STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALLYSON WILLIAMS AND MUHAMMAD SHAKIR, AS PARENTS AND NATURAL GUARDIANS OF FATEMA SHAKIR, A MINOR,

Petitioners,

vs. Case No. 09-4302N

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,

Respondent,

and

SHANDS JACKSONVILLE MEDICAL CENTER, INC., ANEESAH MAJIEDA SANTIAGO, R.N., and ANGELA JACKSON, R.N.,

Intervenors.
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**PETITIONERS' MOTION FOR SUMMARY FINAL ORDER AND MEMORANDUM OF LAW**

The Petitioners, Allyson Williams and Muhammad Shakir as natural parents and on behalf of FATEMA SHAKIR, by and through their undersigned attorneys request entry of a Summary Final Order that determines the Non-Compensability for NICA Benefits of Fatema Shakir and as reasons therefore states as follows:

1. There are no genuine issues of material fact regarding the issue of compensability, therefore, Summary Final Order must be entered making the determination of Non-compensability for NICA Benefits in this matter.
2. It is undisputed that Fatema Shakir's birth was unattended by anyone other that the mother, Allyson Williams. There was no physician or nurse midwife in attendance at the birth.
3. The medical records confirm that the birth of Fatema Shakir was not attended by a NICA participating physician or midwife. In fact, there was no one at the birth, except the mother.
4. The expert reports submitted by NICA from Dr. Willis and Dr. Duchowny confirm from the medical records that Fatema Shakir was born unattended.
5. There is no evidence from any source, whether medical records or deposition testimony, to suggest that there was a NICA participating physician at the birth.
6. Pursuant to Section 766.31, F.S. the administrative law judge (ALJ) shall make an award providing compensation for several different items upon a determination that is very specific. Section 766.31, F.S. provides that the ALJ must determine that the infant has sustained a birth-related neurological injury. The definition of a birth-related neurological injury is provided in Section 766.301(2), F.S. That is not the only determination that must be made before the ALJ is authorized to make an award. The ALJ must also determine that obstetrical services were delivered by a participating physician **at the birth**. Section 766.31, F.S. is very specific with the wording that the participating physician must be **at the birth**.

Without a determination that meets all of the requirements of Section 766.31, F.S. the ALJ is not authorized to make an award of compensation.

7. Furthermore, the ALJ is required to make a finding that NICA does not apply if there is no participating physician **at the birth** as provided in Section 766.309(2), F.S. That section provides that if the ALJ determines that obstetrical services were not delivered by a participating physician **at the birth**, she shall enter an order and shall cause such order to be sent immediately to the parties.

8. "Birth" is defined as passage of a child from the uterus. According to Taber's Medical Dictionary birth is the instant of complete separation of the body of the infant from that of the mother, regardless of whether the cord or placenta is detached.

9. The Florida Birth-Related Neurological Injury Compensation Plan is a statutory scheme that abrogates common law rights. Accordingly, strict scrutiny must be applied to this statutory scheme. The clear meaning of the legislature's choice of wording must be applied.

10. Sections 766.31 and 766.309(2) were written in very specific ways to narrowly apply the necessary definitions for compensability and non-compensability. When a birth occurs without the presence of a participating physician, there can be no determination of compensability if the plain meaning of this section is followed.

11. In order to make a determination of compensability, obstetrical services must be delivered by a participating physician **at the birth**.

12. The administrative law judge is not permitted to expand the statutory definitions beyond their plain meaning.

WHEREFORE, Petitioners request entry of Summary Final Order of Non-compensability for the reasons stated above.

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**MEMORANDUM OF LAW**

The Petitioners, by and through their undersigned attorney, submit this Memorandum of Law in Support of their Motion for Summary Final Order and state as follows:

Section 766.301, F.S. provides for the Legislative findings and intent of what is commonly referred to as the NICA Act. Sections 766.301-766.316, F.S. The Plan provides 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 limited class of catastrophic injuries is further defined in Section 766.302(2), F.S. by including the definition that the infant must be rendered "permanently and substantially mentally and physically impaired".

It is important to note that this Plan only applies to "birth-related neurological injuries". See Section 766.301(2), F.S. This specific phrase is further defined in Section 766.302(2), F.S. which states as follows:

> *(2) "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. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.*

The following criteria must be met in order to qualify for the Plan-

1. The infant must have an injury to the brain or spinal cord;
2. The infant must be born alive, thus the plan does not apply to stillbirths;
3. The infant must weigh at least 2,500 grams at birth for single gestation;
4. If there is multiple gestation, the infant must weigh at least 2,000 grams at birth;
5. The injury to the brain or spinal cord must have been caused by oxygen deprivation or mechanical injury;

6. The oxygen deprivation or mechanical injury must have occurred in the course of labor, delivery, or resuscitation in the immediate postdelivery period;
7. The oxygen deprivation or mechanical injury must have occurred in the hospital;
8. The injury must render the infant permanently and substantially mentally and physically impaired.
9. There must be a NICA participating physician providing obstetrical services at the birth.
10. The birth must occur in a hospital.

The Legislature was very specific in the definition of a "birth-related neurological injury". The Legislative Finding and Intent indicates that the NICA Plan will apply to a limited class of catastrophic injuries. Because the NICA Plan is a statutory abrogation of common law rights, it must be construed with specificity and without ambiguity. There is no ambiguity regarding the necessity that the participating physician must be **at the birth**. If the Legislature wanted to broaden the reach of NICA exclusivity the statute could have provided that a participating physician must be involved with the delivery of obstetrical services during labor, delivery or the immediate post-delivery resuscitative period. But that is not what the Legislature designed. Such an interpretation would expand the limited class of catastrophically injured infants beyond the Legislative intent. Instead, the Legislature, without any ambiguity or uncertainty, states in several sections of the NICA Act that the participating physician must be **at the birth**.

