STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHELLE MARK and JUAN PAYNE, as Natural Parents and Guardians of ASHTON PAYNE, a minor,

Petitioners,

vs. Case No. 18-2337N

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,

Respondent,

and

ADVENTIST HEALTH SYSTEM/SUNBELT, INC., d/b/a WINTER PARK MEMORIAL HOSPITAL; AND ORLANDO HEALTH, INC., d/b/a WINNIE PALMER HOSPITAL FOR WOMEN AND BABIES,

Intervenors.
_____/

FINAL ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569, 120.57(1), and 766.304, Florida Statutes (2018),[1/] on November 14, 2018, in Orlando, Florida.

APPEARANCES

For Petitioners: Jorge E. Silva, Esquire
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For Respondent: David W. Black, Esquire
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For Intervenor Winter Park Hospital:

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For Intervenor Winnie Palmer:

Bradley P. Blystone, Esquire
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STATEMENT OF THE ISSUE

The issue to determine in this matter is whether Ashton Payne suffered a "birth-related neurological injury" as defined by section 766.302(2), Florida Statutes, for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On May 8, 2018, Petitioners Michele Mark and Juan Payne, as natural parents and guardians of Ashton Payne ("Ashton"), a minor,

filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. (the "Petition") with the Division of Administrative Hearings ("DOAH") for the determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan"). (Petitioners submitted their Petition "under protest" contending that Ashton did not suffer a birth-related injury that qualifies for an award under the Plan.)

Ashton was born on January 19, 2018, at Adventist Health System/Sunbelt, Inc., d/b/a Winter Park Memorial Hospital ("Winter Park Hospital"), in Winter Park, Florida. The Petition identified Michelle M. Cabrera, M.D., as the physician who provided obstetrical services at Ashton's birth.

DOAH served a copy of the Petition on Respondent Florida Birth-Related Neurological Injury Compensation Association ("NICA") on May 15, 2018. DOAH also served Dr. Cabrera with a copy of the Petition, as well as Winter Park Hospital on that same date.

Winter Park Hospital moved to intervene on May 23, 2018, which was granted. Orlando Health, Inc., d/b/a Winnie Palmer Hospital for Women and Babies ("Winnie Palmer"), moved to intervene on May 25, 2018, which was also granted.

On July 13, 2018, NICA filed its response to the Petition, taking the position that Ashton suffered a "birth-related neurological injury" within the meaning of section 766.302(2).

Accordingly, NICA asserted that Petitioners' claim is compensable under the Plan. NICA requested DOAH schedule a hearing to determine compensability.

NICA also requested that DOAH bifurcate the administrative proceeding to address the issue of compensability and notice before determining the amount of any award to which Petitioners might be entitled under section 766.31. In light of NICA's request, the undersigned bifurcates this proceeding. Accordingly, this Final Order only addresses compensability and notice. See § 766.309(4), Fla. Stat.

The final hearing was held on November 14, 2018. At the final hearing, Petitioners' Exhibits 1 through 22 were admitted into evidence. NICA's Exhibits 1 and 2 were admitted into evidence. Winnie Palmer's Exhibit 1 was admitted into evidence. Winter Park Hospital did not present any exhibits. No party presented witnesses at the final hearing. However, by agreement of the parties, the undersigned admitted the deposition testimony of the following individuals: Petitioners' medical experts Jason James, M.D. (Petitioners' Exhibit 20), and Ariel Sherbany, M.D. (Petitioners' Exhibit 21); NICA's medical experts Donald Willis, M.D. (Petitioners' Exhibit 16), and Laufey Sigurdardottir, M.D. (Petitioners' Exhibit 19); and Winnie Palmer's medical experts Donald Null, M.D. (Petitioners' Exhibit 17), and Harry Farb, M.D. (Petitioners' Exhibit 18).

A Transcript of the final hearing was filed with DOAH on November 30, 2018. At the close of the hearing, the parties were advised of a ten-day deadline after receipt of the hearing transcript to file post-hearing submittals. The parties jointly requested a ten-day extension of the filing time frame, which was granted.[2/] Petitioners, NICA, and Winnie Palmer filed Proposed Final Orders, which were duly considered in preparing this Final Order.

FINDINGS OF FACT

1. Ashton was born on January 19, 2018. Ashton was delivered at Winter Park Hospital.

2. Petitioner Michele Mark is Ashton's mother. Petitioners are Ashton's natural parents and legal guardians.

3. Michele M. Cabrera, M.D., delivered Ashton at Winter Park Hospital. Dr. Cabrera was a "participating physician" in the Plan at the time she rendered obstetrical services on January 19, 2018. See § 766.302, Fla. Stat. Dr. Cabrera provided her obstetrical services in the course of Ashton's delivery, and the resuscitation in the immediate post-delivery period.

4. Ashton weighed 3310 grams at birth.

5. The parties do not dispute that Ashton has suffered an injury to his brain due to oxygen deprivation which has left him permanently and substantially mentally and physically impaired.

6. The parties do not dispute that the NICA notice requirements, as set forth in section 766.316, were met.

7. Ashton was born under very challenging circumstances. At approximately 1:11 a.m. on January 19, 2018, Ms. Mark appeared at Winnie Palmer.[3/] Ms. Mark, who was at 37 weeks' gestation, complained of contractions and severe pain.

