

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

LOGAN FLOUNDERS AND BRITTANY GAETA,
INDIVIDUALLY AND AS NATURAL PARENTS
OF ASHTYN FLOUNDERS, A MINOR,

Petitioners,

vs.

Case No. 19-5147N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

ORLANDO HEALTH, INC. D/B/A HEALTH
CENTRAL HOSPITAL, AND ROSEANNE M.
HENRY, M.D.,

Intervenors.

FINAL ORDER

This cause came before the undersigned upon the parties' Joint Motion for Final Resolution by Stipulated Record, filed October 28, 2020, which was granted on October 29, 2020, and the parties' proposed final orders.

STATEMENT OF THE ISSUES

Whether Intervenors, Orlando Health, Inc., d/b/a Health Central Hospital and Roseanne M. Henry, M.D., satisfied the notice requirements set forth in section 766.315, Florida Statutes.

PRELIMINARY STATEMENT

On September 10, 2019, Petitioners, Logan Flounders and Brittany Gaeta, individually and as the natural parents of Ashtyn Flounders (Ashtyn), a

minor, filed a Petition for Determination of Compensability Pursuant to Florida Statute Section 766.301 *et seq.* (Petition) with the Division of Administrative Hearings (DOAH), for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (NICA or the Plan). The Petition named Dr. Henry as the physician who provided obstetric services for the birth of Ashtyn at Health Central Hospital in Ocoee, Florida, on July 23, 2017.

On October 4, 2019, DOAH mailed a copy of the Petition to Respondent, Dr. Henry, and Health Central Hospital via certified mail. Respondent was served with the same on October 7, 2019. On October 14, 2019, Orlando Health, Inc., d/b/a Health Central Hospital and Roseanne M. Henry, M.D., filed a petition to intervene, which was granted on October 18, 2019.

After four unopposed motions for extension of time were granted for Respondent to respond to the Petition, on May 27, 2020, Respondent filed a Notice of Compensability and Request for Evidentiary Hearing on Compensability (Notice of Compensability), wherein Respondent averred that it had determined that Petitioners' claim is a "birth-related neurological injury," as defined by section 766.302(2). Respondent further maintained that the claim was compensable and requested the matter be scheduled for final hearing on the issue of compensability. On June 8, 2020, Petitioners' Response to Respondent's Notice of Compensability and Request for Evidentiary Hearing was filed, wherein Petitioners contested that the claim was compensable and requested a hearing on the issue of compensability.

Respondent's Motion for Summary Final Order was filed on June 12, 2020. Thereafter, due to COVID-19 pandemic-related concerns, Petitioner was granted several extensions of time to respond to Respondent's Motion. On August 24, 2020, the undersigned issued an Order on Pending Motions,

granting Petitioners an extension of time of September 30, 2020, to conduct reasonable discovery to respond to Respondent's Motion. Thereafter, on September 9, 2020, the matter was scheduled for a final hearing to begin on November 12, 2020.

On October 30, 2020, the undersigned issued a Partial Summary Final Order, concluding that Petitioners had sustained a compensable birth-related neurological injury, and reserved jurisdiction to determine whether the notice requirements of section 766.316 were satisfied and to determine the issue of an award pursuant to section 766.31.

A hearing to address whether the notice requirements of section 766.316 have been satisfied was scheduled for November 12, 2020. On October 28, 2020, however, the parties filed a Joint Motion for Final Resolution by Stipulated Record, which was granted on October 29, 2020. Pursuant to the parties' Joint Stipulation to Extend Deadlines, filed December 3, 2020, and approved by Order of December 8, 2020, the Joint Stipulated Record was to be filed December 4, 2020, and the parties were to submit proposed final orders on or before December 14, 2020, and any rebuttal proposed final orders on or before December 21, 2020.

The Joint Stipulated Record was filed December 9, 2020, and the exhibits contained therein have been admitted into evidence. The parties timely filed proposed final orders which have been duly considered.

