STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MAURICIO GUGELMIN and STELLA GUGELMIN, as parents and natural guardians of GIULIANO GUGELMIN, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 99-2797N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
SOUTH BROWARD HOSPITAL DISTRICT, d/b/a MEMORIAL HOSPITAL WEST,	)	
Intervenor.	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge, William J. Kendrick, held a formal hearing in the above-styled case on June 12, 2000, by video teleconference, with sites in Tallahassee and Fort Lauderdale, Florida.

APPEARANCES

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For Intervenor: D. David Keller, Esquire
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STATEMENT OF THE ISSUES

1. At issue in this proceeding is whether Giuliano Gugelmin, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (the Plan).

2. If so, whether the notice requirements of the Plan were satisfied.

PRELIMINARY STATEMENT

On June 23, 1999, Mauricio Gugelmin and Stella Gugelmin, as parents and natural guardians of Giuliano Gugelmin, a minor, filed a petition (claim) with the Division of Administrative Hearings (hereinafter referred to as "DOAH") for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (hereinafter referred to as the "Plan"). Pertinent to this case, the petition also included the following allegations regarding the pendency of a civil action, as well as the notice requirements of the Plan.

> . . . a suit has been filed in the Circuit Court of the 17th Judicial Circuit, In and For Broward County, Florida against, among others, South Broward Hospital District doing

> business as Memorial Hospital West . . . . The South Broward Hospital District, on behalf of Memorial Hospital West, has raised as an affirmative defense to any civil liability the applicability of Florida's Birth-Related Neurological Injury Compensation . . . [Plan]. While issues have been raised as to the adequacy and timeliness of the . . . notice, the South Broward Hospital District has agreed to a stay of any Court proceeding during the processing of this . . . petition.
>
> Petitioners also filed suit against Dr. Freling [the physician who provided obstetrical services at birth] and his professional association . . . Dr. Freling has tendered his policy limits and Petitioners are in the process of settling with the physician. The terms of the settlement specifically preserve, and are without prejudice to, Petitioners' claims against South Broward Hospital District, d/b/a Memorial Hospital West and/or Florida Birth-Related Neurological Injury Compensation Association. As stated above, the South Broward Hospital District, d/b/a Memorial Hospital West maintains that NICA benefits apply to this claim.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (hereinafter referred to as "NICA") with a copy of the claim on June 24, 1999. NICA reviewed the claim and on August 20, 1999, filed a motion to dismiss based on its perception that Petitioners had settled their civil claims with Dr. Freling and his professional association and, consequently, could not pursue a claim under the Plan. See Section 766.304, Florida Statutes. That motion was denied by order of September 7, 1999, "without prejudice to raise such matters in

defense of the claim," and NICA was directed to file its response to the petition by September 30, 1999. That deadline was subsequently extended (with the parties' agreement) and on November 16, 1999, NICA filed a Notice of Acceptance of Compensability and Motion to Dismiss wherein NICA averred that it "agrees that the injury constitutes a 'birth-related neurologic injury' as defined by the NICA Plan," but again averred, by way of defense, that the claim be dismissed because "the injury is not compensable based upon the fact that the Petitioners have or will be settling their underlying medical malpractice claim . . . with the obstetrician and his professional association," and requested that a hearing be scheduled to address the compensability of the claim.

By notice of December 30, 1999, a hearing was scheduled for February 3, 2000, to address "[w]hether the subject claim should be accepted for compensation or declined for reasons advanced by Respondent in its Notice of Acceptance of Compensability and Motion to Dismiss filed November 16, 1999." That hearing was ultimately re-scheduled, at the parties' request, for June 12, 2000. In the interim, South Broward Hospital District, d/b/a Memorial Hospital West requested and was accorded leave to intervene.

On May 22, 2000, an opinion of the Fifth District Court of Appeal, State of Florida, in the matter of O'Leary v. Florida

Birth-Related Neurological Injury Compensation Association, DOAH Case No. 99-2901N, was filed with DOAH, which resolved certain issues relevant to the notice issue raised in Petitioners' initial claim. Pertinent to this issue the opinion noted that:

