

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

NPAUG AND TSHAJ XIONG, ON BEHALF OF  
AND AS PARENTS AND NATURAL  
GUARDIANS OF PAJ XIONG, A MINOR,

Petitioners,

vs.

Case No. 20-0501N

FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION,

Respondent

and

DOROTHY J. ODOM, M.D., ORLANDO  
HEALTH PHYSICIAN ASSOCIATES, LLC AND  
ORLANDO HEALTH, INC., D/B/A WINNIE  
PALMER HOSPITAL,

Intervenors.

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FINAL ORDER

Pursuant to notice, a final hearing was conducted by Zoom Conference on March 2, 2021, before Administrative Law Judge (ALJ) Todd P. Resavage of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners: Gregorio A. Francis, Esquire  
Osborne & Francis, PLLC  
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Orlando, Florida 32811-2200

For Respondent: David W. Black, Esquire  
Frank, Weinberg & Black, P.L.  
7805 Southwest 6th Court  
Plantation, Florida 33324

For Intervenors: Jeremy T. Palma, Esquire  
Rissman, Barrett, Hurt, Donahue & McLain, PA  
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201 East Pine Street  
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STATEMENT OF THE ISSUES

For the purpose of determining compensability, the issue is whether the injury claimed is a birth-related neurological injury, as defined by section 766.302(2), Florida Statutes. The specific issue that remains is whether the brain injury caused by oxygen deprivation or mechanical injury, which rendered Paj Xiong (Paj) permanently and substantially mentally and physically impaired, occurred in the course of labor, delivery, or resuscitation in the immediate post-delivery period.

PRELIMINARY STATEMENT

On January 27, 2020, Petitioners filed a “Petition for Benefits” (Petition), for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). Specifically, Petitioners requested a determination of non-compensability.

The Petition named Dorothy J. Odom, M.D., as the physician who provided obstetric services at the birth of Paj on March 13, 2018, at Orlando Health, Inc., d/b/a Winnie Palmer Hospital (Winnie Palmer), in Orlando, Florida.

On February 3, 2020, DOAH mailed a copy of the Petition to Respondent, Dr. Odom, and Winnie Palmer by certified mail. Respondent was served with the Petition on February 4, 2020.

On February 21, 2020, a Petition for Leave to Intervene was filed by Dr. Odom, Orlando Health Physician Associates, LLC, and Winnie Palmer. The requested intervention was granted by Order dated March 2, 2020.

After granting one extension of time, on April 6, 2020, Respondent filed its Response to Petition. Respondent suggested that, based on its review of the claim, Paj had sustained a birth-related neurological injury, as defined in section 766.302(2), and notified Petitioners that Respondent was prepared to provide medical benefits as specified in section 766.31(1)(a) and willing to offer the full \$100,000.00, as provided in section 766.31(1)(b).

After conducting a telephonic status conference, the final hearing was initially scheduled for June 18, 2020. On June 3, 2020, Respondent filed a Motion for Summary Final Order (Respondent's Motion) seeking a determination that Petitioners' claim was compensable under the Plan. Thereafter, the final hearing and the response to Respondent's Motion were continued on several occasions to allow the parties to conduct reasonable discovery.

On January 22, 2021, Respondent's Motion was denied and the final hearing was scheduled for March 2, 2021. The final hearing proceeded, as scheduled, via Zoom Conference. In lieu of presenting live testimony, the parties stipulated and mutually agreed to the presentation of their respective cases solely by the admission of exhibits and the presentation of a closing argument.

Upon the conclusion of the final hearing, the parties stipulated to the submission of proposed final orders within 15 days of the filing of the transcript and to the issuance of the undersigned's Final Order on or before 30 days from the filing of the transcript. The Transcript was electronically filed on March 16, 2021. The identity of the witnesses and exhibits, and rulings regarding each, are as set forth in the Transcript. The parties timely filed proposed final orders, which have been considered in the preparation of this Final Order.