FINDINGS OF FACT

Stipulated facts:

The parties have stipulated to the facts, as set forth verbatim, in paragraphs one through ten:

1. That the Petitioners, Logan Flounders and Brittany Gaeta, are the parents and natural guardians of Ashtyn Flounders.
2. The physician providing obstetric services at birth was Roseanne Henry, M.D.
3. That Roseanne Henry, M.D. was a participating physician in NICA in 2017.
4. Pursuant to 766.309(1)(B), Fla. Stat., obstetrical services were delivered by a participating physician in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital.
5. That Ashtyn Flounders was born at Health Central Hospital on July 23, 2017.
6. That the physician providing obstetric services who was present at birth was Roseanne Henry, M.D.
7. That obstetrical services were delivered by a participating physician, Roseanne Henry, M.D., in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital.
8. That Ashytn Flounders suffered a “birth-related neurological injury” as defined in Section 766.302(2), Florida Statutes.
9. That Brittany Gaeta signed the NICA notice form from West Orange OB/GYN Specialists on December 22, 2016.
10. That Brittany Gaeta signed the NICA notice form from Health Central Hospital on July 21, 2017.

Non-stipulated facts:

11. On December 22, 2016, Ms. Gaeta presented to West Orange OB/GYN Specialists (West Orange)¹ to initiate prenatal care. At the time, Ms. Gaeta was approximately nine weeks pregnant.
12. The unrefuted testimony established that the physicians and staff of West Orange were employed by Orlando Health, Inc. West Orange, at all times pertinent to this matter, had a location within a suite of Health Central

Hospital in Ocoee, Florida. Health Central Hospital is also an entity of Orlando Health, Inc. Angel Patrick, the Patient Access Manager for Health Central Hospital, testified via affidavit that West Orange is a separate entity from Health Central Hospital.

13. Christine Vicente, a front desk receptionist for West Orange, testified that her duties included providing new obstetric patients with a “new patient packet.” Ms. Vincente acknowledged that she does not have an independent recollection of Ms. Gaeta on her initial December 22, 2016 visit. She credibly testified that her routine included providing the new patient with a form entitled “Receipt of Notice to Obstetric Patient” (NICA form) and a photocopied paper version of a brochure entitled “Peace of Mind.”

14. The NICA form contained the following language:

West Orange OB/GYN Specialists
10,000 W. Colonial Drive, Suite 387; Ocoee, FL
34761
13528 Summerport Village Pkwy;
Windermere, FL 34786
HC: 407-58-0033; SVP: 407-614-1654; Fax 407-
294-8003
RECEIPT OF NOTICE TO OBSTETRIC PATIENT

I have been furnished information in the form of a Brochure prepared by the Florida Birth-Related Neurological Injury Compensation Association (NICA), pursuant to Section 766.316, Florida Statutes, by *Dieguez, Oloufa & Pagani OB/GYN*, and have been advised that all physicians in the Physicians Group are participating physician(s) in that program, wherein certain limited compensation is available in the event certain types of qualifying neurological injuries may occur during labor, delivery or resuscitation in a hospital. For specifics on the program, I understand I can contact the Florida Birth-Related Neurological Injury Compensation Association, Post Office Box 14567, Tallahassee, Florida 32317-4567, (800) 398-2129.

¹ West Orange was also known as Dieguez, Oloufa & Pagani OB/GYN.

I specifically acknowledge that I have received a copy of the Brochure prepared by NICA.

15. Ms. Gaeta testified that she did not recall the NICA form or brochure; however, she was not disputing the fact that she received the same. As noted in the stipulated facts above, Ms. Gaeta signed the form on December 22, 2016. Her signature was attested to by Ms. Vicente.

16. The undersigned finds, based upon the totality of credible evidence that it is more likely than not that, on December 22, 2016, Ms. Gaeta was provided the NICA form advising of West Orange's participation in NICA and the NICA brochure. The undersigned further finds that the obstetrical relationship by and between West Orange (including Dr. Henry) and Ms. Gaeta began on December 22, 2016.

17. Dr. Henry began her employment at West Orange in August 2016. Having recently completed her residency in June 2016, Dr. Henry was not a NICA participating physician in 2016.² On January 1, 2017, Dr. Henry became a NICA participating physician. Accordingly, Dr. Henry was not a NICA participating physician at the time Ms. Gaeta signed the form and was provided the NICA pamphlet.

18. West Orange did not perform ultrasounds within the office. On January 25, 2017, Ms. Gaeta presented to Health Central Hospital's Outpatient Radiology Department (Outpatient Radiology) for a nuchal translucency, which was ordered by one of the physicians at West Orange, Shereen Oloufa, M.D. At the conclusion of the scan, Ms. Gaeta went home and the results were faxed to Dr. Oloufa.