> The language used by the legislature in its amendment to . . . [section 766.304] indicates that the administrative law judge is to determine all matters relative to a claim. Notably, the determination of the adequacy of notice is not excluded from the duties of the administrative law judge. Section 766.304 states that the administrative law judge shall hear all claims and shall exercise the full power and authority grated that is necessary to carry out the purpose of the section. The section further grants exclusive jurisdiction to the administrative law judge to determine whether a claim is compensable and precludes any civil action until the issue of compensability is determined. We believe that under these amendments, any issue raising the immunity of a health provider, including the issue of whether the health provider satisfied the notice requirements of the Plan is an issue to be decided by the administrative law judge as one which relates to the question of whether the claim is compensable under the Plan. We recognize that lack of proper notice does not affect a claimant's ability to obtain compensation from the Plan. However, a health provider who disputes a plaintiff's assertion of inadequate notice is raising the issue of whether a claim can only by compensated under the [P]lan. All questions of compensability, including those which arise regarding the adequacy of notice, are properly decided in the administrative forum.

O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, 25 Fla. L. Weekly D1234, 1235 (5th DCA, May 19,

2000). By letter of June 2, 2000, the parties were provided a copy of the court's opinion, as a matter of import to the pending case.

On June 8, 2000, a pre-trial conference was held to address the issues that would be litigated at hearing, and to facilitate the presentation of proof. Those matters were again addressed at the commencement of hearing on June 12, 2000, when it was observed that the issues to be resolved were whether the claim qualified for coverage under the Plan and, if so, whether proper notice was given. As for the issue of settlement of the civil action, and any effect it might have on the compensability of the claim, the parties agreed the settlement was, at best, tentative, and not finalized, and consequently was not an issue that merited further consideration in resolving whether the subject claim was compensable.[1]

At hearing, the parties stipulated to the factual matters set forth in paragraphs 1-3 of the Findings of Fact. Petitioner, Mauricio Gugelmin, testified on his own behalf, and Petitioners' Exhibits 1A-1F (the medical records filed with DOAH on June 23, 1999), 2, 2A[2], and 3 were received into evidence. No further witnesses were called; however, Respondent's Exhibit 1 and Intervenor's Exhibit 1 were also received into evidence. Finally, official recognition was taken of the Order of Dismissal with Leave to Amend and Final Order of Dismissal without

Prejudice in the matter of Berthony Adolphe, et al. v. Florida Birth-Related Neurological Injury Compensation Association, et al., DOAH Case No. 99-2901N, as well as the Corrected Opinion and Mandate in the matter of Timothy D. O'Leary, M.D., et al. v. Florida Birth-Related Neurological Injury Compensation Association et al., District Court of Appeal of the State of Florida, Fifth District, true copies of which were attached to the Notice of Intention to Take Official Recognition, dated June 19, 2000. The O'Leary opinion has since been reported at 25 Fla. L. Weekly D1234 (5th DCA, May 19, 2000).

The transcript of the hearing was filed on June 22, 2000, and the parties were initially accorded 10 days from that date to file proposed final orders; however, at Petitioners' request the deadline was ultimately extended to July 15, 2000. Consequently, the parties waived the requirement that a final order be rendered within 30 days after the transcript has been filed. Rule 28-106.216(2), Florida Administrative Code. The parties elected to file such proposals and they have been duly considered.

FINDINGS OF FACT

1. Mauricio Gugelmin and Stella Gugelmin are the parents and natural guardians of Giuliano Gugelmin (Giuliano), a minor. Giuliano was born a live infant on July 14, 1994, at South Broward Hospital District, d/b/a Memorial Hospital West (the

Hospital), a hospital located in Broward County, Florida, and his birth weight was in excess of 2500 grams.

2. The physician providing obstetrical services during the birth of Giuliano was Eric N. Freling, M.D., who was at all times material hereto, a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan (the Plan), as defined by Section 766.302(7), Florida Statutes.

3. Pertinent to this case, coverage is afforded by the Plan for infants who have suffered a "birth-related neurological injury," defined as an "injury to the brain . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired." Sections 766.302(2) and 766.309(1)(a), Florida Statutes. Here, the parties have stipulated that Giuliano suffered a "birth-related neurological injury," as that term is defined by the Plan, and NICA proposes to accept the claim as compensable. The parties' stipulation is grossly consistent with the proof and, consequently, it is resolved that NICA's proposal to accept the claim as compensable is approved.

4. While the claim qualifies for coverage under the Plan, Petitioners have responded to the health care providers' claim of Plan immunity in the collateral civil action by claiming that the

health care providers failed to comply with the notice provisions of the Plan. Consequently, it is necessary to resolve whether, as alleged, proper notice was given.