8. At Winnie Palmer, a triage nurse evaluated Ms. Mark. The examination revealed that Ms. Mark was experiencing intermittent contractions. The nurse also recorded that Ms. Mark's cervix was one centimeter dilated and 100 percent effaced. Ms. Mark informed the nursing staff that an ultrasound two days earlier revealed that the fetus was breech. However, apparently because the birth was not imminent, Ms. Mark was discharged from Winnie Palmer at 2:33 a.m.

9. Back at her home, at approximately 3:19 a.m., Ms. Mark experienced a spontaneous rupture of her fetal membranes (her "water broke"). The rupture immediate resulted in an umbilical cord prolapse. A cord prolapse means that the umbilical cord dropped down through the cervix before the baby. This complication can cause the umbilical cord to be occluded, or squeezed, which can severely diminish the flow of oxygen to the fetus. Later, Ms. Mark relayed that she felt her baby's foot in her vagina (a "footling" breech).

10. Sitting on her bathroom floor, with the umbilical cord protruding from the birth canal, Ms. Mark called 911.

11. At 3:30 a.m., Emergency Medical Service personnel ("EMS") responded to Ms. Mark's home. When EMS reached Ms. Mark, they found her seated with approximately 15 inches of umbilical cord exposed. Initially, EMS was unable to feel a pulse in the umbilical cord. Once Ms. Mark was lifted and repositioned onto a stretcher, however, EMS was able to detect a faint pulse in the cord. EMS also noted that Ms. Mark was experiencing contractions "2 minutes apart."

12. EMS transported Ms. Mark, in an ambulance, to Winter Park Hospital. EMS departed Ms. Mark's home at 3:41 a.m., and arrived at Winter Park Hospital at 3:53 a.m.

13. At 3:58 a.m., Ms. Mark reached the Labor and Delivery Operating Room. There, she underwent an emergency C-section. Prior to the operation, the triage nurse palpated pulsation in the prolapsed cord. Ms. Mark was still experiencing contractions at two to three minutes apart.

14. Dr. Cabrera conducted the emergency C-section. Ashton was delivered at 4:04 a.m. Dr. Cabrera's notes record "fetal distress cord prolapse, fetal malposition footling breech." A "footling breech" indicates that one or both of the baby's feet were positioned in the birth canal instead of the pelvis.

15. Upon Ashton's delivery, Winter Park Hospital initiated a "Code Blue." Dr. Cabrera immediately started emergency resuscitative measures. At delivery, Ashton was not breathing, with a recorded heart rate of only 30 beats per minute. Ashton required full cardiorespiratory resuscitation. Ashton was emergently intubated at 4:06 a.m. Chest compressions were initiated "@ 20-30 seconds of life" and stopped at 4:08 a.m. At 4:08 a.m., Ashton's heart rate had reached 104 beats per minute.

16. The Code Blue lasted from 4:04 a.m. to 4:29 a.m. By 4:29 a.m., Ashton's heart rate had risen to 144 beats per minute. The last oxygen saturation level recorded during the Code Blue was 77 percent at 4:19 a.m., indicating severe hypoxia. ("Hypoxia" means partial loss of oxygen to the fetus. "Anoxia" means total loss of oxygen to the fetus. The normal oxygen saturation range is 97-100 percent.) Ashton's APGAR ("Appearance, Pulse, Grimace, Activity, Respiration") scores following delivery were 1/2/4/4 at 1, 5, 10, and 15 minutes, respectively. (Scores of 7 to 10 are considered normal.)

17. At 4:29 a.m., Ashton was transferred to the Neonatal Intensive Care Unit ("NICU"). Ashton was still unable to breath on his own. NICU noted "no respiratory effort and seizures." NICU placed Ashton on a mechanical ventilator in a continued effort to resuscitate him.

18. At 4:41 a.m., the initial Arterial Blood Gas ("ABG") Report showed that Ashton was experiencing severe metabolic acidosis. The ABG Report recorded a pH level of 6.809 (critical) with a base excess of negative 25. This score signified a severely acidotic child with both a metabolic and respiratory acidotic condition. The acidotic condition required immediate medical treatment to correct.

19. At 5:14 a.m., approximately 70 minutes after Ashton's birth, a second ABG Report showed a pH level of 7.034 (critical) with a base excess of negative 19. These values indicated that Ashton was continuing to experience severe metabolic acidosis.

20. At 7:15 a.m., Ashton was transferred to the NICU at Florida Hospital Orlando. Although Ashton's oxygen saturation level had reached 99 percent, he was still unable to breathe on his own. He remained on a ventilator. Ashton also experienced repeated seizure activity. A progress report on January 21, 2018 (two days after his delivery), noted two episodes of seizures on that day.

21. Ashton remained on a ventilator until January 26, 2018 (seven days after his delivery), when he was extubated.

22. Petitioners argue that Ashton did not suffer a "birth-related neurological injury" which would entitle him to an award under the Plan. Section 766.302(2) defines the term to mean:

> [I]njury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation . . . 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.

23. Petitioners do not dispute that Ashton's case presents an injury to the brain of a live infant weighing at least 2,500 grams. Neither do Petitioners contest that Ashton's injury was caused by oxygen deprivation which renders him permanently and substantially mentally and physically impaired. What Petitioners challenge is whether Ashton's injury occurred "in the course of labor, delivery, or resuscitation in the immediate postdelivery period."