19. Ms. Gaeta again presented to Outpatient Radiology on March 8, 2017, for an ultrasound to "[c]heck fetal anatomy," and to "check size and dates."

² Pursuant to section 766.302(7), a "participating physician" is defined as "a physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full time or part time and who had paid or was exempted from payment at the time of the injury the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury occurred."

20. Dr. Henry's first prenatal involvement with Ms. Gaeta occurred on May 31, 2017. Thereafter, Dr. Henry ordered another ultrasound and Ms. Gaeta went to Outpatient Radiology for the same on June 5, 2017. The documented purpose of the ultrasound was as follows: "Check fetus. Check fetal anatomy. Possible size and date discrepancy in this third trimester pregnancy."

21. On June 28, 2017, Ms. Gaeta presented to West Orange for a prenatal visit with Dr. Henry. At that time, Ms. Gaeta was presented with a number of consent forms to review and sign. Specifically, she was presented with the following: 1) a "Surgery/Procedure Consent" form, which provided consent for Dr. Henry to perform a Cesarean section; 2) a "Consent to Transfusion of Blood or Blood Products" form, which provided consent for Drs. Henry, Oloufa, and Pagani, as well as Health Central Hospital, to administer and transfuse blood, plasma, blood products, or blood derivatives to Ms. Gaeta "attending my care during this hospitalization and/or course of treatment"; 3) a "Labor Induction Consent" form, which provided consent and authorization for Dr. Henry and whomever she may designate as her assistants, including Health Central Hospital, to perform upon Ms. Gaeta an induction of labor. All of the aforementioned forms were signed by Ms. Gaeta and Dr. Henry. Dr. Henry testified that "we have to fill out these packets before we can even schedule the patient for a C-section or induction."

22. On June 28, 2017, while at West Orange, Ms. Gaeta was also presented with a form entitled "Induction Schedule and Instructions." This form indicated that Ms. Gaeta was scheduled for an induction of labor on July 21, 2017, at Health Central Hospital. Pursuant to the form, she was directed to arrive at 7:00 a.m. This form further provided the following:

Upon Arrival

If you arrive prior to 6:00 am: Please go the
Emergency Room Registration Desk, inform them

that you are here for a scheduled induction and give them this form.

Of [sic] you arrive after 6:00 am: Please go directly to REGISTRATION in the main lobby of the hospital and give them this form. The Admission Clerk will register you into the hospital and send you up to Labor & Delivery on the 3rd Floor.

Note: You are still required to check-in/register upon arrival even if you have pre-registered for the birth of your baby at an earlier date.

23. Finally, on June 28, 2017, Dr. Henry completed and signed a form entitled “Health Central Hospital Induction/Cesarean Worksheet” as well as five pages of “Physician’s Orders for: Admission to Labor & Delivery,” with respect to Ms. Gaeta.

24. At all times pertinent to this matter, Dr. Henry and West Orange only delivered their patients at Health Central Hospital.

25. Dr. Henry credibly testified at her deposition that the forms noted above were signed at West Orange’s office and, on June 30, 2017, faxed to Health Central Hospital. Van K. Tran, the practice manager for West Orange, testified that the consent forms were provided by Health Central Hospital, and after being signed at West Orange the forms were faxed to Health Central Hospital. Ms. Van Tran testified that she did not know Health Central Hospital’s procedure upon receipt of the documents on June 30, 2017.³ Specifically, she testified that, “Again, I don’t know if it’s the hospital want us to or just a process that – just to speed up the – make sure everything is there and organized on the day of the procedure.”

26. Following the June 28, 2017, visit, Dr. Henry ordered an additional ultrasound and, on July 10, 2017, Ms. Gaeta went to Outpatient Radiology

³ Due to the evidentiary presentation, the undersigned cannot discern from the record what Health Central Hospital’s procedure, if any, was upon receipt of the forms faxed on June 30, 2016, from West Orange.

for the same. The purpose of the ultrasound was documented as “Check fetus. Check for fetal size less than dates and a third trimester pregnancy.”

27. Sherrie Quedenfield is the Director of Imaging and Cardiology Imaging for Health Central Hospital. Ms. Quedenfield testified that Outpatient Radiology is not a part of the Labor and Delivery Department at Health Central Hospital. She explained that, upon presentation to Outpatient Radiology, the patient encounters a registration clerk and a data entry person, neither of whom have training in obstetrics or in the NICA program. She further explained that Ms. Gaeta would not and did not encounter a registered nurse, a licensed practical nurse, or a medical doctor during any of her visits to Outpatient Radiology.

