STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TAMICA QUARRIE AND NICOY LATOUCHE,
INDIVIDUALLY AND AS PARENTS AND NEXT
FRIENDS OF RHEA LATOUCHE, A MINOR,

Petitioners,

vs. Case No. 20-0818N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

NORTH BROWARD HOSPITAL DISTRICT D/B/A
BROWARD HEALTH CORAL SPRINGS A/K/A
CORAL SPRINGS MEDICAL CENTER;
ALISON T. CLARKE DESOUZA, M.D.;
ALISON T. CLARKE DESOUZA, M.D., LLC;
PEDRO MOSCOSO, M.D.; AND PEDIATRIX
MEDICAL GROUP OF FLORIDA, INC.,

Intervenors.
_______________________________________/

FINAL ORDER

Pursuant to notice, a final hearing on the issue of notice was held in this case on August 24, 2020, by Zoom Conference, before Todd P. Resavage, an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH).

APPEARANCES

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Statement of The Issue

Whether Intervenor North Broward Hospital District d/b/a Broward Health Coral Springs a/k/a Coral Springs Medical Center (BHCS) satisfied the notice requirements set forth in section 766.316, Florida Statutes.

Preliminary Statement

On February 7, 2020, Petitioners filed an "Amended Petition Filed Under Protest for Determination as to the Applicability of Florida Birth-Related Neurological Injury Compensation Plan" (Amended Petition) at DOAH. The Amended Petition named Alison T. Clarke DeSouza, M.D., as the physician who provided obstetric services at the birth of Rhea LaTouche (Rhea) on August 18, 2017, at BHCS, in Coral Springs, Florida.

The Amended Petition alleges that Dr. DeSouza was a participant in the Florida Birth-Related Neurological Injury Compensation Association Plan (the NICA Plan), and provided timely notice to Petitioners of her participation in the Plan. The Amended Petition further alleges that BHCS, a hospital, while also a participant in the Plan, did not timely provide notice of its participation in the Plan.

DOAH served Respondent with a copy of the Amended Petition on or before February 19, 2020. On February 18, 2020, DOAH mailed a copy of the Amended Petition by certified mail to Dr. DeSouza and BHCS.

On March 10, 2020, BHCS's Petition for Leave to Intervene was granted; and, on May 11, 2020, Alison T. Clarke DeSouza, M.D., and Alison T. Clarke DeSouza, M.D., LLC's Motion for Leave to Intervene was granted. On March 10, 2020, Petitioners filed a "Motion for Partial Summary Judgement as to NICA Notice." After an extension of time was granted, on April 27, 2020, BHCS filed its response to said motion. On May 11, 2020, Petitioners'

motion was denied as material facts remained in dispute concerning the notice issue.

On June 11, 2020, Pedro Moscoso, M.D. and Pediatrix Medical Group of Florida, Inc., filed a Motion for Leave to Intervene. Petitioners' response in opposition was filed June 15, 2020. The motion to intervene was granted on June 29, 2020.

On June 17, 2020, Respondent's Motion for Summary Final Order was filed wherein Respondent contended that Rhea sustained a birth-related neurological injury and requested a summary final order concluding that Petitioners' claim was compensable. On July 2, 2020, the undersigned issued an Order to Show Cause, whereby Petitioners were ordered to show cause in writing why Respondent's Motion should not be granted.

On June 17, 2020, Petitioners filed their response to Respondent's Motion. Said response provides, in pertinent part, as follows:

> Petitioners do not oppose NICA's Motion for Summary Final Order. Petitioners do not dispute that RHEA LATOUCHE sustained a severe hypoxic ischemic injury resulting in substantial mental and physical impairments that are permanent. Petitioners do not dispute that the injuries are felt to be birth related.
>
> WHEREFORE, Petitioners do not oppose the entry of a Summary Final Order determining that the claim is compensable under the NICA plan as a matter of law and reserving a determination of the applicability of NICA based on the evidentiary hearing on notice, which is to be set for the last week of August. Petitioners' position is that BHCS failed to give timely notice.

Accordingly, the matter was scheduled for final hearing on the issue of notice for August 24, 2020.

On July 17, 2020, Respondent's Motion for Summary Final Order on the issue of compensability was granted. Petitioners' claim was found and determined to be compensable and jurisdiction was reserved to determine whether the notice requirements of section 766.316 were satisfied by BHCS and to determine the issue of an award pursuant to section 766.31.

On August 19, 2020, Petitioners and BHCS filed a joint stipulation. Said filing included 13 paragraphs of admitted stipulated facts as well as stipulations concerning the authenticity and the admission of evidence. To the extent relevant, the stipulated facts are adopted and included in this Order.