#### FINDINGS OF FACT

Pursuant to the parties' stipulations at the final hearing, the Findings of Fact set forth in paragraphs 1 through 5 are undisputed.

1. Paj was born on March 13, 2018, at Winnie Palmer, a "hospital," as defined by section 766.302, and was alive at birth.
2. Paj was a single gestation with a birthweight in excess of 2,500 grams.
3. Obstetrical services were delivered by Dr. Odom, a Neurological Injury Compensation Association (NICA) "participating physician," as defined in sections 766.302 and 766.309, in the course of labor, delivery, or resuscitation in the immediate post-delivery period.
4. Paj sustained a brain injury caused by oxygen deprivation or mechanical injury and was thereby rendered permanently and substantially mentally and physically impaired.
5. The notice requirements of section 766.316 were satisfied by the Intervenors.
6. Dr. Odom is a practicing obstetrician/gynecologist (OB/GYN) and at all times relevant was employed with Orlando Health Physician Associates, LLC.
7. Petitioner Npaug Xiong (Mrs. Xiong) first sought prenatal care and treatment with Dr. Odom on September 12, 2017, at which time she was 13

weeks and two days pregnant. Mrs. Xiong's relevant medical history reveals that she had been pregnant on seven prior occasions, resulting in five births. The prior births had been vaginal deliveries without complication. Her expected delivery due date with this pregnancy was March 24, 2018.

8. An ultrasound conducted on February 20, 2018, revealed that the fetus was in a breech position, thus "presenting in a buttocks first" position. On March 8, 2018, Dr. Odom determined that the fetus remained in a breech position. Dr. Odom advised Mrs. Xiong of the external cephalic version (ECV) procedure, which is used to turn a fetus from a breech position into a head-down position in anticipation of a vaginal delivery.

9. Dr. Odom credibly testified that the plan was to schedule Mrs. Xiong for an attempt at ECV and, if successful, her membranes would be ruptured and she would proceed with a total induction of labor. If unsuccessful, Dr. Odom would proceed with a Cesarean section delivery (C-section). In either event, the plan was to deliver the baby following the attempt at ECV.

10. On March 11, 2018, Mrs. Xiong returned to Winnie Palmer for a labor check. At this time, she was 38 weeks pregnant. Autumn Elms, M.D., an OB/GYN, examined Mrs. Xiong. Dr. Elms testified that Mrs. Xiong's chief complaint was that of contractions, which she documented as a two out of 10 on the pain scale.

11. Dr. Elms performed a vaginal exam, which revealed that Mrs. Xiong's cervix was four centimeters (cm) dilated and 50 percent effaced. She also documented that the baby was "minus 3," meaning that the baby had not descended down into the pelvic canal. During this visit, Mrs. Xiong was connected to an external fetal monitor for approximately one hour. While monitored, Mrs. Xiong only had one contraction.

12. Dr. Elms's impression and overall assessment was that of "false labor," which she defined as a patient's complaint of perceived labor without documented findings to support labor.

13. Mrs. Xiong returned to Winnie Palmer on March 13, 2018, at 2:09 p.m., to proceed with the attempt at ECV, and subsequent delivery. As reported on the History and Physical completed by Dr. Odom, Mrs. Xiong “reports regular painful contractions since earlier today.” Mrs. Xiong also reported no loss of fluid and “only a small amount of bloody show.”<sup>1</sup>

14. A vaginal exam was performed by Dr. Odom, which revealed that her cervix remained at four cm dilated; however, she was now 70 percent effaced and there was the presence of bloody show.

15. Mrs. Xiong was placed on an external fetal monitor. The fetal monitoring strips, as interpreted by Dr. Robinson, establish that from 3:09 p.m., to the beginning of the first ECV attempt, Mrs. Xiong experienced 15 separate contractions.

16. During this time period, at approximately 3:40 p.m., a medication, Terbutaline, was administered. The purposed of this medication is to inhibit contractions and relax the uterus in preparation for the ECV procedure. Mrs. Xiong also received an epidural to prevent her from experiencing severe pain associated with the ECV.