28. Ms. Quedenfield further testified, credibly, that Outpatient Radiology would not have access to the consent forms completed by Ms. Gaeta on June 28, 2017; and had no knowledge of whether Ms. Gaeta intended to deliver at Health Central Hospital.

29. Dr. Henry testified that Ms. Gaeta did not “pre-register” at Health Central Hospital for the induction of labor and that she typically does not tell her patients to do so.⁴ Angel Patrick also testified in his affidavit that Health Central Hospital did not possess any records indicating that Ms. Gaeta presented to the hospital on June 28, 2017, for any reason, including pre-registration.

30. Ms. Gaeta went to Health Central Hospital for her induction, as planned, on July 21, 2017, and arrived in Labor and Delivery at 7:15 a.m. The undersigned finds that the hospital provider-obstetrical patient relationship by and between Health Central Hospital and Ms. Gaeta began upon her admission on July 21, 2017.

⁴ The evidentiary record fails to provide any guidance as to what transpires between a potential obstetrical patient and Health Central Hospital when the obstetrical patient pre-registers.

31. Kathleen Schurig, R.N., was the delivery nurse assigned to Ms. Gaeta upon initial admission. Nurse Schurig explained her initial general duties as follows:

And when you are admitting them, you bring them in, you tell them what's going to happen, you put them on a fetal monitor. You go over what you are doing. At some point, you start an IV, you get a consent signed, and then and when everybody agrees on the plan, then they start whatever she's there for, whether she's there for regular labor that she went into naturally or any other reason.

32. Upon review of medical records provided at her deposition, Nurse Schurig provided the following timeline of initial events: 1) Ms. Gaeta's height and weight was charted at 7:26 a.m.; 2) she reviewed Dr. Henry's physician's orders around 7:30 a.m.; 3) a urine sample was also collected around 7:30 a.m.; 4) a fetal monitor was placed on Ms. Gaeta at approximately 7:56 a.m.; 5) at 8:40 a.m., TED hose were placed on Ms. Gaeta's legs and it was documented that she was completely oriented to her room; 6) at 8:50 a.m., a blood sample was collected from Ms. Gaeta; and 7) at 9:00 a.m., Nurse Schurig performed a vaginal examination of Ms. Gaeta.

33. Nurse Schurig acknowledged that she did not have an independent recollection of Ms. Gaeta related to her admission on July 21, 2017. She credibly testified as to her routine practice of providing obstetric patients, upon their admission, a hospital NICA notice form and the brochure furnished from NICA. She credibly testified that she provided a form entitled "Receipt of Florida Birth-Related Neurological Injury Compensation Association (NICA) Information" (NICA form) to Ms. Gaeta sometime between 7:15 a.m. and 9:00 a.m., and that both she and Ms. Gaeta signed the form at 9:00 a.m.

34. At Nurse Schurig's deposition the following exchanges occurred:

Q. Would you have patients at Health Central Hospital sign a form acknowledging notice of participation of the hospital in the NICA program?

A. Yes, that's pretty standard across the board. That's – when you have the sign consents, they sign a statement say – and you give them a pamphlet that goes over the NICA Program.

* * *

Q. Okay. But regardless of when it happened in that timeframe, you would have made sure that you explained to her what the program was, given her the Peace of Mind brochure, and allowed her to make an informed decision on whether she wanted to sign that document, is that right?

A. Oh yes, definitely.

35. The language of the subject NICA form, however, merely advises the patient of the existence of the NICA plan without notifying the patient of Health Central Hospital's participation in NICA. The form language is set forth, in full, as follows:

Receipt of Florida Birth-Related Neurological Injury Compensation Association (NICA) Information

I have been given information, by Health Central Hospital, regarding Florida Birth-Related Neurological Injury Compensation Association (NICA), pursuant to Section 766.301-766.316, Florida Statute.

The information provided discusses certain limited compensation that is available in the event certain types of qualifying neurological injuries may occur during labor, delivery, or resuscitation in a hospital.

For specific information, I understand that I can contact the Florida Birth-Related Neurological Injury Compensation Association (NICA), Post Office Box 14567, Tallahassee, Florida 32317-4567 or via telephone at (800) 398-2129.