5. Regarding the notice issue, it must be resolved that the proof failed to demonstrate, more likely than not, that Dr. Freling provided Mrs. Gugelmin any notice of his participation in the Plan or any explanation of a patient's rights and limitations under the Plan. Indeed, the more compelling proof was to the contrary. Moreover, there was no proof to support a conclusion that Dr. Freling's failure to accord notice was occasioned by a medical emergency or that the giving of notice was otherwise not practicable.

6. While Dr. Freling failed to give notice, the Hospital did, as required by law, provide timely notice to Mrs. Gugelmin as to the limited no-fault alternative for birth-related neurological injuries. That notice included, as required, an explanation of a patient's rights and limitations under the Plan, and was given at 11:45 a.m., July 13, 1994, shortly after Mrs. Gugelmin's admission to the hospital (which occurred at approximately 11:22 a.m., July 13, 1994). Giuliano was delivered at 12:25 a.m., July 14, 1994.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Section 766.301, et seq., Florida Statutes.

8. The Florida Birth-Related Neurological Injury Compensation Plan (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. Section 766.303(1), Florida Statutes.

9. The injured "infant, his personal representative, parents, dependents, and next of kin" may seek compensation under the Plan by filing a claim for compensation with the Division of Administrative Hearings. Sections 766.302(3), 766.303(2), 766.305(1), and 766.313, Florida Statutes. The Florida Birth-Related Neurological Injury Compensation Association (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." Section 766.305(3), Florida Statutes.

10. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, as it has in the instant case, it may award compensation to the claimant,

provided that the award is approved by the administrative law judge to whom the claim has been assigned. Section 766.305(6), Florida Statutes.

11. In discharging this responsibility, the administrative law judge must make the following 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 post-delivery 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 post-delivery period in a hospital.

Section 766.309(1), Florida Statutes. An award may be sustained only if the administrative law judge concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth." Section 766.31(1), Florida Statutes.

12. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes, to mean:

> . . . injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery 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.

13. As the claimants, the burden rests on Petitioners to demonstrate entitlement to compensation. Section 766.309(1)(a), Florida Statutes. See also Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977) ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.")

14. Here, the parties have stipulated, and the proof is otherwise compelling, that the physician who provided obstetrical services at birth was a "participating physician," as that term is defined by the Plan, and that Giuliano suffered a "birth-related neurological injury," as that term is defined by the Plan. Consequently, Giuliano qualifies for coverage under the Plan. Section 766.309, Florida Statutes.

15. Where, as here, it is resolved that an infant qualifies for coverage under the Plan, a civil action is normally foreclosed. Section 766.303(2), Florida Statutes, and Section 766.304, Florida Statutes ("If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303.") See also Gilbert v. Florida Birth-Related Neurological Injury Compensation Association, 724 So. 2d 688, 690 (Fla. 2nd DCA 1999)("[I]f an administrative petition results in a determination that the infant is a NICA baby, a civil action is foreclosed.") The Plan is a substitute, a "limited no-fault alternative," for common-law rights and liabilities. Section 766.301(2), Florida Statutes. See also Section 766.303(2), Florida Statutes, and Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974 (Fla. 1996). Regarding the exclusiveness of the remedy afforded by the Plan, Subsection 766.303(2) provides:

> (2) The rights and remedies granted by this plan on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representatives, parents, dependents, and next of kin, at common law or otherwise, against any person or entity directly involved with the labor, delivery, or immediate postdelivery resuscitation during which such injury occurs, arising out of or related to a medical malpractice claim

> with respect to such injury; except that a civil action shall not be foreclosed where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property, provided that such suit is filed prior to and in lieu of payment of an award under ss. 766.301-766.316. Such suit shall be filed before the award of the division becomes conclusive and binding as provided for in s. 766.311.

16. With but two exceptions, the statute forecloses any civil action against a NICA participant when the injury is of the type defined in Section 766.302(2), Florida Statutes. Barden v. Haddox, 695 So. 2d 1271 (Fla. 5th DCA 1997). The first exception is prescribed by Subsection 766.303(2) which permits a civil action "where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property." The second exception is based on an interpretation of Section 766.316, which, pertinent to this case, provided:[3]

> 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 thereof 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.

17. In Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 309 (Fla. 1977), the Florida Supreme Court described the legislative intent and purpose of the notice requirement as follows:

> . . . 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.