Sections 766.305(1)(c); 766.309(2); and 766.31(1), F.S. all include the specific words, **at the birth**. In Section 766.305(1)(c), F.S. the Legislature has enunciated the particular information required to be included in the Petition seeking compensation. Subparagraph (1) (c) provides that the Petition must include the name and address of the physician providing obstetrical services who was **present at the birth**. In this case, there was no participating physician that was **present at the birth**, therefore the Petition indicated that there was no participating physician present at the birth. The Petition should be denied on that basis alone. In

Section 766.309(2), F.S. the Legislature again makes specific reference to the participating physician **at the birth**. In Section 766.31(1), F.S. the Legislature makes reference a third time within the NICA Act to the participating physician **at the birth**. This language is clear and unambiguous. If the participating physician, as defined by the statute, is not **at the birth**, the ALJ must find that the infant does not qualify for NICA Benefits. Any other interpretation exceeds the specific Legislative intent of the statute.

Legislative intent is determined from the plain language of the statute. There is no need to apply rules of statutory construction because the NICA statute is clear, unambiguous and conveys a very precise meaning which is obvious. There is a limited classification of catastrophically injured infants to which NICA exclusivity applies. That classification includes only those infants who were born with a participating physician physically present. That is what the statute states in plain english.

In Fluet v. Florida Birth-Related Neurological Injury Compensation Association, 788 So.2d 1010 (Fla 2nd DCA 2001), the Second DCA reversed the decision of the ALJ and remanded for proceedings consistent with that opinion. The focus of Fluet was the determination by the ALJ that the involvement of a participating physician who authorized the use of Pitocin via telephone with the nurse midwife did not constitute the delivery of obstetrical services as required by Section 766.309(1)(b), F.S. That statutory provision requires the ALJ to determine whether obstetrical services were delivered in the course of labor, delivery, or resuscitation in the immediate post-delivery period. When the participating physician authorized the use of Pitocin, the patient was in labor. Therefore, obstetrical services were clearly delivered by a participating physician in the course of labor, as required by Section 766.309(1)(b), F.S. The Fluet case did not address the fact that the actual birth was attended by a nurse midwife and not a participating

physician, as required by Section 766.309(2) and 766.31(1), F.S. The ruling in Fluet is not dispositive of the issue presented herein. The mere rendering of obstetrical services during labor does not result in a determination of NICA compensability. Indeed, there are several other prerequisites that must be met before the ALJ is authorized to make an award of compensation. For example, obstetrical services may be provided during labor, but the birth could occur in a birthing center rather than a hospital. The definition of "birth-related neurological injury" as defined in Section 766.302(2), F.S. requires that the injury occur in a hospital. Further, the obstetrical services must be provided during labor, delivery or the immediate post-delivery resuscitative period by a participating physician. If the infant suffered a "birth-related neurological injury" but the obstetrical services were provided by a physician employed by the Federal Government, the NICA Plan does not apply. Physicians employed by the Federal Government are specifically excluded from the definition of a "participating physician" as defined in Section 766.302(7), F.S. The point of these distinctions is that the decision in Fluet was not a decision by the Second DCA that an award of NICA compensation must be made by the ALJ, but rather it was a reversal of the ALJ's determination that a phone call giving Pitocin orders did not qualify as the delivery of obstetrical services under Section 766.309(1)(b), F.S. The ALJ still had to make other determinations after remand, but that particular administrative proceeding was ultimately concluded by approval of a stipulation that NICA Benefits were awardable. The ALJ was never presented with the argument made herein. The Fluet opinion does not mention Section 766.309(2) or 766.31(1), F.S.

In Fluet, the Second DCA states, "Nothing in the language of this Act suggests that it is limited in its scope to obstetricians who are physically present in the deliver room and not to those whose professional service is delivered in other ways." Fluet at 1013. Yet the NICA Act

clearly states that the participating physician **at the birth** is a necessary element for an award of compensation. It is true that the NICA Act is not limited to just those physicians who are physically present in the delivery room. Once it is determined that there was a participating physician **at the birth**, assuming all other necessary elements are established, the scope of NICA exclusivity is global, with the statutory exception of willful and wanton disregard as provided in Section 766.303(2), F.S. If the Legislature wanted the scope of the NICA Plan to stretch to any and all birth-related neurological injuries in which a participating physician was involved in labor, delivery or the immediate post-delivery resuscitative period, it would not have included the words, **at the birth** in Section 766.309(2) or 766.31(1), F.S. Statutes in derogation of common law must be strictly construed to preserve common law rights. See Florida Birth-Related Neurological Injury Compensation Assoc. v. Florida Div. of Admin. Hearings, 686 So.2d 1349, 1354-55 (Fla. 1997). The conclusion we can draw from Fluet is that a phone consultation during labor constitutes obstetrical services. That is a far cry from concluding that all of the other necessary elements for NICA compensability have been met.

The Petition filed in Fluet actually named the participating physician who was present at the birth. Whether the evidence confirmed that a participating physician was present at the birth is unknown as that claim was ultimately resolved by approval of a Joint Stipulation. In can be argued that the ALJ does not have the jurisdictional authority to approve a Joint Stipulation in which there is no participating physician. Likewise, if there is a participating physician involved, but not present at the birth, the ALJ must enter an order of non-compensability pursuant to Section 766.309(2), F.S. In the case at hand, there was no physician present at the birth and the Petition clears states that there was no physician present at the birth. Section 766.305(1)(c), F.S. requires the Petition to include the name and address of any physician

providing obstetrical services who was **present <u>at the birth</u>**, which simply is not possible under these facts. Accordingly, the Petition should be denied and an Order must be entered denying NICA compensability.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this _____ day of

_____
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