24. Petitioners assert that Ashton's neurological impairment directly resulted from the umbilical cord prolapse in Ms. Mark's home at 3:19 a.m. Petitioners contend that Ashton's brain injury (due to oxygen deprivation) manifested before the time Ms. Mark reached Winter Park Hospital (3:53 a.m.). Consequently, Ashton's injury did not develop during his delivery at 4:04 a.m. or any subsequent postdelivery resuscitation efforts. Petitioners further argue that Ms. Mark was never in labor at any point during Ashton's birth. Therefore, they contend that Ashton's brain injury did not occur "in the course

of labor, delivery, or resuscitation," and Ashton does not qualify for coverage under the Plan.

25. To support their argument, at the final hearing, Petitioners presented the (deposition) testimony of Jason James, M.D., and Ariel Sherbany, M.D.

26. Dr. James is a board-certified obstetrician/ gynecologist. Dr. James testified that, in his opinion, Ashton did not sustain a qualifying "birth-related" injury because Ms. Mark was not in labor at any point prior to Ashton's delivery at 4:04 a.m.

27. Initially, Dr. James commented that it is "impossible to say" with any certainty whether Ms. Mark was in labor at the time of the umbilical cord prolapse at her home or prior to Ashton's delivery. Dr. James defined labor as "progressive cervical change in response to contractions." He relayed that, "In order for me to say a patient's in labor, I would need to see progressive cervical change in the presence of contractions, and we don't see that." Dr. James explained that, even with Ms. Mark dilated at one centimeter at Winnie Palmer, he saw "no documentation of any cervical change, whether by the EMS or by the hospital staff at Winter Park."

28. Dr. James further expounded that the 100 percent effacement observed at Winnie Palmer was not necessarily related to labor. "Effacement is one of the cervical changes that we do

see, but there are things that can cause cervical effacement that are not associated with labor." Accordingly, Dr. James did not see sufficient evidence to conclude that Ms. Mark was in labor before Ashton's delivery.

29. Regarding the exact time Ashton's brain injury occurred, Dr. James testified that Ashton's brain injury resulted from oxygen deprivation due to the umbilical cord prolapse. He opined that the majority of the oxygen deprivation occurred during the 34 minutes from the "moments . . . the cord prolapse occurred" (3:19 a.m.) to the time Ms. Mark arrived at Winter Park Hospital (3:53 a.m.). Dr. James stated that:

> [T]he amount of brain damage that occurred prior to even the patient arriving at the hospital was substantial and permanent, and I think that the die was cast. . . . Was there ongoing and further damage? Yes. . . . I will agree that there was ongoing and further damage, but I think that to say that that was the portion that resulted in permanent impairment is a mischaracterization.

Accordingly, Dr. James supported Petitioners' position that Ashton's brain injury did not occur in the course of labor, delivery, or resuscitation in the immediate postdelivery period because "this baby already had substantial and permanent brain damage on arrival."

30. Despite this assertion, Dr. James conceded that Ashton did suffer oxygen deprivation during the 11 minutes between the time Ms. Mark was admitted to Winter Park Hospital (3:53 a.m.) and

his delivery at 4:04 a.m. Dr. James also accepted that Ashton continued to incur brain damage through the one hour and 10-minute time frame after his birth.[4/] Dr. James further acknowledged that the hypoxia (partial lack of oxygen) Ashton experienced after 3:53 a.m. could have resulted in significant brain impairment.

31. Finally, Dr. James disclosed that, in his opinion, Ashton was never anoxic (total lack of oxygen to the fetus) during the 34 minutes prior to Ms. Mark's arrival at Winter Park Hospital.

32. Dr. Sherbany is a pediatric neurologist. Dr. Sherbany offered no opinion as to whether Ms. Mark was actually in labor at the time of the umbilical cord prolapse.

33. Regarding the time period during which Ashton's brain injury due to oxygen deprivation occurred, Dr. Sherbany testified that Ashton's "brain-damaged fate was already predetermined before he arrived." Dr. Sherbany believed that the umbilical cord prolapse caused anoxia, or complete loss of oxygen to the fetus. Dr. Sherbany opined that this period of anoxia lasted 11 minutes until EMS repositioned Ms. Mark on a stretcher. Thereafter, the fetus experienced hypoxia (partial loss of oxygen) until Ms. Mark was admitted to the hospital. Dr. Sherbany explained that the "bulk of [Ashton's] oxygen deprivation really occurred" during the 34-minute time period before Ms. Mark presented at Winter Park Hospital. Dr. Sherbany

expressed that, "The damage was determined at the time of that anoxic event. . . . In those 34 minutes, basically, this unfortunate child suffered his fate." In Dr. Sherbany's opinion, Ashton sustained the "majority of the insult to the brain stem . . . during that anoxic period."

34. Like Dr. James, however, Dr. Sherbany conceded that Ashton continued to suffer oxygen deprivation, which resulted in additional brain injury, in the first 11 minutes after Ms. Mark arrived at Winter Park Hospital up to and through the four minutes of cardiac massage administered to Ashton after his delivery. Although Dr. Sherbany limited the immediate postdelivery resuscitation period to four minutes after birth, he acknowledged that Ashton was not medically stable until he was transported to the NICU unit at Florida Hospital Orlando at 7:15 a.m., three hours and 11 minutes after delivery. Dr. Sherbany also recognized that Ashton did not breathe on his own, without the assistance of a mechanical ventilator, for six days after his birth.