Consequently, the court concluded:

> . . . as a condition precedent to invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan a reasonable time prior to delivery.

Such mandate dictates that where, as here, notice was not given by the "participating physician" (the Plan participant),[4] the patient may accept compensation under the Plan (thereby foreclosing the filing or continuation of any civil action) or reject the Plan benefits and pursue their common-law remedies. That the hospital may have complied with the notice provisions of Section 766.316, as it did in this case, does not alter the options or accord the hospital any benefit independent of that enjoyed by the "participating physician." See Section 766.303(2), Florida Statutes.

18. In reaching the foregoing conclusion, the Hospital's argument that by giving notice "the District [Hospital] has met and fulfilled the condition precedent to invoking NICA as the exclusive remedy as to liability of the [Hospital]" has not been overlooked; however, there is no rational basis to embrace the Hospital's argument or stated differently, to accord the Hospital or the claimants any rights or remedies beyond those expressed in the Plan. In so concluding, it is observed that there is nothing in the language chosen by the Legislature that would suggest that a hospital or other provider involved in the birth process enjoys any benefit (i.e., Plan immunity) independently from that enjoyed by the "participating physician." Stated differently, Plan immunity is inclusive, not severable. See Section 766.303(2), Florida Statutes (The rights and remedies granted by the Plan are

exclusive of any civil or other remedies that may be available "against any person or entity directly involved [in the birth process during which the injury occurs.]" See also Gilbert v. Florida Birth-Related Neurological Injury Compensation Association, supra, at page 690 ("[I]f an administrative petition results in a determination, that the infant is a NICA baby, a civil action is foreclosed . . . [since] [t]he remedies are mutually exclusive.") Moreover, there is nothing in the rationale announced in Galen that would suggest or compel a different result. In summary, it must be resolved that where, as here, the participating physician failed to give the patient notice, neither the hospital (even though it gave notice) nor any other health care provider involved in the birth process can enforce the exclusivity of the Plan. Rather, acceptance or rejection of the Plan benefits under such circumstances is, as it is under the exception established by Section 766.303(2), a right personal to the claimants. If accepted, the Plan forecloses a civil action against all the health care providers. Conversely, if rejected, the claimants may proceed with their civil remedies, and the health care providers enjoy no greater benefit (under the Plan) then they would have enjoyed had obstetrical services been rendered by a physician who had elected not to participate in the Plan.

19. Apart from the exceptions discussed supra, the Plan is designed to foreclose any civil action against a NICA participant when the injury is of the type defined in Section 766.302(2), Florida Statutes, and obstetrical services were provided at birth by a "participating physician;" however, the Plan "is not without defects" and, as history has shown, its implementation has, on occasion, proved cumbersome. Central Florida Regional Hospital, Inc. v. Wagner, 656 So. 2d 491, 493 (Fla. 5th DCA 1995). Frequently, parents elected to file a medical malpractice action against the participating obstetrician and hospital, rather than seek the benefits of the Plan. When the medical providers raised the exclusivity of the Plan as an affirmative defense, they were left to litigate the issue of coverage in the civil action.[5] Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974 (Fla. 1996). Accord Central Florida Regional Hospital, Inc. v. Wagner, supra; White v. Florida Birth-Related Neurological Injury Compensation Association, 655 So. 2d 1292 (Fla. 5th DCA 1995); and Board of Regents of the State of Florida v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997). Moreover, when the parents traversed the providers' defense of exclusivity, by alleging that they had not been accorded notice as required by Section 766.316, Florida Statutes, the providers were compelled to litigate both notice and coverage

in the civil action. Board of Regents of the State of Florida v. Athey, supra.

20. In response to the foregoing, the Legislature adopted Section 6, Chapter 98-113, Laws of Florida, which amended Sections 766.301 and 766.304, Florida Statutes, effective July 1, 1998. Pertinent to this case, the amendments to Section 766.301 were as follows:

> (1) The Legislature makes the following finding:
>
> * * *
>
> (d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault. This issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding. (Amendment emphasized.)

Pertinent to this case, the amendments to Section 766.304 were as follows:

> The administrative law judge shall hear and determine all claims filed pursuant to ss. 766.301-766.316 and shall exercise the full power and authority granted to her or him in chapter 120, as necessary, to carry out the purposes of such sections. The administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under s. 766.309 have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought

> or continued in violation of the exclusiveness of remedy provisions of s. 766.303. If it is determined that a claim filed under this act is not compensable, neither the doctrine of collateral estoppel nor res judicata shall prohibit the claimant from pursuing any and all civil remedies available under common law and statutory law. . . . (Amendment emphasized.)

