STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BASSAM ABIFARAJ and RAYYA ABIFARAJ, as parents and natural guardians of SAMER ABIFARAJ, a deceased minor,	)	
Petitioners,	)	
vs.	)	
	)	Case No. 00-4406N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
JOHN L. RINELLA, M.D. AND RINELLA, HUDANICH, GREENBERG, RALPH & SIJIN, P.A.; JOAQUIN TARANCO, M.D. AND TARANCO & ASSOCIATES ANESTHESIOLOGY GROUP, P.A., d/b/a PLANTATION-TAMARAC ANESTHESIA GROUP, P.A.; and PLANTATION GENERAL HOSPITAL,	)	
Intervenors.	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a final hearing in the above-styled case on July 25, 2001, by video teleconference, with sites in Tallahassee and Fort Lauderdale, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

1. At issue is whether Samer Abifaraj, a deceased minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

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

3. If so, whether the Division of Administrative Hearings has the exclusive jurisdiction to resolve or, alternatively, must preliminarily resolve, whether there is "clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property" before a claimant may elect (under the provisions of Section 766.303(2), Florida Statutes) to reject Plan benefits and pursue a civil suit.

PRELIMINARY STATEMENT

On October 25, 2000, Petitioners, Bassam Abifaraj and Rayya Abifaraj, on behalf of as parents and natural guardians of Samer Abifaraj (Samer), a deceased minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).[1] Pertinent to this case, the petition averred that Samer had suffered a "birth-related neurological injury," but sought to avoid any claim of Plan immunity by contending that the health care providers (the participating physician and hospital) failed to comply with the notice

provisions of the Plan or, alternatively, proposed to reject coverage under the provisions of Section 766.303(2), Florida Statutes, based on their perception that there existed "clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety or property."

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on October 26, 2000, and on November 22, 2000, NICA gave notice that it had determined that the claim was compensable. Consequently, an evidentiary hearing was noticed for, and held on, July 25, 2001, to resolve whether NICA's proposal to accept the claim should be approved, and whether the notice requirements of the Plan were satisfied. As for the third issue raised, whether DOAH must resolve whether there is "clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property" before a claimant may (under the provisions of Section 766.303(2), Florida Statutes) elect to reject Plan benefits and pursue a civil suit, it was resolved that, if necessary, such issue would be addressed as a matter of law. Prior to hearing, John L. Rinella, M.D., and Rinella, Hudanich, Greenberg, Ralph & Sijin, P.A.; Joaquin Taranco, M.D. and Taranco & Associates Anesthesiology Group, P.A., d/b/a Plantation-Tamarac Anesthesia Group, P.A., and Plantation General Hospital were accorded leave to intervene.

At hearing, the parties stipulated to the factual matters set forth in paragraphs 1, 2, and 4 of the Findings of Fact. Petitioner, Rayya Abifaraj, testified on her own behalf, and Petitioners' Exhibit 1 (the medical records filed with DOAH on October 26, 2000), Exhibit 2 (the affidavit of Rayya Abifaraj), and Exhibit 3 (the affidavit of Jill Pettitt) were received into evidence. Respondent called no witnesses; however, its Exhibit 1 (a report of Dr. Charles Kalstone, dated November 20, 2000, and filed November 28, 2000) was received into evidence. Intervenor, John L. Rinella, M.D., testified on his own behalf, and called Belinda Jill Pettitt and Sarah Mitchell as witnesses. Finally, Intervenor Dr. Rinella's Exhibit 1 (Dr. Rinella's office records regarding Rayya Abifaraj) and Exhibit 2 (a copy of the NICA brochure), as well as Plantation General Hospital Exhibit 1 (the deposition of Rayya Abifaraj) were received into evidence.[2]

The transcript of the hearing was filed August 22, 2001, and the parties were accorded 10 days from that date to file proposed final orders. All parties elected to file such proposals, and they have been duly considered.

FINDINGS OF FACT

Fundamental findings

1. Petitioners, Bassam Abifaraj and Rayya Abifaraj, are the parents and natural guardians of Samer Abifaraj (Samer), a deceased minor, and co-personal representatives of their deceased

son's estate. Samer was born October 30, 1997, at Plantation General Hospital, a hospital located in Broward County, Florida, and died December 4, 1997. At birth, Samer's weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Samer's birth was John L. Rinella, M.D., who was at all times material hereto a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(2), Florida Statutes.