17. Dr. Odom began the first ECV attempt at approximately 4:26 p.m. During the first attempt, the fetal heart rate dropped to 80 beats per minute (bpm) for approximately one to two minutes. After external pressure was released, the baby’s heart rate rebounded to 120 bpm. Dr. Odom credibly opined that a normal fetal heart rate in a third trimester infant is between 110 and 160 bpm.

18. A second ECV attempt was made at approximately 4:50 p.m. Dr. Odom testified that the attempted procedure would have taken roughly 10 minutes. Again, the procedure was unsuccessful and the fetal heart monitor was placed back on Mrs. Xiong.

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<sup>1</sup> Christopher Robinson, M.D., Intervenor’s OB/GYN and maternal-fetal expert, explained that bloody show is the “natural progress of cervical change” and that “when the cervix is changing and thinning out and undergoing stretch, there are small blood vessels that are disrupted in the stroma of the cervix, leading to that bleeding and that presentation.”

19. The strips from the fetal heart rate monitor provide that the infant's heart rate ranged from about 100 to 110 bpm from approximately 5:00 p.m. until 5:21 p.m. Dr. Odom credibly testified that during this period, the heart monitoring strips were consistent with potential compromise and/or hypoxia, and, therefore, an emergency C-section was necessary.

20. At 5:21 p.m, the heart rate monitor was removed to transition Mrs. Xiong to the operating room for a C-section. The C-section delivery was completed by 5:31 p.m.

21. At birth, Paj was profoundly depressed. His immediate heart rate was less than 30. His Apgar scores were 1 at one minute, 4 at five minutes, and 4 at 10 minutes of life.<sup>2</sup> At one minute of life, Paj had a heart rate less than 100, no respiratory rate, flaccid muscle tone, no response to reflex, and was blue and pale. At 10 minutes of life, Paj remained severely depressed. Positive pressure ventilation by intubation was required for respiratory distress with an increase in heart rate to 150 bpm.

22. Cord blood gas pH obtained was 7.29 with a base excess of -5. The initial arterial blood gas pH was 7.07 with a base excess of -21.

23. Paj's newborn hospital course was complicated by multi-system organ failures, including respiratory distress, seizures, acute renal failure, adrenal hemorrhage, thrombocytopenia, feeding difficulty, elevated liver functions, hearing loss, hypoxic ischemic encephalopathy (HIE), and brain hemorrhage.

24. An MRI obtained on Paj's fifth day of life had findings suggestive of HIE with right cerebellum hemorrhage.

25. As noted above, the parties stipulate that Paj sustained a brain injury caused by oxygen deprivation or mechanical injury and was thereby rendered permanently and substantially mentally and physically impaired.

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<sup>2</sup> An Apgar score is a numerical expression of the condition of the newborn and reflects the sum total points gained on an assessment of heart rate, respiratory effort, muscle tone, reflex irritability, and color. See *Bennett v. St. Vincent's Med. Ctr., Inc.*, 71 So. 3d 828, 834 n. 2 (Fla. 2011) citing *Nagy v. Fla. Birth-Related Neuro. Injury Comp. Ass'n*, 813 So. 2d 155, 156 n. 1 (Fla. 4th DCA 2002). Each factor is scored 0, 1, or 2; the maximum total score is 10.

26. There is no record evidence to support a finding that the injury to Paj's brain occurred prior to the ECV attempts on March 13, 2018.<sup>3</sup> It appears undisputed that the original injury occurred during or immediately following the attempts at ECV, but prior to the C-section delivery. The parties presented expert witness testimony concerning, *inter alia*, whether Mrs. Xiong was in "labor" during the time of the original injury and whether the injury continued to manifest during delivery, and into the immediate post-delivery period. The expert medical testimony is addressed below.