On August 24, 2020, 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 their exhibits and the presentation of a closing argument. The identity of the exhibits and the rulings regarding each are as set forth in the final hearing Transcript, which was filed on September 10, 2020.

Upon the conclusion of the final hearing, the parties stipulated to submission of proposed final orders within 21 days of the filing of the transcript and to the issuance of the undersigned's Final Order on or before 42 days from the filing of the transcript. The parties timely filed proposed final orders, which have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Petitioners, Tamica Quarrie and Nicoy Latouche, are the natural parents of Rhea, a minor.

2. Alison DeSouza, M.D., and Dione Occenad, M.D., obstetricians with Alison T. Clarke DeSouza, MD, LLC (hereinafter collectively referred to as Dr. DeSouza), provided prenatal care to Ms. Quarrie commencing on January 5, 2017.

3. On January 5, 2017, Ms. Quarrie received notice of Dr. DeSouza's participation in the NICA Plan. With respect to Dr. DeSouza, compliance with section 766.316 is not in dispute.

4. On May 17, 2017, at 10:15 a.m., Ms. Quarrie presented to BHCS with complaints of cramping. Her pain level was documented as a "6" on the Pain Score. Upon presentation, she signed a document, as a patient, entitled "General Consent," whereby she consented, inter alia, to the examination and treatment of her medical condition by BHCS.

5. Ms. Quarrie was brought to the Labor and Delivery Department and placed in the triage holding area. Once there, she was placed on a fetal monitor. Ms. Quarrie provided a blood and urine sample, which underwent laboratory analysis. A vaginal exam was also performed. Additionally, a fetal assessment ultrasound was performed, which revealed that the fetus was in a breech position and that the gestational age of the fetus was 26 weeks and three days.

6. At approximately 4:30 p.m., per the certifying physician, it was determined that, "after a medical screening examination and reasonable period of observation, the patient is not in true labor and does not have an emergency medical condition." She was thereafter discharged from the hospital.

7. At the direction of Dr. DeSouza, Ms. Quarrie returned to BHCS on August 9, 2017. She arrived at the hospital at 11:29 a.m., and was ordered to present to the Labor and Delivery department for her "scheduled outpatient

visit."[1] As occurred on her previous visit to BHCS, she was presented with, and signed, as a patient, the hospital's General Consent form.

8. An undated physician's order written by Dr. DeSouza indicates that the hospital was to perform a BPP, NST (a biophysical profile/non-stress test), as well as a series of laboratory tests. The "Chief Complaint" documented in the hospital's antepartum assessment is "R/O Pre-eclampsia"—to rule out pre-eclampsia.

9. The BPP ultrasound was performed and the resulting report documented that the estimated gestational age of the fetus was 37 weeks and six days and the estimated date of delivery was August 24, 2017. A gynecological assessment was conducted addressing the amount and color of any vaginal bleeding. An antepartum assessment was also conducted with respect to contraction duration, intensity, and description. Ms. Quarrie also provided a blood and urine sample, which underwent laboratory analysis.

10. At approximately 2:00 p.m., the certifying physician determined that, "after a medical screening examination and reasonable period of observation, the patient is not in true labor and does not have an emergency medical condition." She was then discharged from the hospital.

11. It is undisputed that Ms. Quarrie was pregnant when she presented, on May 17 and August 29, 2017, to BHCS. It is further without question that, on those occasions, Ms. Quarrie was a BHCS patient, and that obstetrical services were provided. Accordingly, a hospital provider-patient relationship was clearly formulated at each of those occasions and the services rendered were obstetric in nature.

12. It is undisputed that BHCS did not provide Ms. Quarrie notice of its participation in NICA during the prior visits to the hospital on May 17, 2017, and August 9, 2017. BHCS nurses, Grazyna Catal, R.N., Danielle Madiera, R.N., and Monique Fleuristal-McIntosh, R.N, who were involved in the two

[1] It is unclear from the record when this contact with the hospital was scheduled.

pre-delivery visits, consistently and credibly testified that BHCS's policy, in 2017, was to provide NICA notice upon admission to the hospital. These witnesses consistently explained that NICA notice would occur when the physician ordered the patient to be admitted into the hospital for observation, administration of medication, premature labor, or some other potential pregnancy-related complication that required inpatient admission. Nurse Fleuristal-McIntosh succinctly testified that the triggering event to provide NICA notice was that the patient was admitted and ready for delivery, or admitted with the potential for delivery.