Coverage under the Plan

3. Pertinent to this case, coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as an "injury to the brain . . . caused by oxygen deprivation . . . 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.

4. Here, NICA has concluded, and the parties agree, that Samer suffered a "birth-related neurological injury." Consequently, since obstetrical services were provided by a "participating physician" at birth, NICA proposes to accept the claim as compensable under the Plan. NICA's conclusion is

consistent with the proof, and its proposal to accept the claim as compensable is approved.

Notice of Plan participation

5. While the claim qualifies for coverage under the Plan, Petitioners have responded to the health care providers' claim of Plan immunity by contending that the hospital and participating physician failed to comply with the notice provisions of the Plan. Consequently, it is necessary to resolve whether, as alleged by the health care providers, appropriate notice was given. O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, 757 So. 2d 624 (Fla. 5th DCA 2000).

6. Regarding the notice issue, it is resolved that on June 3, 1997, Mrs. Abifaraj was provided timely notice that Dr. Rinella was a participating physician in the Plan, together with notice as to the limited no-fault alternative for birth-related neurological injuries provided by the Plan. Such conclusion is based on the more credible proof which demonstrates that on such date, when Mrs. Abifaraj presented to Dr. Rinella's office, Belinda Jill Pettitt, a medical assistant at the time, gave Mrs. Abifaraj a brief explanation of the Plan, as well as a form titled INFORMED CONSENT OF MY PHYSICIAN'S PARTICIPATION IN THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN (NICA). The form further provided:

> I hereby acknowledge that:
>
> 1. I have been advised that Dr. John Rinella (OB), MD is a participant in the NICA Plan;
>
> 2. I have been furnished with a copy of the NICA brochure which describes the NICA Plan and my rights and limitations under the NICA Plan;
>
> 3. I understand that the no-fault aspects of the NICA Plan will serve as an exclusive remedy for injury which qualifies under the NICA Plan and that as a result I am forfeiting any and all rights to bring legal action in a Court of Law for damages in connection with such injuries;
>
> 4. Any questions I may have had regarding my physician's participation in the NICA Plan and my rights and limitations under the NICA Plan have been answered to my satisfaction;
>
> 5. I hereby consent to obstetrical services having been given notice pursuant to Florida Statutes 766.316 by my physician of the applicability of NICA upon such obstetrical services.

Contemporaneously, Ms. Pettitt gave Mrs. Abifaraj a copy of the brochure (prepared by NICA) titled "Peace of Mind for an Unexpected Problem," which contained a concise explanation of the patient's rights and limitations under the Plan. Ms. Abifaraj acknowledged her understanding of the form, as well as receipt of the NICA brochure, by dating and signing the form.[3]

7. While Mrs. Abifaraj received notice on behalf of the participating physician, the proof failed to demonstrate that Plantation General Hospital provided any pre-delivery notice, as

envisioned by Section 766.316, Florida Statutes. Moreover, there was no proof offered to support a conclusion that the hospital's failure to accord Mrs. Abifaraj pre-delivery notice was occasioned by a medical emergency or that the giving of notice was otherwise not practicable. Rather, the health care providers contend that the hospital's failure to give notice is inconsequential when, as here, the patient's obstetrician has accorded notice of his participation in the Plan. Whether, as contended by the health care providers, the hospital's failure to accord Mrs. Abifaraj notice should be overlooked, as harmless, is addressed in the Conclusions of Law.

CONCLUSIONS OF LAW

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. As the claimants, the burden rested 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.")

15. Here, it has been established that the physician who provided obstetrical services at birth was a "participating physician," as that term is defined by the Plan, and that Samer suffered a "birth-related neurological injury," as that term is defined by the Plan. Consequently, Samer qualifies for coverage under the Plan. Section 766.309, Florida Statutes.