21. Given the amendments to Sections 766.301 and 766.304, Florida Statutes, it has been resolved that the Legislature intended to change the status quo and to compel resolution of any issue regarding coverage, including the adequacy of notice, in the administrative forum. O'Leary v. Florida Birth-Related Neurological Injury Compensation Plan, 25 Fla. L. Weekly D1234 (5th DCA, May 19, 2000). As noted by the Court in O'Leary, at page D1235:

> The language used by the legislature in its amendment to the Act indicates that the administrative judge is to determine all matters relative to a claim. Notably, the determination of the adequacy of notice is not excluded from the duties of the administrative law judge. Section 766.304 states that the administrative law judge shall hear all claims and shall exercise the full power and authority granted that is necessary to carry out the purposes of the section. The section further grants exclusive jurisdiction to the administrative law judge to determine whether a claim is compensable and precludes any civil action until the issue of compensability is determined. We believe that under these amendments, any issue raising the immunity of a health provider, including the issue of whether the health provider satisfied the notice requirements of the Plan is an issue

> to be decided by the administrative law judge as one which relates to the question of whether the claim is compensable under the Plan. We recognize that lack of proper notice does not affect a claimant's ability to obtain compensation from the Plan. However, a health provider who disputes a plaintiff's assertion of inadequate notice is raising the issue of whether a claim can only be compensated under the plan. All questions of compensability, including those which arise regarding the adequacy of notice, are properly decided in the administrative forum.

22. Here, it has been resolved that the infant qualifies for coverage under the Plan, but that the participating physician failed to accord the obstetrical patient notice of his participation. Consequently, Petitioners may, at their election, accept compensation under the Plan or reject the Plan benefits and continue with their civil action. See O'Leary v. Florida Birth-Related Neurological Injury Compensation Plan, supra, at page D1235 ("[L]ack of notice does not affect a claimant's ability to obtain compensation from the Plan. However, a health provider who disputes a plaintiff's assertion of inadequate notice is raising the issue of whether a claim can only be compensated under the plan."), and Gilbert v. Florida Birth-Related Neurological Injury Compensation Association, supra.[6]

23. While the Plan has been interpreted by the courts to accord claimants, such as Petitioners, the option to accept coverage under the Plan (thereby foreclosing the filing or continuation of any civil action) or to reject the Plan benefits

and pursue their common law remedies, neither the Plan nor the courts expressly address how or when that election must be manifested. Notably, however, the Plan does speak to such matters with regard to the first exception to the exclusivity of the remedy afforded by the Plan. That exception, as heretofore noted, is prescribed by Section 766.303(2), Florida Statutes, which permits a civil action under the following circumstances:

> . . . where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property, provided that such suit is filed prior to and in lieu of payment of an award under ss. 766.301-766.316. Such suit shall be filed before the award of the division becomes conclusive and binding as providing for in s. 766.311. (Emphasis added.)

24. Since the courts have interpreted the Legislature's intention with regard to the notice requirements of Section 766.316 to accord claimants, such as Petitioners, the option of accepting or rejecting Plan coverage, it is reasonable to infer that, as with the first exception, the Legislature intended that a claimant's election to proceed with their common law remedies be evidenced "prior to and in lieu of payment of an award under ss. 766.301-766.316," and that such election be made "before the award of the division becomes conclusive and binding as provided for in s. 766.311." Therefore, absent the rejection of the award before it becomes final as provided in Section 766.311, it

reasonably follows that the remedy accorded by the Plan will be considered exclusive and will bar the filing or continuation of any civil action.

25. Where, as here, the administrative law judge determines that "the infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth," the administrative law judge is required to make a determination as to "how much compensation, if any, is to be awarded pursuant to s. 766.31." Section 766.309(1)(c), Florida Statutes. In this case, the issues of compensability and the amount of compensation to be awarded were bifurcated. Accordingly, absent agreement by the parties, or rejection of this award by the claimants, a further hearing will be necessary to resolve any existing disputes regarding "actual expenses," the amount and manner of payment of "an award to the parents or natural guardians," and the "reasonable expenses incurred in connection with the filing of the claim." Section 766.31(1), Florida Statutes. Nevertheless, and notwithstanding that matters related to the amount of compensation may need to be addressed (absent rejection of Plan benefits by Petitioners), the determination that the claim qualifies for compensation under the Plan constitutes final agency action subject to appellate court review. Section 766.311(1), Florida Statutes.