35. Upon receiving Petitioners' Petition for NICA benefits, NICA conducted an evaluation to determine whether Petitioners' claim was compensable under the Plan. Unlike Petitioners, however, NICA concluded that Ashton did suffer a "birth-related neurological injury" within the meaning of section 766.302(2) and should be covered by the Plan.

36. NICA does not dispute Petitioners' claim that Ashton suffered oxygen deprivation beginning as early as 3:19 a.m. (the moment of the umbilical cord prolapse) through 3:53 a.m. (All medical experts agree that Ashton experienced oxygen deprivation, as well as brain injury, between 3:19 a.m. and 3:53 a.m.) However, NICA asserts that Ms. Mark was in labor at the time of the cord prolapse. NICA also argues that Ashton continued to experience oxygen deprivation (which resulted in brain injury) through his delivery and postdelivery resuscitation at Winter Park Hospital. Therefore, NICA contends that Ashton's medical condition meets the statutory definition of "birth-related neurological injury" because his neurological injury occurred "in the course of labor, delivery, or resuscitation."

37. To support its position, NICA presented the (deposition) testimony of Donald C. Willis, M.D., and Laufey Y. Sigurdardottir, M.D.

38. Dr. Willis is board-certified in both obstetrics and maternal fetal medicine. Dr. Willis opined, within his medical expertise, that Ms. Mark went into labor shortly before or just after 3:19 a.m. Dr. Willis explained that "when EMS came [at 3:30 a.m.], [Ms. Mark] was having regular contractions, so I would assume that she was either in labor before that time or labor initiated with rupture of the membranes. . . . I would assume that her labor began somewhere right around 3:19 a.m."

39. Dr. Willis concurred with Petitioners' medical experts that oxygen deprivation occurred at the moment of the umbilical cord prolapse at 3:19 a.m. Dr. Willis explained that "oxygen deprivation can lead to brain injury." Accordingly, Dr. Willis agreed that "there was some degree of brain injury [to Ashton] during that time period [3:19 a.m. through 3:53 a.m.]."

40. However, unlike Dr. James and Dr. Sherbany, Dr. Willis declared that Ashton experienced an ongoing and continuing injury from the cord prolapse through at least 70 minutes after he was delivered at 4:04 a.m. Dr. Willis explained that oxygen deprivation continues until the oxygen returns to the bloodstream and reaches the organs and tissues. Consequently, Ashton's neurological injury progressed through his delivery and into the immediate postdelivery resuscitation period, at least through the time that Ashton continued to experience metabolic acidosis (5:14 a.m.). Accordingly, in Dr. Willis' opinion, Ashton's brain injury due to oxygen deprivation undoubtedly occurred during the labor, delivery, and the immediate postdelivery resuscitation period.

41. However, while agreeing that Ashton began experiencing oxygen deprivation with the umbilical cord prolapse (3:19 a.m.), Dr. Willis testified that he did not "have any way to gauge" the amount of oxygen deprivation between 3:19 a.m. and 3:53 a.m. Therefore, he would not quantify when exactly Ashton's brain

injury reached the level of permanent and substantial mental and physical impairment. On the other hand, Dr. Willis was certain Ashton continued to suffer brain injury due to oxygen deprivation during the resuscitation efforts in the immediate postdelivery period.

42. Finally, Dr. Willis refuted Dr. Sherbany's statement that Ashton experienced complete anoxia for any prolonged period (11 minutes) after the umbilical cord prolapse. Dr. Willis did not believe that Ashton would have lived through that situation.

43. Dr. Sigurdardottir is a pediatric neurologist. Alone among the expert witnesses, Dr. Sigurdardottir performed an independent medical evaluation of Ashton on June 27, 2018.

44. Similar to Dr. Willis, Dr. Sigurdardottir testified that the "very, very substantial part" of Ashton's brain injury occurred at Winter Park Hospital in the final couple of minutes just prior to his delivery. Dr. Sigurdardottir declared that Ashton endured a continuum of brain injury due to oxygen deprivation. Dr. Sigurdardottir explained that brain injuries from oxygen deprivation occur exponentially, with the most critical period of injury "at the tail end of the hypoxic ischemic event." Dr. Sigurdardottir opined that the most severe part of Ashton's neurological injury occurred in the few minutes right before his delivery, and extended through the immediate post resuscitative period when Ashton experienced metabolic acidosis.

Dr. Sigurdardottir further stated that Ashton's brain injury continued to evolve "within the first week" of his life, when he was most unstable.

45. Dr. Sigurdardottir also commented that, given that hypoxia existed for some undetermined time prior to Ms. Mark's arrival at a hospital, it is difficult, if not impossible, to determine the full extent of the oxygen deprivation that occurred prior to 3:53 a.m. Therefore, it is difficult, if not impossible, to conclude that Ashton incurred a permanent and substantial brain injury prior to his delivery. Accordingly, Dr. Sigurdardottir concluded that Ashton's irreversible brain injury occurred during the final minutes prior to his birth at Winter Park Hospital, and in the hours and days after his delivery.