27. Donald Willis, M.D., a board-certified obstetrician specializing in maternal-fetal medicine, was retained by Respondent to review the pertinent medical records of Mrs. Xiong and Paj and opine as to whether Paj sustained an injury to his brain or spinal cord caused by oxygen deprivation or mechanical injury that occurred during the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital. Dr. Willis's ultimate opinions are that Mrs. Xiong was in labor when she presented to Winnie Palmer on March 13, 2018, and that the initial injury occurred during or after the second ECV attempt and continued through delivery and into the immediate post-delivery period.

28. Dr. Willis defines the term "labor" as uterine contractions that result in a change in the cervix. The change can be either a change in dilation or effacement, or both. In support of his opinion that Mrs. Xiong was in labor, Dr. Willis testified that her cervix had increased in effacement from 50 percent on March 11, 2018, to 70 percent on March 13, 2018. Additionally, as compared to her prior visit to Winnie Palmer on March 11, she was now experiencing painful uterine contractions since earlier in the day. Moreover, Dr. Willis opined that the bloody show, while not indicative of labor in and of itself, is a complementary indication of labor.

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<sup>3</sup> The record evidence demonstrates that Mrs. Xiong was not in labor on March 11, 2018.



29. Dr. Willis also opined that the initial injury occurred after the second ECV attempt as the baby sustained fetal bradycardia, which he defined as a “baseline heart rate that drops for ten minutes or more.” He further opined that the baby was bradycardic, and consequently suffering oxygen deprivation to the brain, from approximately 5:00 p.m. through delivery.

30. Dr. Willis testified that the injury continued through delivery and into the immediate post-delivery period; however, he could not ascribe a percentage or certainty to the level of “insult” or “injury”:

I mean, brain injury, I believe, did occur, but how much occurred then versus during delivery and the postdelivery period, there’s no way to tell with any certainty how much occurred during one particular time period in that frame.

31. In support of his opinion that the injury to the brain was continuing post-delivery, Dr. Willis noted that Paj’s heart rate at birth was less than 30; his Apgar score was 1; he was profoundly depressed; and the blood gas results obtained approximately 30-35 minutes after birth (and after resuscitative efforts) were consistent with ongoing oxygen deprivation and resulting or continuing brain injury.

32. Respondent also retained Luis E. Bello-Espinosa, M.D., a pediatric neurologist, to review the medical records of Mrs. Xiong and Paj, and to conduct an Independent Medical Examination (IME) of Paj. Dr. Bello-Espinosa opines that Paj suffered from an acute severe hypoxic ischemic injury, and, as a result, suffers from a permanent and substantial mental and physical impairment.

33. Dr. Bello-Espinosa opines that certain findings or descriptions of Paj at birth such as poor Apgar scores, that he was apneic, had a low heart rate, was flaccid, and cyanotic are consistent with a hypoxic ischemic brain injury at the time of birth. He does not offer, however, an opinion as to whether Mrs. Xiong was in labor at the time of the injury. Additionally, while

Dr. Bello-Espinosa testified that this type of injury is “usually a continuum of injury,” he could not offer an opinion on the exact timing:

Q. Is there any way for you to determine within a reasonable degree of medical certainty as to the exact timing of when these injuries occurred with respect to whether it was before delivery, during delivery or during the immediate postdelivery period?

A. No.

34. As noted above, Intervenors retained and presented the deposition testimony of Dr. Robinson. Dr. Robinson’s ultimate opinion is that Mrs. Xiong was in labor at the time when she presented to Winnie Palmer on March 13, 2018.

35. Dr. Robinson defines the term “labor” as uterine contractions that result in cervical change, and the change can be dilation and/or effacement. He opines that Mrs. Xiong was in labor for several reasons. First, Dr. Robinson noted that Mrs. Xiong had reported regular and painful contractions, which were supported by the fetal monitoring strips. His review of the strips revealed that she had at least 15 contractions from 3:09 to 4:27 p.m. Second, her cervical effacement was documented to be 70 percent, thus a 20 percent progression since she was examined on March 11, 2018. According to Dr. Robinson, there is a “big difference” between 50 and 70 percent effaced. Finally, she also had some bloody show over this time course when examined.