13. Dr. DeSouza held admitting privileges at BHCS and Northwest Medical Center to admit patients for labor and delivery. Ms. Quarrie credibly testified that she understood her delivery options and that "we chose Coral Springs because it's closer." On August 16, 2017, Ms. Quarrie was admitted into BHCS's Labor and Delivery Department as an inpatient for a planned induction of labor and delivery.[2]

14. On that date, as part of her registration as an inpatient, Ms. Quarrie was provided notice of BHCS's participation in the NICA Plan and signed a document entitled "Receipt and Acknowledgement of Notice to Obstetric Patient," which provided as follows:

> I have been furnished information in the form of a Brochure prepared by the Florida birth-related [sic] Neurological Injury Compensation Association (NICA), pursuant to Section 766.316, Florida Statutes, by Broward Health, 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 that I can contact the Florida Birth-Related Neurological Injury Compensation

[2] While the parties stipulate that it was a "planned induction of labor and delivery," due to the evidentiary presentation, the undersigned is unable to determine exactly when or how the planned induction decision was communicated to BHCS.

> Association, Post Office Box 14567, Tallahassee, Florida 32317-4567, (800) 398-2129.
>
> I specifically acknowledge that I have received a copy of the Brochure, "Peace of Mind" prepared by NICA.

15. The available record fails to contain any evidence to suggest that when Ms. Quarrie was provided NICA notice she was in an "emergency medical condition," as that term is defined in section 395.002(8), Florida Statutes. On August 18, 2017, two days after her admission into the hospital, Rhea was born via Cesarean section.

CONCLUSIONS OF LAW

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

17. 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.

18. 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 ALJ has exclusive jurisdiction to determine whether a claim filed under the Plan is compensable. § 766.304, Fla. Stat.

19. 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.

20. At issue here is whether BHCS complied with the notice requirements of section 766.316. Specifically, the parties dispute whether BHCS provided notice in a reasonable time prior to delivery. As the proponents of the proposition that appropriate notice was given or that notice was not required, the burden on the issue of notice is upon BHCS. *Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 880 So. 2d 1253, 1257 (Fla. 1st DCA 2004).

21. 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.

22. In *Galen of Florida, Inc. v. Braniff*, 696 So. 2d 308 (Fla. 1997), the court addressed the issue of when notice must be given, pursuant to 766.316. The court held that "as a condition precedent to invoking [the Plan] as a patient's exclusive remedy, health care 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. Section 766.316 requires that obstetrical patients be given notice "as to the limited no-fault alternative for birth-related neurological injuries." That notice must "include a clear and concise explanation of a patient's rights and limitations under the plan." § 766.316. This language makes clear that the purpose of the notice is to give an obstetrical patient an opportunity to make an informed choice between using a health care provider participating in the NICA plan or using a

> provider who is not a participant and thereby preserving her civil remedies. *Turner v. Hubrich*, 656 So. 2d 970, 971 (Fla. 5th DCA 1995). 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.

23. In *Weeks v. Florida Birth-Related Neurological*, 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.

24. 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.

25. 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).

26. 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]."

27. 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.

28. 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.

29. 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.

30. 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.

31. Although Ms. Quarrie did not participate in delivery pre-registration, she became an obstetrical patient of BHCS, which triggered the obligation to provide NICA notice, well before her delivery. It is undisputed that Ms. Quarrie was pregnant when she presented, on May 17, 2017, to BHCS. On that occasion, she presented due to concerns of cramping and obstetrical services were provided by the hospital to rule out labor. On this occasion, BHCS had an opportunity to provide NICA notice, but did not do so.

32. BHCS had another opportunity to provide NICA notice, but failed to do so. On August 9, 2017, one week prior to her scheduled induction, she was sent to the hospital for prenatal testing by Dr. DeSouza. As noted above in the Findings of Fact, on this occasion, BHCS again provided obstetrical services related to delivery. Finally, as stipulated by the parties, on August 16, 2017, Ms. Quarrie "was admitted into BHCS's Labor and Delivery department as an inpatient for a *planned* induction of labor and delivery." Accordingly, BHCS had knowledge, at some point prior to August 16, 2017, of Ms. Quarrie's intention to deliver the baby at BHCS, but failed to provide the notice until she was actually admitted into the hospital.

33. It is concluded that BHCS failed to meet its burden of establishing that NICA notice was provided to Ms. Quarrie within a reasonable time after the hospital provider-obstetrical patient relationship began. Although pre-delivery notice was provided, it is concluded that the same was not provided in sufficient time for Ms. Quarrie to make a meaningful choice. Accordingly,

it is concluded that the notice provided on August 16, 2017, was insufficient to meet the requirements of section 766.316.

Conclusion

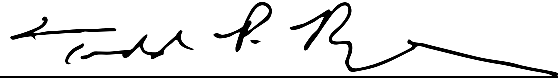
Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED:

1. BHCS failed to provide notice for the hospital in compliance with section 766.316.

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

3. In the event Petitioners file an election of remedies declining or rejecting NICA benefits, this case will be dismissed with prejudice and DOAH's file will be closed.

DONE AND ORDERED this 21st day of October, 2020, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

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