46. In addition, contrary to Dr. Sherbany and similar to Dr. Willis, Dr. Sigurdardottir unequivocally stated that Ashton did not experience complete lack of oxygen (anoxia) prior to his delivery. Dr. Sigurdardottir rejected any suggestion that the fetus had no heartbeat from 3:19 a.m. until EMS felt a pulse around 3:31 a.m. Dr. Sigurdardottir explained that if Ashton had no heartbeat for 12 minutes prior to his birth, then relieving pressure on the umbilical cord would not have made a difference; Ashton would have been dead at his delivery. However, because EMS was able to detect a pulse after repositioning Ms. Mark on the

stretcher, Dr. Sigurdardottir believed that Ashton's heart was beating between 3:19 a.m. and 3:31 a.m.

47. Dr. Sigurdardottir further posited that, if Ashton had been utterly deprived of oxygen (anoxic) prior to 3:53 a.m., some meconium would have been present in the amniotic fluid. However, the EMS personnel who first treated Ms. Mark did not document any meconium from the rupture of membranes. In addition, the operative report from Ashton's delivery at Winter Park Hospital noted that the amniotic fluid was "clear." Therefore, Dr. Sigurdardottir refuted Dr. Sherbany's conclusion that Ashton experienced anoxia (total loss of oxygen) rather than hypoxia (partial loss of oxygen).

48. Winnie Palmer joined NICA in arguing that Ashton suffered a "birth-related neurological injury" as defined in section 766.302. Winnie Palmer presented the expert (deposition) testimony of Donald Null, M.D., and Harry Farb, M.D.

49. Dr. Null is a board-certified neonatologist. In his practice, Dr. Null provides care and treatment to critically ill infants just after delivery.

50. In Dr. Null's opinion, Ms. Mark was experiencing some form of labor, though not "active" labor, when she visited Winnie Palmer at 1:11 a.m. on January 19, 2018. Dr. Null based his opinion on the fact that Ms. Mark was noted to have contractions and "minor" changes in her cervix. Dr. Null explained that active

labor is when contractions start happening at a regular and consistent basis, and there is a change in the cervix. Dr. Null believed that Winnie Palmer released Ms. Mark at 2:33 a.m. because her contractions and cervical changes were not progressing. Dr. Null further remarked that Ms. Mark was clearly in labor at the time she presented to Winter Park Hospital at 3:53 a.m. However, Dr. Null qualified his comment by conceding that "I don't really have an opinion of when [Ms. Mark] was or wasn't in labor."

51. Regarding the timing of Ashton's neurologic injury, in Dr. Null's opinion, Ashton had only suffered "mild insult" when Ms. Mark arrived at Winter Park Hospital. Dr. Null explained that a footling breech typically does not result in "total occlusion" of the umbilical cord, only "partial occlusion." In other words, Ashton only experienced hypoxia (partial loss of oxygen to the fetus) not anoxia (total loss of oxygen to the fetus) prior to 3:53 a.m. Dr. Null further opined that the hypoxia was not as severe before Ms. Mark's admission to the hospital as it was during the delivery and resuscitation efforts.

52. Dr. Null testified that Ashton suffered a continuing brain injury from the time of the cord prolapse (3:19 a.m.) until his metabolic acidosis was rectified approximately 70 minutes after his delivery (5:14 a.m.). Dr. Null concluded that Ashton suffered a profound neurological injury, which he referred to as hypoxic ischemic encephalopathy ("HIE"), from the time Ms. Mark

arrived at Winter Park Hospital until the time the postdelivery resuscitation efforts concluded. Dr. Null based his opinion on the fact that Ashton's heartrate was measured at 30 beats per minute at delivery, and was most likely at that level at the time Ms. Mark arrived at the hospital. Dr. Null also referred to the fact that Ashton required continuing resuscitation to correct his metabolic acidosis. Dr. Null opined that the HIE was significant enough to cause Ashton's substantial brain injury.

53. Agreeing with Dr. Willis, Dr. Null testified that it is "impossible to quantify" the extent of the oxygen deprivation Ashton suffered between 3:19 a.m. and 3:53 a.m. However, agreeing with Dr. Sigurdardottir, Dr. Null testified that if Ashton had experienced "profound" oxygen deprivation (anoxia) or "a very profound injury prior to arrival" at Winter Park Hospital, he "probably would not have survived the rest of the labor and the resuscitation." Therefore, in concert with Dr. Sigurdardottir's opinion, Dr. Null believed that Ashton sustained the "more substantial portion of his brain injury" after the time Ms. Mark presented at the hospital (3:53 a.m.) and during delivery and postdelivery resuscitation.

54. Dr. Farb is board-certified in both obstetrics and maternal fetal medicine. In Dr. Farb's opinion, the vast majority of Ashton's brain injury occurred after Ms. Mark arrived at Winter Park Hospital.

55. Initially, Dr. Farb testified that Ms. Mark was in labor, "with a qualifier," when she arrived at Winter Park Hospital at 3:53 a.m. Dr. Farb defined labor as "contractions in association with cervical dilation [or change]." Dr. Farb commented that Ms. Mark's "contractions every two minutes could certainly be consistent with labor." However, he did not have any information on the presence of cervical change. Therefore, Dr. Farb issued a "qualified" conclusion that, if Ms. Mark was not in the active phase of labor, then she was at least in the "latent phase of labor."