CONCLUSION

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

ORDERED that:

1. The claim for compensation filed by Mauricio Gugelmin and Stella Gugelmin, as parents and natural guardians of Giuliano Gugelmin, a minor, and NICA's acceptance of the claim for compensation be and the same is hereby approved.

2. NICA shall make immediate payment of all expenses previously incurred, and shall make payment for future expenses as incurred.

3. Mauricio Gugelmin and Stella Gugelmin, as the parents and natural guardians of Giuliano Gugelmin, a minor, are entitled to an award of up to $100,000. The parties are accorded 45 days from the date of this order to resolve, subject to approval by the administrative law judge, the amount and manner in which the award should be paid. If not resolved within such period, the parties will so advise the administrative law judge, and a hearing will be scheduled to resolve such issue.

4. Petitioners are entitled to an award of reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees. The parties are accorded 45 days from the date of this order to resolve, subject to approval by the administrative law judge, the amount of such

award. If not resolved within such period, the parties will so advise the administrative law judge, and a hearing will be scheduled to resolve such issue.

5. Pursuant to Section 766.312, Florida Statutes, jurisdiction is reserved to resolve any disputes, should they arise, regarding the parties' compliance with the terms of this Final Order.

DONE AND ORDERED this 26th day of September, 2000, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of September, 2000.

ENDNOTES

1/ Presumably, consistent with the mandate of Section 766.304, Florida Statutes, the civil action will remain stayed until the issue of compensability, including the issue of notice has been resolved.

2/ Petitioners' Exhibit 2A did not include any documents identified as deposition exhibits A-3, A-6, A-8, or A-10.

3/ Effective July 1, 1998, Section 766.316, Florida Statutes, was amended to read as follows:

> . . . 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. (Amendment emphasized.)

Section 7, Chapter 98-113, Laws of Florida, provided that the "[a]mendments to section 766.316, Florida Statutes, shall take effect July 1, 1998, and shall apply only to causes of action accruing on or after that date." However, such amendments basically codified the conclusions reached in Galen of Florida Inc. v. Braniff, discussed infra.

4/ A plan participant (a "participating physician") is a term of art, as that term is used in the Plan, and describes a "physician licensed pursuant to Chapter 458 or 459 who wishes to participate in the Florida Birth-Related Neurological Injury Compensation Plan . . . [,] who otherwise qualifies as a participating physician under ss. 766.301-766.316," and who has paid the special assessment required for participation. Section 766.314(4)(c) and (5)(a), Florida Statutes. Clearly, not all qualified physicians are required to participate in the Plan. See Galen of Florida, Inc. v. Braniff, supra. Distinguished from a plan participant are other physicians (including physicians who do not choose to participate in the Plan), as well as all hospitals at which infants are delivered, who pay an annual

assessment or "tax" (except, inter alia, "a hospital owned or operated by . . . a county . . . [or] special taxing district," such as the Intervenor Hospital), to help maintain the fund on an actuarially sound basis. See, e.g., Coy v. Florida Birth-Related Neurological Injury Compensation Plan, 595 So. 2d 943 (1992), certiorari denied 113 S. Ct. 194, 506 U.S. 867, 121 L. Ed.2d 137.

5/ The Plan does not accord a participating physician or other healthcare provider any right or opportunity to initiate such a claim, and initially provided no opportunity to compel the resolution of any dispute regarding the compensability of any injury to an infant, before DOAH. See Sections 766.302(3) and 766.305(1), Florida Statutes (1997). Compare Sections 766.301(1)(d) and 766.304, Florida Statutes (1998 Supp.). See also Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, supra.

6/ Where, as here, a health care provider disputes a Petitioner's assertion of inadequate notice, the burden is on the health care provider to demonstrate, more likely than not, that proper notice was given or that failure to accord notice should be excused because of a medical emergency or because the giving of notice was otherwise not practicable. Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.") See also Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 311 (Fla. 1997)("[T]he assertion of NICA exclusivity is an affirmative defense.")

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Sections 120.68 and 766.311, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 120.68(2), Florida Statutes, and Florida Birth-Related Neurological Injury Compensation Association v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992). The Notice of

Appeal must be filed within 30 days of rendition of the order to be reviewed.