36. Nurse Schurig credibly testified that she provided Ms. Gaeta the brochure prepared by NICA entitled Peace of Mind. Ms. Gaeta testified that she did not recall receiving the NICA form or brochure; however, as noted in the stipulated facts, she acknowledges she signed the NICA form, and further testified that she had no reason to dispute receipt of the NICA form or brochure.

37. The undersigned finds, based upon the totality of credible evidence that it is more likely than not that Ms. Gaeta was provided the NICA form and the NICA brochure on July 21, 2017.

38. With respect to the timing of the notice, and whether it could have been provided earlier, Nurse Schurig testified as follows:

. . . It looks like, according to the charting, that I had the consent signed at 9 o'clock. So, that's the only thing I can tell you is that that's what I did.

* * *

If I was – usually, I do all the consents at one point and time. There is – would have been no reason for me to do that NICA earlier. I could have given her – had her sign all the consents as soon as she walked in the door, but that is obviously not what happened here.

39. Nurse Schurig further credibly testified that, at the time the NICA notice was provided, Ms. Gaeta had not been administered any medication that would have affected her ability to make an informed decision about signing the NICA notice form. Ms. Gaeta credibly testified that there were no

conditions that would have prevented her from reading the NICA notice form prior to signing the same.

40. The available record fails to contain any evidence to suggest that, when Ms. Gaeta was admitted to Health Central Hospital, she was in an “emergency medical condition,” as that term is defined in section 395.002(8), Florida Statutes. Two days after being admitted, on July 23, 2017, Ashtyn was born a live infant at Health Central Hospital.

CONCLUSIONS OF LAW

41. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. §§ 766.301-766.316, Fla. Stat.

42. 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.

43. Section 766.301(2) provides that it is “the intent of the Legislature to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation.” The injured infant, her or his personal representative, parents, dependents, and next of kin may seek compensation under the Plan by filing a claim for compensation with DOAH. §§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat. The administrative law judge (ALJ) has exclusive jurisdiction to determine whether a claim filed under the Plan is compensable. § 766.304, Fla. Stat.

44. In discharging this responsibility, pursuant to section 766.309(1), the ALJ must make the following determinations based upon all available evidence:

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

administrative law judge, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.302(2).

(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.

(c) How much compensation, if any, is awardable pursuant to s. 766.31.

(d) Whether, if raised by the claimant or other party, the factual determinations regarding the notice requirements in s. 766.316 are satisfied.

45. At issue here is whether Intervenors complied with the notice requirements of section 766.316. “Because NICA remedies are limited, obstetric patients subject to limited compensation under NICA are entitled to receive pre-delivery notice of their rights and limitations under the plan.”

Fla. Birth-Related Neurological Injury Comp. Ass’n v. Div. of Admin.

Hearings, 29 So. 3d 992, 995 (Fla. 2010). As the proponents of the proposition that appropriate notice was given or that notice was not required, the burden rests upon the Intervenors to show that the statutory requirements have been met. *Fla Health Sciences Ctr., Inc. v. Div. of Admin. Hearings*, 974 So 2d 1096, 1099-1000 (Fla. 2d DCA 2008); *Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass’n*, 880 So. 2d 1253, 1257 (Fla. 1st DCA 2004).

46. Section 766.316 provides as follows:

Notice to obstetrical patients of participation in the plan.—Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient’s rights and limitations under the plan. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when notice is not practicable.

47. In *Galen of Florida, Inc. v. Braniff*, 696 So. 2d 308, 309-10 (Fla. 1997), the court set forth the purpose for the notice requirement as follows:

[The statutory language] makes clear 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. *Turner v. Hubrich*, 656 So. 2d 970, 971 (Fla. 5th DCA 1995).

48. The Florida Supreme Court has interpreted NICA’s notice provision to require independent notice from both participating physicians and participating hospitals—notice by one does not satisfy notice for the other. *Univ. of Miami v. Ruiz*, 916 So. 2d 865 (Fla. 3d DCA 2005) citing *Fla. Birth-*

Related Neurological Injury Comp. Ass'n v. Div. of Admin. Hearings, 29 So. 3d 992, 998 (Fla. 2010).