56. Regarding when Ashton's neurological injury occurred, Dr. Farb acknowledged that some hypoxia occurred prior to Ms. Mark's arrival at the hospital. However, Dr. Farb agreed with the assessments of Dr. Willis, Dr. Sigurdardottir, and Dr. Null that the actual amount of oxygen deprivation cannot be determined. That being said, Dr. Farb, again agreeing with Dr. Willis, Dr. Sigurdardottir, and Dr. Null, believed that "the substantial part of the injury occurred after arrival [at 3:53 a.m.] and into the immediate neonatal resuscitation period."

57. Dr. Farb estimated that "90 percent of the injury at least occurred at and after admission to the hospital." Dr. Farb based his opinion on several factors, including: a footling breech does not cause total umbilical cord occlusion; Ashton's condition worsened from the time of his presentation to the

hospital (3:53 a.m.) until delivery (4:04 a.m.); and Ashton experienced "continuous seizure activity" for at least 70 minutes after delivery (through 5:14 a.m.). Dr. Farb further commented that the second ABG draw at 5:14 a.m. showed that Ashton was still severely acidotic, which meant that his brain injury was still progressing.

58. Dr. Farb also explained that a fetus does not immediately suffer a neurological injury at the moment of an umbilical cord prolapse. A fetus has a reserve of oxygen that must be depleted before injury to the brain occurs. Dr. Farb explained that oxygen deprivation (and any resulting brain injury) may not have commenced in Ashton until 10 to 18 minutes after the ruptured membranes and prolapsed cord.

59. Like Dr. Sigurdardottir, Dr. Farb explained that oxygen deprivation is progressive in nature and exacerbates over time. Accordingly, "the severity of the oxygen deprivation was much worse at [Ms. Mark's] admission and [Ashton's] delivery." There was no question in Dr. Farb's mind "that the severity of the oxygen deprivation and the brain injury . . . occurs much closer to the time of delivery because things are progressive and as well as continuing in the immediate resuscitation period." Specifically, Ashton's brain injury continued to occur up to an hour and 10 minutes after his delivery as revealed by his severe metabolic acidosis at 5:14 a.m. In addition, Dr. Farb stated that

Ashton's brain was also injured due to constant seizure episodes after his delivery while he was still being resuscitated.

60. Based on the competent substantial evidence in the record, the preponderance of the evidence establishes that Ashton suffered a "birth-related neurological injury" as defined in section 766.302(2). The evidence demonstrates that Ashton began experiencing oxygen deprivation at the time of the umbilical cord prolapse which continued through delivery and immediate postdelivery resuscitation. This oxygen deprivation caused Ashton to sustain a brain injury which has rendered him permanently and substantially mentally and physically impaired.

61. The evidence does not prove that Ms. Mark was in labor prior to Ashton's birth. However, based on the more persuasive medical testimony, the evidence establishes that Ashton suffered injury to his brain, caused by oxygen deprivation, in the course of his delivery and resuscitation in the immediate postdelivery period at Winter Park Hospital. Accordingly, Ashton is eligible for an award of compensation under the Plan.

CONCLUSIONS OF LAW

62. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 766.301 through 766.316. The undersigned, as an Administrative Law Judge, has "exclusive jurisdiction to

determine whether a claim filed under [NICA] is compensable." §§ 766.301(1)(d), 766.304, and 766.311(1), Fla. Stat.[5/]

63. In 1988, the Florida Legislature created the Plan as a means to alleviate the high costs of medical malpractice insurance for physicians practicing obstetrics. Bennett v. St. Vincent's Med. Ctr., Inc., 71 So. 3d 828, 836 (Fla. 2011); and Univ. of Miami v. Ruiz, 164 So. 3d 758, 764 (Fla. 3d DCA 2015). Specifically, the Legislature established the Plan "to provide compensation, on a no-fault basis, for a limited class of catastrophic [birth-related neurological] injuries that result in unusually high costs for custodial care and rehabilitation." Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349, 1354 (Fla. 1997), and § 766.301(2), Fla. Stat. The Plan's purpose is to "provid[e] compensation, irrespective of fault, for birth-related neurological injury claims." § 766.303(1), Fla. Stat.

64. To seek compensation under the Plan, a legal representative on behalf of an injured infant files a claim with DOAH. §§ 766.302(3) and 766.305(1), Fla. Stat.

65. In reviewing the compensability of a claim, section 766.309(1) directs the Administrative Law Judge to make the following determinations based upon the available evidence:

> (a) Whether the injury claimed is a birth-related neurological injury;

> (b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; and
>
> (c) How much compensation, if any, is awardable pursuant to s. 766.31.

66. The term "birth-related neurological injury" is defined in section 766.302(2) as:

> [I]njury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation . . . 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.

Stated another way, a "birth-related neurological injury" has four components: (1) an injury to the brain or spinal cord; (2) which is caused by oxygen deprivation or mechanical injury; (3) during labor, delivery, or resuscitation in the immediate postdelivery period; and (4) which renders the infant permanently and substantially impaired. Bennett, 71 So. 3d at 837.

67. The burden of proof in this matter falls on NICA (and the Intervenors) to prove that Petitioners' claim is covered by the NICA statute. Petitioners initiated this matter. However, they are not seeking compensation under the Plan. Instead,

Petitioners seek a determination that Ashton does not fall within the scope of the NICA statute. See Bennett, 71 So. 3d at 846. See also N.R. v. Fla. Birth-Related Neuro. Injury Comp. Ass'n, 143 So. 3d 463, 465 (Fla. 5th DCA 2014), and Balino v. Dep't of Health & Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977)("The general rule is, that as in court proceedings, the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.").

