benefits under the Plan.

43. Petitioners have raised the issue of whether notice was provided by the Intervenors pursuant to section 766.316, which provides:

Each hospital with a participating physician on its staff and each participating physician . . . 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.

44. Petitioners contend Intervenor's did not give notice pursuant to section 766.316. In turn, Intervenor's assert they provided sufficient notice. Respondent did not take a position on the notice issue. As the proponents of the proposition that appropriate notice was given, the burden on the issue of notice is upon the Intervenor's. Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass'n., 880 So. 2d 1253, 1257 (Fla. 1st DCA 2004).

45. Here, it is Dr. McTammany's burden to prove that he gave NICA notice to Mrs. Hays. Dr. McTammany urges the undersigned to rely on Ms. Hill's testimony, that notice was provided to Mrs. Hays based upon Ms. Hill's custom and practice.

46. In Jackson v. Florida Birth-Related Neurological Injury Compensation Association, 932 So. 2d 1125 (Fla. 5th DCA 2006), the court considered "custom and practice" evidence, along with other corroborating evidence, to support a finding that NICA notice was provided. In Jackson, the delivering obstetrician was a member of a large group of obstetricians that practiced in the Orlando area. It was undisputed that Mrs. Jackson received and signed a NICA consent form, which was also signed and witnessed by a nurse affiliated with the practice. However, the notice form was left blank as to which

doctors in the practice were participants in the plan. Therefore, the court found that the Intervenors were not entitled to a rebuttable presumption, and the court was left to resolve the issue of fact.

47. Because of the number of physicians in the practice, and the uncertainty as to which physician would ultimately deliver her baby, Mrs. Jackson argued that the notice was insufficient, because it failed to identify which physicians in the group were NICA participants, and which physicians in the group were not. The Intervenors argued and produced evidence that all of the physicians in the practice were NICA participants. Nurse Posey, the nurse responsible for providing NICA notice for the practice, testified that in addition to providing written notice and the NICA brochure, and documenting the interaction in the patient's medical chart, it was also her custom and practice to tell the patient that all physicians in the practice were participants in the NICA plan.

48. At the final hearing in Jackson, Intervenors presented evidence, including the NICA notice form signed by both Mrs. Jackson and the nurse, and the documentation of the interaction in the medical record--contemporaneous notes made in the prenatal flow sheets. Based thereon, it was determined that:

Here, giving due consideration to the proof, it must be resolved that the more persuasive proof supports the conclusion that, more likely than not, Nurse Posey, consistent with her routine, discussed the NICA program with Mrs. Jackson on her initial visit, and informed Mrs. Jackson that the physicians associated with PAF's obstetrical program were participating physicians in the Plan. In so concluding, it is noted that, but for the NICA program, Mrs. Jackson acknowledged Nurse Posey otherwise followed her routine; that it is unlikely, given such consistency, Nurse Posey would not have also discussed the NICA program; that Nurse Posey, as was her routine, co-signed each of the forms she discussed with Mrs. Jackson, including the Notice to Obstetric Patient; that Nurse Posey, as was her routine, documented her activity on the prenatal flow sheet; and that Mrs. Jackson evidenced little recall of the documents she signed or the discussions she had with Nurse Posey. Finally, Nurse Posey's testimony was logical, consistent, and credible, whereas Mrs. Jackson's testimony was often equivocal.

Id. at 1129.

49. The Jackson Court considered the custom and practice evidence relating to who was a participating physician, together with all of the other evidence in the case. Unlike the Intervenor in Jackson, Dr. McTammany has not produced any NICA notice form, although Ms. Hill claims it was her custom, practice, and office requirement to obtain a signed form from every patient. Further, Dr. McTammany has not produced any record from Mrs. Hays' medical chart at Medical Associates, documenting any discussion of NICA or documenting the fact that



NICA notice was provided, although Dr. McTammany and Medical Associates admit that they could have done so either by checking a box, or manually making an entry in the chart. Although Dr. McTammany contends that it is an office requirement to electronically scan all signed NICA forms into the patient's chart, no NICA form was ever scanned into Mrs. Hays' electronic medical record.

50. As to the NICA checkbox referenced above, Mrs. Hill testified at the final hearing that she checked the box confirming that she had given NICA notice. At her deposition, however, she was unsure, and testified that she could not remember whether she checked the NICA box in Mrs. Hays' electronic medical record.