49. The NICA “Peace of Mind” brochure satisfies the legislative mandate of providing a “clear and concise explanation of a patient’s rights and limitations under the plan.” *Dianderas v. Fla. Birth-Related Neurological Comp. Ass’n*, 973 So. 2d 523, 527 (Fla. 5th DCA 2007). To meet the purpose of the statute, however, participating physicians and hospitals must notify the patient of their own participation in NICA. *Fla. Health Sciences Ctr. v. Div. of Admin. Hearings*, 974 So.2d 1096, 1100 (Fla. 2d DCA 2007), *cert. denied sub nom Fla. Birth-Related Neurological Injury Comp. Ass’n v. Britt*, 984 So. 2d 519 (Fla. 2008).

50. In *Florida Health Sciences Center*, the court addressed, *inter alia*, whether a provider’s notice to the patient of the existence of the NICA plan, as provided in the NICA brochure, was satisfactory to invoke the immunity and exclusivity provisions of the NICA plan. *Id.* In concluding it was insufficient, the Second District Court of Appeal provided as follows:

The *Galen* analysis of the purpose of the statute’s notice provision is also applicable to the question of the sufficiency of notice. Applying *Galen* to the instant case, if the notice given [Petitioner] is to meet the intent of the statute, it would be necessary to notify her that her doctor was, in fact, a participant. The brochures that she received from the clinic on behalf of the physician and from [the hospital] only explained the existence of the Plan and that it would be applicable to her if her physician was a Plan participant. Without further notification that her physician was indeed a Plan participant, [Petitioner] would be unaware that she needed to choose either to continue care with her current physician-thus accepting the Plan’s coverage-or seek the services of a nonparticipating physician-thereby reserving any rights she may have to pursue a civil action. In *Galen*, the Florida Supreme Court specifically qualified the notice that

satisfies the intent of the statute as notice of participation. Accordingly, we agree with the ALJ that notice of the Plan as provided by the brochure, even though it may comply with the literal wording of the notice statute, is not sufficient to meet the statute's intent. To read the statute in such a way as to not include the notice of participation would result in a statutory interpretation requiring a meaningless act that fails to accomplish the purpose of the notice requirement.

Id.

51. Against this legal background, based on the Findings of Fact set forth above, the undersigned concludes that Dr. Henry met her burden of establishing that the notice requirements of section 766.316 were satisfied. The undersigned concludes that notice of Dr. Henry's participation in NICA and the NICA brochure were sufficiently provided to Ms. Gaeta upon the initial visit to West Orange on December 22, 2016, at which time the obstetrical provider-patient relationship was established. Ms. Gaeta's signature acknowledging receipt of the NICA brochure raised a rebuttable presumption that the notice requirements have been met. § 766.316, Fla. Stat. Petitioners did not present sufficient evidence to overcome the presumption.

52. Although Dr. Henry was not, as represented in the NICA notice form, a participating physician at the time the NICA notice form was provided and signed, the undersigned concludes that this error was without harm or prejudice to Petitioners. As noted above, the purpose of the statutory notice requirement 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." Here, at the time of the factual inaccuracy, the notice language was overly inclusive, providing that all the physicians (including Dr. Henry) at West Orange were participating physicians.

Accordingly, based on that information, Ms. Gaeta could have made the choice of using an obstetrician elsewhere that was not a NICA participant, but did not do so. Moreover, the factual inaccuracy was cured within 10 days, as Dr. Henry became a participating physician on January 1, 2017. Dr. Henry was a participating physician at the time of her first obstetrical contact with Ms. Gaeta and continued to be a participating physician through the time when obstetrical services were delivered to Ms. Gaeta in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital.

53. With respect to Health Central Hospital, the undersigned concludes, based on the Findings of Fact above, that Health Central Hospital provided a NICA notice form and NICA brochure to Ms. Gaeta upon admission on July 21, 2017. Again, Ms. Gaeta's signature acknowledging receipt of NICA information raised a rebuttable presumption that the notice requirements have been met. § 766.316, Fla. Stat. The undersigned concludes that the presumption was rebutted.

54. The Florida Supreme Court has held that "as a condition precedent to invoking [the Plan] as a patient's exclusive remedy, healthcare providers must, when practicable, give their obstetrical patients notice of the participation in the plan a reasonable time prior to delivery." *Galen*, 696 So. 2d at 309. In support of this holding, the court provided the following:

We agree with the district courts that the only logical reading of the statute is that before an obstetrical patient's remedy is limited by the NICA plan, the patient must be given pre-delivery notice of the health care provider's participation in the plan. . . . In order to effectuate this purpose a NICA participant must give a patient notice of the "no-fault alternative for birth-related neurological injuries" a reasonable time prior to delivery, when practicable.