68. The preponderance of the evidence standard is applicable to this matter. See § 120.57(1)(j), Fla. Stat.

69. The Plan provides limited remedies as a statutory substitute for common law rights and liabilities. Therefore, the NICA statute "should be strictly construed to include only those subjects clearly embraced within its terms." Bennett, 71 So. 3d at 836; and Fla. Birth-Related Neuro. Injury Comp. Ass'n, 686 So. 2d at 1354.

70. Turning to the injury in this matter, the competent substantial evidence in the record establishes that Ashton suffered a "birth-related neurological injury" as defined in section 766.302(2). The parties do not dispute, and the available facts establish, the following:

a. Ashton was born a live infant, weighing at least 2,500 grams;

b. Ashton suffered a brain injury;

c. Ashton's brain injury was caused by oxygen deprivation;

d. Ashton's brain injury rendered him permanently and substantially mentally and physically impaired;

e. The obstetrical services at Winter Park Hospital were delivered by a "participating physician" (Dr. Cabrera); and

f. The NICA notice requirements under section 766.316 were met.

71. The disputed issue in this matter concerns whether Ashton's brain injury "occur[ed] in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital."

72. Initially, the undersigned finds that the facts and testimony produced at final hearing do not establish that Ms. Mark was not in labor prior to Ashton's birth. The consensus among the medical experts is that "labor" requires two criteria, (1) contractions and (2) cervical change or dilation. Ample evidence demonstrates that Ms. Mark was experiencing contractions prior to Ashton's birth. She went to Winnie Palmer at 1:11 a.m. complaining of contractions. At 3:31 a.m., the EMS recorded contractions at "2 minutes apart." Finally, Winter Park Hospital noted contractions at two to three minutes apart just prior to Ashton's delivery.

73. The preponderance of the evidence, however, does not establish cervical change. Winnie Palmer recorded that Ms. Mark's

cervix was one centimeter dilated and 100 percent effaced. The medical expert testimony does not provide firm, unqualified support for a conclusion that the Winnie Palmer medical records, alone, prove that Ms. Mark experienced cervical change associated with active labor at some point prior to Ashton's delivery at 4:04 a.m.

74. On the contrary, Petitioners' witnesses (Dr. James and Dr. Sherbany) offer the more persuasive testimony that Ms. Mark was not in labor before Ashton's birth at Winter Park Hospital. Dr. James specifically explained that effacement is not necessarily associated with labor. Accordingly, based on the medical testimony and available records in evidence, the undersigned finds that Ms. Mark was not in labor during the time Ashton suffered oxygen deprivation prior to delivery.

75. Despite finding that Ms. Mark was not in labor during Ashton's difficult birth, the undersigned determines that Ashton did sustain an injury to his brain, caused by oxygen deprivation, which occurred "in the course of . . . delivery, or resuscitation in the immediate postdelivery period in a hospital."[6/] The preponderance of the evidence and testimony establishes that Ashton suffered neurological injury after Ms. Mark was admitted to Winter Park Hospital. And, Ashton continued to suffer injury to his brain during the ongoing efforts of postdelivery resuscitation. Accordingly, the evidence in the record shows

that oxygen deprivation, as well as Ashton's resulting brain injury, occurred within the time period contemplated by section 766.302(2).

76. The parties' medical experts present opposing views on exactly when, over the course of Ashton's birth, he sustained a brain injury significant enough to render him "permanently and substantially mentally and physically impaired." The experts all agree that oxygen deprivation started as early as 3:19 a.m., the moment of the umbilical cord prolapse. The experts disagree on the degree of brain injury, due to oxygen deprivation, Ashton experienced before, and then after, Ms. Mark arrived at Winter Park Hospital at 3:53 a.m.

77. The undersigned finds that Ashton's brain injury was not isolated to the 34-minute window prior to Ms. Mark's admission to Winter Park Hospital. On the contrary, the more persuasive medical testimony supports the finding that Ashton suffered the majority of his neurological injury (due to oxygen deprivation) during the moments after Ms. Mark reached the hospital at 3:53 a.m., and this injury progressed and exacerbated through the time of his delivery (4:04 a.m.) and resuscitation in the postdelivery period (through at least 5:14 a.m.).

78. This finding is supported by two points. First, no evidence establishes the exact level of oxygen deprivation (or brain injury) Ashton experienced prior to 3:53 a.m. Every medical

expert, except Dr. Sherbany, agreed that the amount of oxygen deprivation that occurred between 3:19 a.m. and 3:53 a.m. cannot be known for certain. (On the other hand, every medical expert, including Dr. Sherbany, agreed that oxygen deprivation, which led to additional brain injury, took place after Ms. Mark was admitted to the hospital.) The preponderance of the evidence does not support a finding that the "bulk" or "majority" of Ashton's oxygen deprivation occurred in the 34-minute time period before Ms. Mark reached Winter Park Hospital.