51. Here, Mrs. Hill had no recall at all of Mrs. Hays, or any particular recollection of her interaction with her. Her testimony relating to the NICA checkbox was equivocal. Further, unlike the Jackson circumstances, there is nothing in the record to support Ms. Hill's testimony that she followed her custom and practice here. The medical chart does not contain any notice form, nor does it contain any documentation, electronic or otherwise, confirming that NICA notice was provided.

52. At hearing, Dr. McTammany moved Exhibit M-7 into evidence, a letter from NICA confirming that he was a participating physician in NICA in 2015. The letter advised

Dr. McTammany that he was required to provide notice of his participation in NICA to all obstetrical patients. The letter also strongly recommended that Dr. McTammany document in the medical chart that notice was provided and identify the staff member who provided the notice. None of these recommendations were followed in this case. Neither Dr. McTammany nor Ms. Hill provided any explanation as to why, if in fact the custom and practice was followed with Mrs. Hays, no signed NICA notice form could be located.

53. It is Dr. McTammany's burden to establish that NICA notice was provided to Mrs. Hays. The greater weight of the evidence, in particular, the absence of a signed NICA notice form coupled with a lack of specific recall by Mrs. Hill as to her interaction with Mrs. Hays, undermines any presumption that might have attached to the usual custom and practice of Dr. McTammany and Medical Associates with regard to providing NICA notice. Accordingly, the undersigned finds that Dr. McTammany and Medical Associates did not provide NICA notice as required by section 766.316.

54. The Florida Supreme Court has made it clear that section 766.316 requires both participating physicians and hospitals with participating physicians on staff to provide obstetrical patients with notice of their rights and limitations under the plan. Fla. Birth-Related Neurological Injury Comp.

Ass'n v. Dep't of Admin. Hearings, 29 So. 3d 992, 998 (Fla. 2010).

55. 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 the statute is silent on the time period within which notice must be furnished, under well-established principles of statutory construction, the law implies that the 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). This determination depends upon 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 a primary purpose of the notice requirement. Turner v. Hubrich, 656 So. 2d 970, 971 (Fla. 5th DCA 1995).

56. HRMC asserts that Mrs. Hays was provided NICA notice upon her presentation to HRMC on September 25, 2015. However, at the time she was given the notice, she was in labor. By definition, she had an emergency medical condition.

§ 766.302(8)(b)3., Fla. Stat. It was too late at that time for HRMC to give notice pursuant to section 766.316 when it had an

opportunity prior to Mrs. Hays' admission on September 25, 2015, to provide notice.

57. The court in Weeks held:

In summary, we hold that the NICA notice must be given within a reasonable time after the provider-obstetrical patient relationship begins, unless the occasion of the commencement of the relationship involves a patient who presents in an "emergency medical condition," as defined by the statute, or unless the provision of notice is otherwise "not practicable." When the patient first becomes an "obstetrical patient" of the provider and what constitutes a "reasonable time" are issues of fact. As a result, conclusions might vary, even where similar situations are presented. For this reason, a prudent provider should furnish the notice at the first opportunity and err on the side of caution.

Id. at 619-620.

58. At hearing, HRMC contended that it provided notice within a reasonable time before delivery, because Mrs. Hays did not deliver Cian until 12 hours after her admission to the labor and delivery unit. HRMC asserted that although Mrs. Hays was having ongoing and persistent contractions, notice was provided during a "resting period" between contractions. HRMC further contended that during the 12 hours while Mrs. Hays was in active labor, she could have called the 1-800 number regarding NICA, requested to stop her epidural, unhooked herself from the fetal monitor, left the hospital and sought out another provider if

she so chose. Finally, the Intervenor contended that Mrs. Hays was at all times alert, oriented, and capable of making decisions about her health care. Finally, HRMC argues that although Mrs. Hays presented to HRMC on three occasions prior to the date she delivered Cian, no obstetrical patient relationship was established because each presentation was on an outpatient basis only.