16. While Samer qualifies for coverage under the Plan, Petitioners have sought to avoid the health care providers' attempt to invoke the Plan as their exclusive remedy by averring that the health care providers (the participating physician and hospital) failed to comply with the notice provisions of the Plan. Consequently, it is necessary for the administrative law judge to resolve whether, as alleged by the health care providers, appropriate notice was given or, if not given, any failure to accord notice should be excused. O'Leary v. Florida Birth-Related Neurological Injury Compensation Plan, supra. As the proponent of such issue, the burden rested on the health care providers to demonstrate, more likely than not, that the notice provisions of the Plan were satisfied. See Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 311 (Fla. 1997)("[T]he assertion of NICA exclusivity is an affirmative defense.") See also Balino

v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1997)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.").

17. Pertinent to the issue of notice, Section 766.316, Florida Statutes, provided, at the time of Samer's birth, as follows:[4]

> 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.

18. In Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 309 (Fla. 1997), the Florida Supreme Court had before it the following question certified by the court in Braniff v. Galen of Florida, Inc., 669 So. 2d 1051 (Fla. 1st DCA 1995), as a matter of great public importance:

> Whether Section 766.316, Florida Statutes (1993), requires that health care providers give their obstetrical patients pre-delivery notice of their participation in the Florida Birth Related Neurological Injury Compensation Plan as a condition precedent to

> the providers' invoking NICA as the patient's exclusive remedy?

In addressing the question, 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." Section 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.
>
> Our construction of the statute is supported by its legislative history. Florida's Birth-Related Neurological Injury Compensation Plan was proposed by the 1987 Academic Task Force for Review of the Insurance and Tort Systems. In its November 6, 1987, report, the Task Force recommended adoption of a no-fault compensation plan for birth-related neurological injuries similar to the then newly enacted Virginia plan . . . . However, the Task Force was concerned that the Virginia legislation did not contain a notice

requirement and recommended that the Florida plan contain such a requirement. The Task Force believed that notice was necessary to ensure that the plan was fair to obstetrical patients and to shield the plan from constitutional challenge. The Task Force explained in its report:

> The Virginia statute does not require participating physicians and hospitals to give notice to obstetrical patients that they are participating in the limited no-fault alternative for birth-related neurological injuries. The Task Force recommends that health care providers who participate under this plan should be required to provide reasonable notice to patients of their participation. This notice requirement is justified on fairness grounds and arguably may be required in order to assure that the limited no fault alternative is constitutional.

Task Force Report at 34 (emphasis added). Since Florida's NICA plan was the result of the Task Force's report, it is only logical to conclude that the plan's notice requirement was included in the Florida legislation as a result of this recommendation and therefore was intended to be a condition precedent to immunity under the plan.

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.

19. In Board of Regents v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997), the First District Court of Appeal, consistent with its decision in Braniff v. Galen of Florida, Inc., supra, again resolved that notice was a condition precedent to invoking the Plan as a patient's exclusive remedy.[5] Of particular interest to this proceeding, the court in Athey (under circumstances where it was alleged neither the participating physicians nor the hospital gave the pre-delivery notice required by the Plan) spoke to the independent obligation of both the physician and the hospital to accord the patient notice, as mandated by Section 766.316, Florida Statutes, as follows:

> Under the plan, a "participating physician" is one who is "licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full time or part time and who had paid or was exempted from payment at the time of the injury the assessment required for participation" in NICA. Section 766.302(7), Fla. Stat. (1989). Thus, if a hospital has a "participating physician" on staff, to avail itself of NICA exclusivity the hospital is required to give pre-delivery notice to its obstetrical patients. In addition, except for residents, assistant residents and interns who are exempted from the notice requirement, a participating physician is required to give notice to the obstetrical patients to whom the physician provides services. Under section 766.316, therefore, notice on behalf of the hospital will not by itself satisfy the notice requirement imposed on the participating physician(s) involved in the delivery . . . . [Conversely, it reasonably follows, notice on behalf of the participating physician will not by itself

> satisfy the notice requirement imposed on the hospital.]

Id. at 49.

20. The conclusions reached by the court in Athey regarding the independent obligation of the physician and the hospital to accord the patient notice "as to the limited no-fault alternative for birth-related neurological injuries" are consistent with basic principles of statutory construction. First, the statutory language in Section 766.316, clearly supports the court's conclusion:

> Each hospital with a participating physician on its staff and each participating physician . . . shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries . . . (emphasis added).