36. Dr. Robinson opined that, on March 13, 2018, Mrs. Xiong was in “transitional labor.” He expanded on this opinion as follows:

So, I believe that, you know, what was happening on that date is she was transitioning from latent to active phase labor, so she basically had achieved a regular uterine contraction pattern with a breech presentation, and she was now progressing toward active phase labor. Now, was she in active phase

labor, no, but she was in labor, labor being defined as uterine contractions with cervical change, that's dilation and/or effacement. In this case, it was specifically effacement.

37. Dr. Robinson testified that the original injury to the fetus occurred after the second ECV attempt and prior to the C-section delivery. During this time period, he opine that there was persistent bradycardia, lack of variability in heart rate, and suggested hypoxia. With respect to whether the injury concluded prior to delivery, Dr. Robinson testified that, “[i]t would not necessarily have been completely during that time, it would have probably continued on beyond that time after delivery, based upon looking at what the Apgars are like.” He further testified, however, that with respect to post-delivery, he would defer to a pediatric neurologist overall as to the completeness and timing of injury.

38. The undersigned finds that Drs. Willis, Bello-Espinosa, and Robinson possess significant education, training, and expertise, and are well-qualified and credentialed to render the above-noted opinions. The undersigned finds their opinions as set forth above to be credible.

39. Petitioners retained and presented the deposition testimony of Sarah Mulkey, M.D., who is board certified in neurology with special qualifications in child neurology. Dr. Mulkey provided no opinions concerning whether Mrs. Xiong was in labor at the time of the original injury. Her ultimate opinion is that the brain injury was complete by the time of the C-section delivery, and that there was no ongoing further neurologic injury thereafter.

40. Dr. Mulkey testified that an MRI obtained five days after birth is consistent with an acute injury that occurred over the span of 10 to 30 minutes. She conceded, however, that “we can’t tell exactly which 30 minute window back in history.” With respect to the low Apgar scores, Dr. Mulkey opined that “[t]he baby has already had an injury, and what we’re seeing are

the neurological effects of that in these ten minutes as we're scoring these Apgars. But it's not – it's not an ongoing new injury.”

41. Dr. Mulkey was asked when, after delivery, Paj was receiving sufficient oxygen to the brain so that the brain was not suffering oxygen deprivation. In response, Dr. Mulkey testified that “. . . when the baby's respiratory status was taken care of with being ventilated and the heart rate was good, this baby was then perfusing the brain pretty quickly.”

42. The undersigned finds that Dr. Mulkey possesses significant education, training, and expertise, and is well-qualified and credentialed to render the above-noted opinions. Her opinion that Paj sustained an acute brain injury is credited. The undersigned, however, finds her opinion with respect to the injury being complete at the time of delivery to be less persuasive and entitled to less weight.

43. Petitioners also retained and presented the deposition testimony of Berto Lopez, M.D. Dr. Lopez is an OB/GYN, however, he is not currently board certified and does not have admitting privileges at any hospital. At the final hearing, Dr. Lopez's license to practice medicine had been revoked by the Department of Health, Board of Medicine. Dr. Lopez's ultimate opinion is that Paj suffered a brain injury caused by oxygen deprivation and was rendered permanently and substantially mentally and physically impaired; however, said injury did not occur in the course of labor, delivery, or resuscitation in the immediate post-delivery period.

44. Dr. Lopez testified that Mrs. Xiong was not in labor on March 13, 2018, when she presented to Winnie Palmer because she did not have a complaint of increasing pain, she did not demonstrate a cervical change that could not be easily explained by interoperative bias (two different examiners coming up with slightly different results), and she did not have progressive dilation or effacement of a significant nature. Additionally, he opined that labor was not indicated as her contractions were not every two to three minutes.