59. Florida courts have repeatedly rejected the argument that an expectant mother, in the midst of labor, could somehow make a reasoned decision about whether to select a NICA provider or not. In Northwest Medical Center v. Ortiz, 920 So. 2d 781, 785 (Fla. 4th DCA 2006), the court held that the purpose of the notice is "to give an obstetrical patient an opportunity to make an informed choice between using a health care provider participating in the NICA plan or using a provider who is not a participant and thereby preserving her civil remedies." (quoting Galen of Fla., Inc. v. Braniff, 696 So. 2d 308, 309-10 (Fla. 1997)). The court reasoned that if the purpose of the notice requirement is to give the patient the choice to choose a NICA-protected delivery or not, hospitals should give notice at a time where such choice can still be made. By waiting until an emergency arises, the hospital is depriving the patient of this choice.

60. In rejecting Northwest's argument that notice provided the day of delivery was reasonable, the court stated as follows:

What patient in the midst of labor is going to take the time to call an 800 number to question the hospital's NICA participation?

Id. at 785. The Court rejected Northwest's suggestion that notice provided on the day of delivery was reasonable, emphasizing the purpose of the rule in allowing the patient to make an informed choice at a time when she could act on the information.

61. Consistent with the Court's analysis in Ortiz, the undersigned also rejects HRMC's contention that in the 12 hours before she delivered her son, Mrs. Hays could have requested to stop her epidural (after which she could not walk), unhook herself from the fetal monitors, left the hospital and selected a non-NICA-participating physician to deliver her baby, all while in the midst of labor. At that point, Mrs. Hays was unable to make an informed choice, nor could she act on the information.

62. The hospital's professional relationship with Mrs. Hays, relating to her pregnancy, began when Mrs. Hays presented to HRMC on August 30, 2015, with complaints relating to her pregnancy. She was treated at the hospital for those complaints. See Lamendola v. NICA, Case No. 13-3870N (Fla. DOAH Aug. 13, 2014).

63. As discussed above, it is undisputed that HRMC did not give Mrs. Hays NICA notice on August 30, 2015; September 6, 2015; or September 24, 2015, even though it was practicable to do so. It is also undisputed that when HRMC finally did give Mrs. Hays NICA notice on September 25, 2015, such notice was not sufficient to meet the notice obligation under the statute because it was not given before an emergency medical condition arose. See Weeks, 977 So. 2d at 616 (concluding that notice must be given within a reasonable time after the commencement of the relationship and that the failure to do so is not excused by a subsequent emergency).

64. Based upon the above, it is concluded that HRMC did not provide NICA notice to Mrs. Hays in accordance with section 766.316.

65. HRMC further contends that it should be excused for failing to provide NICA notice because Mrs. Hays' primary objective was to find an obstetrician that would perform a VBAC, because she had had two prior C-sections and desired more children, and therefore, finding a provider that did not have NICA protection was not her concern. For the reasons set forth below, this argument is rejected as legally irrelevant.

66. Section 766.316 requires hospitals and participating physicians to give notice of their participation in NICA as a condition precedent to the providers' invoking NICA as the

patient's exclusive remedy. See Galen of Fla., Inc. v. Braniff, 696 So. 2d 308, 309 (Fla. 1997). Nothing in the statute allows for waiver of this condition precedent based upon the introduction of evidence as to what the patient would have done had she been given proper notice. What a patient would or would not have done is simply not relevant to the issue of whether a hospital met its condition precedent of providing notice in accordance with section 766.316. This tribunal does not have the authority to construe an unambiguous statute in a way that extends its express terms. See, e.g., Fla. Carry, Inc. v. Univ. of N. Fla., 133 So. 3d 966, 971 (Fla. 1st DCA 2013); Jeffrey A. Hunt, D.O., P.A. v. Huppman, 28 So. 3d 989, 992 (Fla. 2d DCA 2010); See also Levine v. Dade Cnty. Sch. Bd., 442 So. 2d 210, 213 (Fla. 1983) (consideration of the efficacy of or need for the notice requirement is a matter wholly within the legislative domain).

67. This conclusion is supported by case law in which similar arguments were rejected. For instance, in Board of Regents v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997), approved sub nom., University Medical Center, Inc. v. Athey, 699 So. 2d 1350 (Fla. 1997), the health care providers argued that they had no opportunity to provide NICA notice pursuant to the Act. They claimed that no "informed choice" by the patients was possible because the patients were Medicaid recipients and there were no



other facilities in the county accepting Medicaid. The First District Court of Appeal found this argument to be meritless. The court determined that accepting the providers' argument would, inter alia, "encourage uncertainty . . . by permitting health care providers to 'ignore the notice requirement and then assert the NICA exclusivity to defeat a civil action.'" Id. at 50.