Had the Legislature intended for the patient to receive notice from only the physician or the hospital, the statute could easily have been worded to reflect that intention. The legislature's choice of clear, unambiguous language to the contrary evidences its intention that Plan exclusivity will preclude a civil action only when the hospital and the participating physician have provided notice. As noted in Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984):

> Florida case law contains a plethora of rules and extrinsic aids to guide courts in their efforts to discern legislative intent from ambiguously worded statutes. However, [w]hen the language of the statute is clear and

> unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning . . . . Courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power. (citations omitted).

Accord, Tropical Coach Line, Inc. v. Carter, 121 So. 2d 779, 782 (Fla. 1960)("If the language of the statute is clear and unequivocal, then the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think that the legislators intended or should have intended."), and Levin v. Dade County School Board, 442 So. 2d 210, 212 (Fla. 1983)("Our views about the wisdom or propriety of the notice requirement are irrelevant because the requirement is so clearly set forth in the statute . . . Consideration of the efficacy of or need for the notice requirement is a matter wholly within the legislative domain.") Finally, because the Plan, like the Workers' Compensation Act, is a statutory substitute for common law rights and liabilities, it should be strictly construed to include only those subjects clearly embraced within its terms. Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974, 977 (Fla. 1996).

21. Given the foregoing, it must be resolved that where, as here, notice was not given by the hospital, the patient may accept compensation under the Plan (thereby foreclosing the filing or continuation of a civil suit against the participating physician, hospital or others involved with the labor or delivery) or reject the Plan benefits and pursue her common law remedies. See Braniff v. Galen of Florida, Inc., supra, at page 1053 ("The presence or absence of notice will neither advance or defeat the claim of an eligible NICA claimant who has decided to invoke the NICA remedy . . . Notice is only relevant to the defendants' assertion of NICA exclusivity where the individual attempts to invoke a civil remedy.") Accord, O'Leary v. Florida Birth-Related Neurological Injury Compensation Plan, supra, at page 627 ("We recognize that lack of notice does not affect a claimant's ability to obtain compensation from the Plan.") That the participating physician may have complied with the notice provisions, as he did in this case, does not alter the conclusion reached.

22. In so concluding, it is observed that there is nothing in the language chosen by the Legislature that would suggest that a participating physician, hospital or other provider involved in the birth process enjoys any benefit (i.e., Plan exclusivity or immunity) independently from that enjoyed by all persons or entities involved in the birth process. Stated differently, Plan

exclusivity and Plan benefits are 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 injury occurs.) See also Gilbert v. Florida Birth-Related Neurological Injury Compensation Association, 724 So. 2d 688, 690 (Fla. 2d DCA 1999)("[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.") Consequently, it must be resolved that where, as here, the hospital failed to give the patient notice, neither the participating physician (even though he gave notice) nor any other health care provider involved in the birth process can enforce the exclusivity of the Plan. Rather, acceptance of Plan benefits under such circumstances is an option to be exercised at the discretion of the claimants. Conversely, if rejected, the claimants may proceed with their civil remedies, and the health care providers may not assert Plan exclusivity to defeat such civil suit.

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 suit) 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 another exception to the exclusivity of the remedy afforded by the Plan. That exception 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. Having resolved that the notice provisions of the Plan were not satisfied and the claimants may, at their election, pursue their civil remedies without limitation, it is unnecessary to resolve whether, as contended by NICA and Intervenors, the administrative law judge must resolve whether there is "clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property" before a claimant may elect (under the provisions of Section 766.303(2), Florida Statutes) to reject Plan benefits and pursue such a cause of action in a civil suit. Nevertheless, since the likelihood cannot be foreclosed that such issue, a matter of first impression, may ultimately prove ripe for review the issue will be addressed.

26. Pertinent to the issue raised, the Plan provides:

> 766.301 Legislative findings and intent.-
> (1) The Legislature makes the following findings:
>
> * * *
>
> (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. The issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding.

766.303 Florida Birth-Related Neurological Injury Compensation Plan; exclusiveness of remedy.–

(1) There is established the Florida Birth-Related Neurological Injury Compensation Plan for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims . . . .

(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, her or his personal representative, 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. (Emphasis added.)

766.304 Administrative law judge to determine claims.–

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 . . . .

766.309 Determination of claims; presumption; findings of administrative law judge binding on participants.–

(1) The administrative law judge shall 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.

(2) If the administrative law judge determines that the injury alleged is not a birth-related neurological injury or that obstetrical services were not delivered by a

> participating physician at the birth, she or he shall enter an order and shall cause a copy of such order to be sent immediately to the parties by registered or certified mail.
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> 766.311 Conclusiveness of determination or award; appeal.–
>
> (1) A determination of the administrative law judge as to qualification of the claim for purposes of compensability under s. 766.309 or an award by the administrative law judge pursuant to s. 766.31 shall be conclusive and binding as to all questions of fact. Review of an order of an administrative law judge shall be by appeal to the District Court of Appeal . . . .

27. Given the current provisions of the Plan, it is no longer subject to debate that the administrative forum is the exclusive forum to resolve whether a claim is compensable. O'Leary v. Florida Birth-Related Neurological Injury Compensation Plan, supra. However, having once resolved that a claim is compensable, NICA and Intervenors also contend that DOAH is required to resolve whether "there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property" before a claimant may elect (under the provisions of Section 766.303(2), Florida Statutes) to reject Plan benefits and pursue a civil suit. Variously, the parties describe DOAH as the exclusive forum to resolve the issue or, alternatively, that DOAH's function is to make a preliminary finding (a non-binding determination) that "there is clear and convincing evidence of bad faith or malicious

purpose or willful and wanton disregard of human rights, safety, or property" before the claimants may reject Plan benefits and pursue a civil suit. The parties' contentions are rejected, as unpersuasive.

28. First, since the language adopted by the Legislature clearly contemplates the filing of a civil suit, where presumably the claimants (plaintiffs) will be required to demonstrate, by clear and convincing evidence, that the defendants were guilty of "bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property," it is apparent that DOAH is not the exclusive forum to resolve the issue. Moreover, given the absence of any imperative language in the statute, the parties are equally lost to reasonably articulate a procedure DOAH should employ or a standard DOAH should apply in rendering a preliminary finding that "there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property." Consequently, it must be resolved that there is no requirement under the provisions of the Plan that the administrative law judge first resolve or has jurisdiction to resolve whether there is "clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property" before a claimant may elect (under the provisions of Section 766.303(2), Florida Statutes) to reject an award and pursue "such [a civil] suit."

City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So. 2d 493, 495-96 (Fla. 1973)("All administrative bodies created by the Legislature are not constitutional bodies, but, rather, simply mere creatures of statute. This, of course, includes the Public Service Commission . . . . As such, the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State . . . . Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, . . . and the further exercise of the power should be arrested."), and Department of Environmental Regulation vs. Falls Chase Special Taxing District, 424 So. 2d 787, 793 (Fla. 1st DCA 1982)("An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in . . . a court of general jurisdiction.")

29. In reaching such conclusion, the argument of NICA and Intervenors, that the 1998 amendments to Sections 766.301 and 766.304, Florida Statutes, read in conjunction with the opinion rendered in O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, supra, compel the conclusion that the administrative forum is the exclusive forum to resolve whether

"there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property" has not been overlooked. However, for reasons heretofore discussed, and for additional reasons that follow, such argument is rejected as unpersuasive.

30. In O'Leary, where the Plan was silent on the issue, the court was called upon to resolve whether the administrative forum or the trial court should determine the notice question. In resolving that issue, the court noted that, in Chapter 98-113, Laws of Florida, the Legislature amended Sections 766.301 and 766.304, Florida Statutes, as follows:

> Be It Enacted by the Legislature of the State of Florida:
>
> Section 1. Paragraph (d) of subsection (1) of Section 766.301, Florida Statutes, is amended to read:
>
> 766.301 Legislative findings and intent.-
>
> (1) The Legislature makes the following findings:
>
> (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. The issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding.
>
> Section 2. Section 766.304, Florida Statutes, is amended to read:

> 766.304 Administrative law judge to determine claims.-
>
> 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 proposes 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 . . . .