44. While Dr. Lopez conceded that there had been a change in the effacement of Mrs. Xiong's cervix from 50 to 70 percent, however, he discounted this change and attributed the same to the subjective scoring of two separate physicians.

46. Dr. Lopez also acknowledged the documentation that Mrs. Xiong had bloody show. He opined that it is common in dilated women who have had multiple children to free up cervical mucus with or without blood, and the bloody show may have been due to the prior digital vaginal examination.

47. In support of his opinion that Mrs. Xiong was not in labor at the time of injury, he also testified that at no time on March 13, 2018, was it ever documented that she was in labor, which he would have expected given that Mrs. Xiong was being assessed for the purpose of performing an ECV. Additionally, he testified that there is no indication that the Terbutaline or epidural were administered to abate labor.

48. Dr. Lopez agreed that there are several stages of labor. He defined "active labor" as cervical change and more than five centimeters of cervical dilation. "Latent phase" labor was defined by Dr. Lopez as early labor wherein the patient might be having contractions, the cervix may be dilated (typically less than 6 cm), and she is progressing in effacement and dilation. When asked whether early labor is considered within the definition of labor, he testified that "[i]t's one definition, yes." He also agreed that painful contractions over several hours, change in cervical effacement, persistent dilation, and bloody show, would be consistent with a woman being in labor, whether it's active or early labor.

49. Dr. Lopez further opined that the initial injury did not commence on March 13, 2018, until sometime after the second ECV attempt; however, he deferred to a pediatric neurologist as to when the hypoxic injury would have concluded.

50. Dr. Lopez possesses significant education, training, and experience to render the above-noted opinions. Dr. Lopez's opinion concerning the timing of

the initial injury is credited as well as his opinion that there was no documentation of labor on March 13, 2018. His opinion concerning whether Mrs. Xiong was in labor on March 13, 2018, is found less persuasive and entitled to less weight.

51. Intervenor, Dr. Odom, also testified concerning whether Mrs. Xiong was in labor. She acknowledged that, on March 13, 2018, neither she nor any other healthcare provider involved in Mrs. Xiong's care and treatment documented that she was in labor. She also confirmed that Mrs. Xiong's membranes were intact at all times prior to the C-section delivery.

52. Dr. Odom testified that Mrs. Xiong was not in "active labor" that day because her cervix was not dilated more than four centimeters, however, she opined that Mrs. Xiong was in "early labor" as she was experiencing contractions and there had been a cervical change in effacement from her prior examination on March 11, 2018. Dr. Odom declined to offer an opinion as to when the injury occurred.

53. In support of the position that Mrs. Xiong was not in labor at the time of the original injury, Petitioners contend that labor is a contraindication to the performance of an ECV procedure, and, therefore, Dr. Odom would not have performed the ECV procedure if Mrs. Xiong was, in fact, in labor. Dr. Lopez testified that active labor is a contraindication in performing an ECV and that he believes the delivery nurse probably would not have permitted the procedure if she felt Mrs. Xiong was in labor.

54. Dr. Willis confirmed that an ECV should not be attempted if the mother is in active labor because the contractions and the location of the fetus in the pelvis would make it difficult, if not impossible, to turn the baby externally. Dr. Robinson opined that labor is not a contraindication to an ECV and that it is done routinely. He acknowledged, however, that there are complicating factors that labor presents for performance of an ECV. Specifically, he testified that if the uterus is contracting regularly and will

not relax, the fetus cannot be turned, and there is a potential for rupturing the membranes.

55. The undersigned finds that, on March 13, 2018, Paj sustained an injury to his brain caused by oxygen deprivation occurring in the course of labor. The undersigned further finds that the injury was not complete at the time of the C-section delivery and continued into resuscitation in the immediate post-delivery period.

#### CONCLUSIONS OF LAW

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

57. 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.

58. 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.”

59. 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. NICA, which administers the Plan, has “45 days from the date of service of a complete claim . . . in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury.” § 766.305(4), Fla. Stat.