68. Additionally, in Athey, the court held that "health care providers who have a reasonable opportunity to give notice and fail to give predelivery notice under section 766.316, will lose their NICA exclusivity regardless of whether the circumstances precluded the patient making an effective choice of provider at the time the notice was provided." Id. at 50-51. Finally, the court concluded that "[h]aving failed to take advantage of a reasonable opportunity to provide predelivery notice, a health care provider will not be heard to complain that notice, if given, would have been ineffective." Id. at 51.

69. The undersigned finds the court's decision in Athey to be controlling here. Underlying that case was a claim by the provider that NICA notice was not necessary under the circumstances because the patient was going to deliver at the facility regardless of whether timely NICA notice had been given. As in Athey, accepting HRMC's argument would encourage uncertainty by allowing HRMC to "ignore the notice requirement

and then assert the NICA exclusivity to defeat" this action. Id. at 50. NICA establishes a bright line rule requiring providers to give predelivery notice, except in circumstances not relevant here, in order to claim NICA exclusivity. The undersigned cannot and will not accept HRMC's invitation to create a caveat to that clear legislative mandate.

70. Finally, HRMC contends that it should be excused from giving notice because its internal policy in effect in 2015 was to give NICA notice only when the patient was admitted for delivery. Florida courts have likewise rejected this argument. See Tarpon Springs Hosp. Found. v. Anderson, 34 So. 3d 742 (Fla. 2d DCA 2010) (rejecting the hospital's lengthy explanation of its policy against providing NICA notice at registration, and affirming that notice must be provided at the first opportunity). Again, the statute does not permit hospitals to create a caveat simply by establishing a policy that violates the notice requirement, and the undersigned declines to do so today.

71. HRMC's argument that an obstetrical patient relationship with HRMC was not established until Mrs. Hays was admitted as an inpatient on September 25, 2015, is rejected. While "obstetrical patient relationship" is not defined by statute, HRMC's assertion that Mrs. Hays' three presentations to HRMC prior to the day she gave birth did not establish an

obstetrical patient relationship is unpersuasive. Rather, on each of those occasions HRMC knew, or should have known, that Mrs. Hays was in late-stage pregnancy, and had expressed her intent to have the baby delivered at HRMC. There is no logic in HRMC's assertion that a patient must be admitted to the hospital to deliver her baby before the obstetrical patient relationship is established. By this reasoning, NICA notice given upon admission for delivery would be per se untimely, since the patient would likely already be in labor and unable to make an effective choice of provider at the time the notice was provided.

72. Mrs. Hays became an obstetrical patient of HRMC well before her delivery, thus triggering the obligation to furnish her with NICA notice within a reasonable time, which was not excused by the subsequent emergency (presenting in labor to deliver her baby). By September 25, 2015, Mrs. Hays did not have sufficient time to make an informed choice on whether to use a participating health care provider prior to delivery, as she was in labor. The hospital had three opportunities to provide notice to Mrs. Hays prior to her presenting for delivery, but did not do so. Thus, the notice provided by HRMC on September 25, 2015, was inadequate to meet the requirements of section 766.316.

73. Under the facts found herein, neither Dr. McTammany (including his associated medical group, Medical Associates) nor HRMC provided NICA notice as required by section 766.316, and therefore, neither is entitled to the exclusive remedy protection of section 766.303.

CONCLUSION

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

ORDERED:

1. Dr. McTammany and his associated medical group, Medical Associates of Brevard, LLC, failed to provide notice in compliance with section 766.316.

2. Holmes Regional Medical Center failed to provide notice for the hospital in compliance with section 766.316.

3. Jurisdiction over this matter is retained, and the parties are accorded 30 days from the date of this Order to resolve, subject to approval of the undersigned, the amount and manner of payment of an award to Petitioners; the reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees and costs; and the amount owing for expenses previously incurred. If not resolved within such period, the parties shall so advise the undersigned, and a hearing will be scheduled to resolve such issues. Once resolved, an award will be made consistent with section 766.31.

4. In the event Petitioners file an election of remedies declining or rejecting NICA benefits, this case will be dismissed with prejudice and the file of the Division of Administrative Hearings will be closed.

DONE AND ORDERED this 25th day of March, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
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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).