Upon consideration of such amendments, the court concluded:

> In reviewing the amendments in light of the McKaughan and Braniff opinions, it appears that the legislature, in sections 1 and 2 of chapter 98-113, was responding adversely to the result reached in McKaughan. In McKaughan, the supreme court concluded that the circuit court, as well as the administrative law judge, could determine whether a claim fell under NICA. The legislature countered that conclusion by adding to Section 766.301 the provision that "whether such claims are covered by this act must be determined exclusively in an administrative proceeding." Likewise, section 766.304 was amended to provide that "the administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable."
>
> The appellants urge, and we agree, that the legislature, by amending section 766.304 to grant exclusive jurisdiction to an administrative law judge to determine whether

a claim filed under this act is compensable, clearly meant to correct the dual jurisdiction problem that existed after the McKaughan decision.

[2, 3] 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.

Our conclusion that the administrative forum is the intended exclusive forum to determine the notice question eliminates the "ping-pong effect," that is, the trial court and the administrative law judge each throwing the case back to the other on this question. We also note that a section 766.316 notice issue

> is peculiar to a NICA claim. The 766.316 notice is not applicable to a common law tort or contract action. We also believe that it is economical and practicable to both the litigants and judicial system to have all NICA issues determined by one tribunal.
>
> The dismissal by the administrative law judge is vacated and we remand to the Division of Administrative Hearings for further proceedings, including the determination of whether notice was given or excused in this case.

31. The court's conclusion that "the administrative forum is the intended exclusive forum to determine the notice question" is logical, as it provides a rational balance between the duties of the administrative forum and the trial court. As the court noted: "[o]ur conclusion . . . eliminates the 'ping-pong effect,' that is, the trial court and the administrative law judge each throwing the case back to the other on this question;" "a section 766.316 notice issue is peculiar to a NICA claim;" "[t]he 766.316 notice is not applicable to a common law tort or contract action;" and "it is economical and practicable to both the litigants and judicial system to have all NICA issues determined by one tribunal." However, the exception to the exclusiveness of remedies provisions of section 766.303 heretofore noted (that "there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property") enjoys no similar nexus with the administrative forum, but does with the courts of general

jurisdiction. Moreover, it is evident from the clear language chosen by the legislature that the administrative forum (DOAH) is not the intended exclusive forum to resolve such issue. Consequently, neither the amendments to Sections 766.301 and 766.305, Florida Statutes, or the opinion rendered in O'Leary compel the conclusion that the administrative forum has jurisdiction to resolve the exception to the exclusiveness remedies provisions of Section 766.303, or that such issue need be addressed before a claimant may elect to reject an award and pursue a civil suit.

32. 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 the claim for compensation filed by Bassam Abifaraj and Rayya Abifaraj, as parents and natural guardians of Samer Abifaraj, a deceased minor, and NICA's proposal to accept the claim for compensation be and the same are hereby approved.

IT IS FURTHER ORDERED that, absent timely rejection of this award by the Claimants, that:

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

2. Bassam Abifaraj and Rayya Abifaraj, as the parents and natural guardians of Samer Abifaraj, a deceased 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.

3. 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.

IT IS FURTHER ORDERED that 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 21st day of September, 2001, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of September, 2001.

ENDNOTES

1/ At the time Petitioners filed the claim with DOAH, they had pending a medical malpractice/negligence action against John L. Rinella, M.D. and Rinella, Hudanick, Greenberg, Ralph & Sijin, P.A.; Joaquin Taranco, M.D., and Taranco & Associates Anesthesiology Group, P.A., d/b/a Plantation-Tamarac Anesthesia Group, P.A.; and Plantation General Hospital in the Circuit Court for the Seventeenth Judicial Circuit, Broward Court, Florida, Case No. 98-20917 02. By order of November 4, 1999, the court granted the motion of the defendants (Intervenors here) to abate the civil action. Specially, the court concluded:

> 2. Pursuant to section 766.304, Florida Statutes (Supp. 1998), all claims are ABATED until the determinations under section 766.309, Florida Statutes, have been made by the administrative law judge.
>
> 3. No later than twenty days after the determinations by the administrative law judge have become final and any appellate proceedings have either been concluded or been waived by expiration of the time to appeal, whichever first occurs, Plaintiffs shall file a status report with the Court and move the Court for a status conference.