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

claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, Respondent disputes the claims, as here, the dispute must be resolved by the assigned ALJ in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

61. In its present posture, the undersigned is required to make the following threshold determination based upon the available evidence:

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

(b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate 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.

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

§ 766.309(1), Fla. Stat. An award may be sustained only if the ALJ concludes that the “infant has sustained a birth-related neurological injury. . . .”

§ 766.31(1), Fla. Stat.



62. The term “birth-related neurological injury” is defined in section 766.302(2) as follows:

“Birth-related neurological injury” means injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth 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.

63. The term “labor” is neither defined by statute nor rule. In *Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administration Hearings*, 686 So. 2d 1348 (Fla. 1997)(hereinafter *Bernie*), the court explained that “[w]here, as here, the legislature has not defined the words used in a phrase, the language should usually be given its plain and ordinary meaning.” *Bernie*, at 1354, citing *Southeastern Fisheries Ass’n, Inc. v. Dep’t Nat. Res.*, 453 So. 2d 1351 (Fla. 1984). “Nevertheless, consideration must be accorded not only to the literal and usual meaning of the words, but also to their meaning and effect on the objectives and purposes of the statute’s enactment.” *Id* at 1354.

64. Drs. Willis and Robinson defined “labor” as uterine contractions that result in a change to the cervix in dilation or effacement. The undersigned accepts this definition and concludes the definition encompasses the usual meaning of the word and is consistent with the objectives and purposes of section 766.301 *et. seq.*

65. Each of the parties to this proceeding presented one or more experts to support their respective positions as to whether Mrs. Xiong was in labor at the time of the original injury. All of the experts presented were well-qualified, and possessed extensive and significant training and experience in their respective disciplines or areas of expertise. Having thoroughly reviewed

and weighed the considered expert opinions and evidence, the undersigned concludes that the better evidence supports the conclusion that Mrs. Xiong was in labor at the time Paj sustained an injury to his brain caused by oxygen deprivation. Specifically, the undersigned concludes that Mrs. Xiong was not in active labor, but rather, early labor at the time of the original injury.

66. Having concluded that Mrs. Xiong was in labor at the time of the original injury, it is unnecessary to determine whether the injury continued through delivery and the immediate post-delivery period. For the sake of completeness, however, the undersigned concludes that the better evidence establishes that, while incapable of precise measurement, the injury to Paj's brain was ongoing through delivery and into resuscitation in the immediate post-delivery period.

67. The undersigned concludes that sufficient evidence was presented, or otherwise stipulated or admitted by the parties to establish that Paj was born a live infant on March 13, 2018, at Orlando Health, Inc. d/b/a Winnie Palmer Hospital, a "hospital," as defined by section 766.302; and that Paj was a single gestation, weighing over 2,500 grams at birth.

68. Sufficient evidence was presented, or otherwise stipulated to or admitted by the parties, to establish that Paj's injury rendered him permanently and substantially mentally and physically impaired.

69. It is further concluded that sufficient evidence was presented, or otherwise stipulated to or admitted by the parties, to establish that obstetrical services were delivery by a participating physician, Dr. Odom, in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.


70. It is also concluded, based on the evidence presented, or otherwise stipulated to or admitted by the parties, that the notice requirements of section 766.319 were satisfied by the Intervenors.

71. In summary, the undersigned concludes that Respondent and Intervenor met their burden of establishing that Paj sustained a birth-related neurological injury, as that term is defined in section 766.302(2), and the claim is compensable under the Plan.

CONCLUSION

1. Paj sustained a “birth-related neurological injury,” as defined in section 766.302(2).
2. Obstetrical services were delivered by a participating physician, Dr. Odom, in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, Winnie Palmer.
3. Intervenor satisfied the notice requirements of section 766.316.
4. The claim is found and determined to be compensable.
5. 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 15th day of April, 2021, in Tallahassee, Leon County, Florida.



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TODD P. RESAVAGE  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 15th day of April, 2021.

COPIES FURNISHED:  
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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).