79. Second, Dr. Willis, Dr. Sigurdardottir, Dr. Null, and Dr. Farb convincingly testify that the most significant portion of Ashton's brain injury occurred "much closer to the time of delivery . . . as well as continuing in the immediate resuscitation period." These medical experts ably explain that Ashton suffered an ongoing and continuing injury following the cord prolapse. Oxygen deprivation began at 3:19 a.m., and progressed, unabated, until oxygen returned to Ashton's bloodstream during postdelivery resuscitation efforts. Resuscitation efforts started immediately after Ashton's delivery at 4:04 a.m. and lasted until 4:08 a.m. However, because Ashton still could not breath on his own, suffered from multiple seizures, and was not stabilized, he required active medical care for approximately six days until he was taken off a mechanical ventilator. The oxygen deprivation after Ms. Mark reached Winter

Park Hospital caused Ashton's permanent and substantial mental and physical impairment. See Bennett, 71 So. 3d at 842 ("resuscitation in the immediate postdelivery period" includes circumstances involving "a continuous, ongoing need of resuscitation from the time of birth to the time of the injury that resulted in the severe impairment").

80. The undersigned notes that the oxygen deprivation that led to Ashton's brain injury was not caused by any medical personnel who were directly involved in Ashton's birth in Winter Park Hospital. Neither was the oxygen deprivation due to any obstetrical services Ashton received, or failed to receive, at Winter Park Hospital. Instead, the genesis of the oxygen deprivation was the umbilical cord prolapse that occurred approximately 45 minutes earlier in Ashton's mother's home (when Ms. Mark was not shown to be in labor). The evidence shows, however, that Ashton continued to experience oxygen deprivation (which resulted in the qualifying neurological injury) into and throughout the course of his delivery and resuscitation. This conclusion is well-supported by the testimony of Dr. Sigurdardottir who stated that the "very, very substantial part" of Ashton's brain injury occurred at Winter Park Hospital. Dr. Farb also opined that "90 percent of the injury at least" occurred at or after Ms. Mark was admitted to Winter Park Hospital.

81. In sum, the evidence in the record establishes that, more likely than not, Ashton's brain injury derived from the oxygen deprivation he experienced during the period of time encircling his delivery in Winter Park Hospital. Furthermore, given that medical records report that Ashton was severely acidotic at 5:14 a.m. and remained on a respirator for six days thereafter, the oxygen deprivation, as well as the resulting brain injury, continued, uninterrupted, for a period of up to six days after Ashton's birth. The brain injury Ashton endured over this period of time led to his permanent and substantial mental and physical impairment. Therefore, based on this factual circumstance, Ashton suffered a "birth-related neurologic injury" which occurred "in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital." Accordingly, Ashton is eligible for compensation under the NICA Plan.

DISPOSITION

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

1. Petitioners' Petition for compensation under the NICA Plan is APPROVED.

2. NICA shall make immediate payment of all expenses previously incurred, and shall make payment for future expenses as incurred pursuant to section 766.31(1)(a).

3. Michele Mark and Juan Payne, as the parents and legal guardians of Ashton, are entitled to an award pursuant to section 766.31(1)(b)1. The parties are accorded 45 days from the date of this Final Order to resolve, subject to approval by the Administrative Law Judge, the amount and manner in which the award should be paid. If not resolved within such period, the parties will so advise the Administrative Law Judge, and a hearing will be scheduled to resolve such issue.

4. Petitioners are entitled to an award of reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees, pursuant to section 766.31(1)(c). The parties are accorded 45 days from the date of this Order to resolve, subject to approval by the Administrative Law Judge, the amount of such award. If not resolved within such period, the parties will so advise the Administrative Law Judge, and a hearing will be scheduled to resolve such issue.

5. Pursuant to section 766.312, the Division of Administrative Hearings retains jurisdiction over this matter to address the amount of an award pursuant to section 766.31, as well as to resolve any disputes regarding the parties' compliance with the terms of this Final Order.

DONE AND ORDERED this 29th day of March, 2019, in Tallahassee, Leon County, Florida.

J. BRUCE CULPEPPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of March, 2019.

ENDNOTES

[1/] All statutory references are to Florida Statutes (2018), unless otherwise noted.

[2/] By requesting a deadline for filing post-hearing submissions beyond ten days after the final hearing, the 30-day time period for filing the Final Order was waived. See Fla. Admin. Code R. 28-106.216.

[3/] Documents in the record indicate that Winnie Palmer (Orlando Health, Inc.), as well as "its employed physicians, residents, mid-wives and physician assistants" participated in the NICA Plan on January 19, 2018.

[4/] Dr. James, Dr. Null, and Dr. Farb all agreed that "resuscitation" can be defined as "the process of sustaining the vital functions of a person in respiratory or cardiac failure, while reviving him or her by using techniques of artificial restoration and cardiac massage, correcting acid based imbalance, and treating the cause of failure." See Mosby's Medical Dictionary, Ninth Edition (2009).

[5/] Pursuant to section 766.309(4), in the interest of judicial economy, this proceeding is bifurcated to address compensability

first. The issue of the amount of an award pursuant to section 766.31 may be addressed in a separate proceeding.

[6/] The word "or" is "generally construed in the disjunctive when used in a statute or rule. The use of this particular disjunctive word in a statute or rule normally indicates that alternatives were intended." Fla. Pulp & Paper Ass'n Envtl. Affs., Inc. v. Dep't of Envtl. Prot., 223 So. 3d 417, 420 (Fla. 1st DCA 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 Neuro. Injury Comp. Ass'n v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992).