2/ Marked as Dr. Rinella's Exhibit 3 for identification were pages 40-43 of an April 15, 1998, unsworn statement of Rayya Abifaraj made as part of the pre-suit investigation in the underlying action. Petitioners objected to that statement as privileged under Section 766.205(4), Florida Statutes, the exhibit was sealed (and not reviewed by the administrative law judge), and the parties were accorded an opportunity to brief the issue of privilege post-hearing before it would be resolved whether the exhibit should be received into evidence.

The party's post-hearing submittals regarding the privilege issue have been considered and it must be resolved for reasons advanced on behalf of Dr. Rinella that the statement is admissible. Those reasons were stated, as follows:

> Mrs. Abifaraj's unsworn statement was taken pursuant to Florida Rule of Civil Procedure 1.650(c)(2)(A) and Section 766.201 through 766.212, Fla. Stat. (1995), Florida's Medical

Malpractice Reform Act. The rule provides that unsworn statements taken in presuit proceedings conducted pursuant to the act are not "admissible in any civil action for any purpose by the opposing party." The same prohibition appears in Section 766.205(4), Fla. Stat. (1995). In both instances, however, the prohibition is limited to use of the presuit unsworn statements in [a] civil action. See also, Cohen vs. Dauphnee, 739 So. 2d 68, 73 (Fla. 1999).

This proceeding is not a "civil action" within the prohibitions of the rule and the statute. Instead, this proceeding is an exclusive remedy established by the Florida Legislature to avoid the necessity or availability of a civil action. See, e.g., Section 766.303, Fla. Stat. (1995). Nothing suggests that the Legislature intended to limit the evidence available in these proceedings in the same way as it has chosen to limit [it in] civil actions.

Furthermore, Mrs. Abifaraj's admissions in her unsworn statement are otherwise relevant and admissible under Florida law. Ordinarily, all relevant evidence is admissible. Section 90.402, Fla. Stat. (1995). Section 90.608, Florida Statutes (1995), provides that inconsistent statements are relevant on the issue of a party's credibility. Section 90.614(1), Florida Statues (1995), similarly provides for the use of a witness's prior inconsistent statement. Section 90.803(18)(a), Florida Statutes (1995), further provides that such admission is an exception to the hearsay rule. The overwhelming impact of the[se] sections is that the Florida Legislature ordinarily not only allows but encourages admissibility of statements that go to enforce revelation of the truth in all legal proceedings. Contrasting the usual result in circumstances such as this with the narrow nitch carved out by the Act's presuit provisions convinces the Court [sic] that

> Mrs. Abifaraj's statements against interest are admissible.

Nevertheless, Dr. Rinella's counsel suggests that if the administrative law judge concludes that the evidence otherwise supports a conclusion that notice was properly given, he should choose not to consider the admission on that issue. Here, because this is a question of first impression and the evidence otherwise supports the conclusion that notice was properly given by Dr. Rinella, I concur with Dr. Rinella's counsel that the exhibit not be admitted or considered so that potential error or prejudice will be avoided. Consequently, counsel's request that the exhibit be admitted is deemed withdrawn.

3/ The testimony and other proof offered by Mrs. Abifaraj to the contrary has been rejected as unpersuasive and contrary to the greater weight of the evidence.

4/ 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. <u>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.</u> (Amendment emphasized.)

Chapter 98-113, Section 7, 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.

5/ The court in Athey certified the same question to the Florida Supreme Court that it had certified in Braniff v. Galen of Florida, Inc., supra. In University Medical Center, Inc. v. Athey, 699 So. 2d 1350 (Fla. 1997), the Florida Supreme Court, Per Curiam, concluded:

> In Galen of Florida, Inc. v. Braniff, 696 So. 2d 308 (Fla. 1997), we answered the certified question by holding "that 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." 696 So. 2d at 309. Accordingly, we answer the question certified here as we did in Galen [,] approve the decision under review to the extent it is consistent with that opinion . . . [and decline to reach any other issues raised by the petitioners].

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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.