Id., at 309-10.

55. In *Weeks v. Florida Birth-Related Neurological Injury Compensation Association*, 977 So. 2d 616, 618-19 (Fla. 5th DCA 2008), the court confronted the timing of NICA notice and held that “the formation of the provider-obstetrical patient relationship is what triggers the obligation to furnish the notice.” Specifically, the *Weeks* court held as follows:

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.

Weeks, 977 So. 2d at 619-20.

56. While the *Weeks* court acknowledged that the relationship and timing are questions of fact, the court noted that “a central consideration should be whether a 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.” *Id.*, at 19.

57. Several appellate decisions have recognized that delivery pre-registration can mark an appropriate occasion for the hospital to provide the patient notice of participation in the Plan within a reasonable time. *See Weeks*, 977 So. 2d at 619 (concluding mother became an obstetrical patient of hospital well before delivery when she pre-registered for delivery at hospital and was actually admitted to hospital for prenatal care several weeks prior to delivery); *Tarpon Springs Hosp. Found., Inc. v. Anderson*, 34 So. 3d 742 (Fla. 2d DCA 2010)(affirming ALJ’s findings that delivery pre-registration at the

hospital (weeks prior to delivery) marked the beginning of the patient-provider relationship and the failure to provide notice until the day prior to delivery was not reasonable under the circumstances); *Nw. Med. Ctr. v. Ortiz*, 920 So. 2d 781 (Fla. 4th DCA 2006)(affirming ALJ's findings that hospital knew patient intended to deliver at hospital and had reasonable opportunity to provide NICA notice when patient completed delivery pre-registration months prior to delivery); *Univ. of Miami v. Ruiz*, 916 So. 2d 865 (Fla. 3d DCA 2005)(concluding that patient's pre-registration three weeks ahead of maternity admission "clearly manifested an intent to the deliver at that hospital" and that pre-registration provided a reasonable opportunity to furnish NICA notice).

58. 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 court affirmed a trial court decision finding the hospital had failed to meet the notice requirement. The *Athey* court's reasoning hinged upon the hospital's knowledge of the patients prior to their presentation to the hospital for delivery. In the consolidated case, the obstetrical patients were Medicaid patients who substantially received their prenatal care at a health clinic, which, in turn, had a contract with the hospital to provide maternity services, and referred the patients to the hospital for prenatal ultrasound procedures and delivery. *Athey*, 699 So. 2d at 48. Each patient presented to the hospital in labor; however, the hospital had not provided NICA notice prior to delivery. *Id.* Although the patients had not pre-registered for delivery at the hospital, the court held that the hospital had a reasonable opportunity to provide NICA notice where, weeks prior to delivery, the hospital "performed prenatal ultrasound procedures on these patients and had knowledge that these patients would deliver their babies at [the hospital]."

59. Under facts similar to those presented here, final orders from this tribunal have addressed the NICA notice. In *Pillonato v. Florida Birth-*

Related Neurological Injury Compensation Association, Case No. 14-1980N (Fla. DOAH June 24, 2015), *aff'd per curiam*, *Wellington Regional Medical Center v. Pillonato*, 200 So. 3d 70 (Fla. 4th DCA 2016), the mother presented to the hospital on several occasions prior to delivery. On the second visit, she was 26+ weeks' gestation and had complaints of abdominal cramping. She was seen in the emergency room and "hooked up to a fetal monitor and received a labor check and sonogram." *Pillonato*, FO at 9.

60. The ALJ found that, during this visit, the mother had no recollection of informing the hospital of her intention to deliver at that hospital. *Id.* The ALJ also found that the mother was aware of her options to pre-register, and to take a tour of the hospital's labor and delivery department prior to delivery (both of which, pursuant to hospital policy, would have resulted in the hospital providing NICA notice), but did not avail herself of those options. *Id.*, FO at 10-11.

61. The mother ultimately presented to the labor and delivery section of the hospital with contractions and was provided with the NICA brochure within 20 minutes of admission. *Id.*, FO at 11. The ALJ concluded that the hospital-obstetrical patient relationship began on the second visit, because the hospital staff was aware the patient was pregnant, and presented with obstetrical issues. *Id.*, FO at 18. Accordingly, the ALJ concluded that the notice provided by the hospital upon admission for labor and delivery was not provided in a reasonable time, and, therefore, insufficient. *Id.*, FO at 19.

62. In *Bastien v. Florida Birth-Related Neurological Injury Compensation Association*, Case No. 17-1830N (Fla. DOAH Feb. 16, 2018), the ALJ found that the hospital provider obstetrical-patient relationship developed when the obstetrician sent the patient to the hospital for prenatal testing in the hospital's labor and delivery department, and during that visit, the patient was scheduled to be induced several days later. The ALJ concluded that the hospital's failure to furnish notice within a reasonable time thereafter was

not excused by the subsequent emergency (presenting in labor to deliver the baby). *Bastien*, FO at 15.

63. In *Quarrie v. Florida Birth-Related Neurological Injury Compensation Association*, Case No. 20-0818N (Fla. DOAH Oct. 10, 2020), it was recently concluded that the intervenor hospital had failed to provide timely notice in compliance with section 766.316. The determination was premised on the finding that a hospital provider-obstetrical patient relationship had begun well prior to delivery with significant obstetrical contacts with the hospital; however, the hospital did not provide notice within a reasonable time thereafter.

64. Unlike the claimant in *Quarrie*, here, Ms. Gaeta did not have any contact with Health Central Hospital's Labor and Delivery department prior to her actual admission to the hospital for an induction. Ms. Gaeta's pre-delivery contacts with Health Central Hospital solely concerned outpatient ultrasounds conducted in Outpatient Radiology. Although Dr. Henry only delivered at Health Central Hospital during the relevant time period, the evidence does not support a finding that Health Central Hospital had knowledge that Ms. Gaeta would deliver there. Under the specific facts of this case, the undersigned finds that Ms. Gaeta's limited pre-delivery contacts were insufficient to establish the hospital provider-obstetrical patient relationship prior to her admission on July 21, 2017.

65. While it appears undisputed that, on June 28, 2017, West Orange faxed several consent forms to Health Central Hospital related to Ms. Gaeta's planned induction, the undersigned does not construe the same as tantamount to preregistration. Even assuming, *arguendo*, that upon receipt of the documents Health Central Hospital placed Ms. Gaeta on the schedule for an induction, the undersigned declines to conclude that, by this sole act, the hospital had knowledge that Ms. Gaeta would, in fact, deliver at Health Central Hospital. It is further concluded that the faxing of consent forms by

West Orange to Health Central Hospital, without more, did not establish a provider-obstetrical patient relationship.

66. The undersigned further concludes that Health Central Hospital provided the NICA notice form and brochure to Ms. Gaeta within two hours of her admission to the hospital. Under the specific facts of this case, the undersigned concludes that the same was provided within a reasonable time after the hospital provider-obstetrical patient began.

67. It is further concluded, however, that the NICA notice form provided by Health Central Hospital to Ms. Gaeta was facially insufficient. While it notified Ms. Gaeta of the existence of the NICA Plan, the NICA notice form failed to notify her that Health Central Hospital was a participant in the NICA plan. The available record fails to present sufficient evidence to support a finding or conclusion that Ms. Gaeta was otherwise notified of Health Central Hospital's participation in the Plan.

68. In summary, it is concluded that, based on the Findings of Fact set forth above, that the hospital provider-obstetrical patient relationship (by and between Health Central Hospital and Ms. Gaeta) did not begin until Ms. Gaeta presented for her planned induction on July 21, 2017. The undersigned further concludes that, on July 21, 2017, Ms. Gaeta received Health Central Hospital's NICA notice form and the brochure furnished by NICA, and that the same were provided within a reasonable time. However, as the Health Central's NICA notice form did not notify Ms. Gaeta that it was a participant in the NICA plan, Health Central Hospital failed to satisfy the requirements of section 766.316.

CONCLUSION

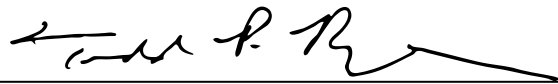
Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Intervenor Roseanne M. Henry, M.D., satisfied the notice requirements of section 766.316.

2. Intervenor Health Central Hospital failed to satisfy the notice requirements of section 766.316.

3. Having previously determined the claim to be compensable, Petitioners shall within thirty (30) days of this Order provide written notice of whether Petitioners' desire a hearing to determine the issue of an award pursuant to section 766.31.

DONE AND ORDERED this 22nd day of January, 2021, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of January, 2021.

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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).