

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLARICE TABB (Mother),)	
individually and as next friend)	
of DYLAN TABB, a minor,)	
)	
Petitioner,)	
)	
vs.)	Case No. 02-3277N
)	
FLORIDA BIRTH-RELATED)	
NEUROLOGICAL INJURY)	
COMPENSATION ASSOCIATION,)	
)	
Respondent,)	
)	
and)	
)	
GRACE M. VALENTE, M.D. and)	
MEMORIAL HEALTHCARE GROUP,)	
INC., d/b/a MEMORIAL HOSPITAL)	
JACKSONVILLE,)	
)	
Intervenors.)	
_____)	

AMENDMENT TO FINAL ORDER FOLLOWING REMAND

The Final Order entered in the above-styled case on July 17, 2003, was appealed to the District Court of Appeal, First District, State of Florida.

By Opinion of August 30, 2004, the court concluded that the administrative law judge (ALJ) erred when he determined that Memorial Hospital's evidence of a routine practice of providing the NICA brochure to patients at pre-registration, supported a rebuttable presumption that the routine was followed in this

case. Rather, the court concluded "such evidence will support only an inference by the ALJ that the practice was followed when [Ms.] Tabb pre-registered." Consequently, the court reversed the decision of the ALJ, and remanded with directions that "[o]n remand, the ALJ, affording Memorial's evidence the proper weight, should make a new determination on the question of notice." Subsequently, the Mandate issued commanding that further proceedings be had in accordance with the Opinion of the court.

In accordance with the court's Opinion and Mandate, it is ORDERED that:

1. Paragraph 9 of the Final Order is vacated, and the following paragraph is adopted in its stead:

9. With regard to the notice issue, Ms. Tabb contends the participating physician and hospital failed to provide her with a copy of the NICA brochure, and thereby failed to comply with the notice provisions of the Plan. In contrast, the health care providers contend they had a routine practice to provide their obstetrical patients with a copy of the NICA brochure (in the case of the participating physician, at the time of the patient's initial visit, and in the case of the hospital, at the time of pre-registration) and that, given such practice, it must be resolved that, more likely than not, Ms. Tabb was provided a copy of the NICA brochure and the notice provisions of the Plan were satisfied. See Lumberman Mutual Casualty Company v. Alvarez, 443 So. 2d 279, 281 (Fla. 3d DCA 1983)("While . . . [defendant's proof] as to the routine practice establishes no presumption that it was followed in a particular instance, it is nonetheless sufficient to support an

inference by the trier of fact that the practice was followed on the particular occasion in question notwithstanding that [the plaintiff's] testimony directly contradicts such an inference.")

2. Paragraph 11 of the Final Order is vacated, and the following paragraphs, numbered 11A, 11B, and 11C, are adopted in its stead:

11A. As for Memorial Hospital and the notice issue, it is resolved that on September 20, 2001, when Ms. Tabb presented to Memorial Hospital for pre-registration, the hospital had an established routine whereby the registration clerk would provide the prospective patient with a preadmission packet, which customarily included nine documents: (1) a "Maternity Pre-Admission Form"; (2) a form that was variously described in this proceeding as the "Date of Preadmission" form, the "yellow preadmission" form, and the "birth certificate" form, hereinafter referred to as the "birth certificate form," which was white at the time, but later changed to bright yellow; (3) a "Patient Rights and Responsibilities" notice; (4) a brochure titled "What You Should Know About Receiving A Blood Transfusion"; (5) a brochure titled "Advance Directives," which was baby blue at the time, but later changed to white; (6) a brochure titled "Reduce the Risk of Sudden Infant Death Syndrome (SID)"; (7) a copy of "New Parent Magazine"; (8) a NICA brochure; and (9) a business reply envelope for the patient to mail the Maternity Pre-Admission Form back to the hospital, if they so elected.¹ (Hospital Exhibits 2, 3, 4, and 5) Generally, the Maternity Pre-Admission Form and the birth certificate form were placed on the outside of the packet, and the seven other documents were placed in an inside pocket, at the back of the packet. At the time, Memorial Hospital did not have pre-

registrants sign a form acknowledging receipt of the NICA brochure or otherwise document the delivery of the brochure.

11B. At hearing, Ms. Tabb acknowledged having received the pre-admission packet when she presented mid-afternoon, September 20, 2001, and recalled receiving five of the nine documents that were customarily included with the packet (the Maternity Pre-Admission Form, the Patient Rights and Responsibilities notice, the What You Should Know About Receiving a Blood Transfusion brochure, the Reduce the Risk of Sudden Infant Death (SID) brochure, and a copy of New Parent Magazine). As for three of the remaining four documents customarily included in the packet, and shown to her at hearing (the envelope, the birth certificate form, and the Advance Directives brochure), Ms. Tabb did not recall receiving them. Notably, however, Ms. Tabb elected to fill out the Maternity Pre-Admission Form at the hospital, so she had no use for the envelope, and its presence was insignificant; the birth certificate form shown to her at hearing was bright yellow, as opposed to the white form she would have received with the packet; and the Advance Directives brochure shown to her at hearing was white, as opposed to the baby blue form she would have received with the packet, and likely of a different format.² Consequently, Ms. Tabb's failure to recall these documents does not reflect adversely on her recall of pre-registration or the contents of the pre-registration packet. Finally, as for the last form customarily included in the packet, the NICA brochure, Ms. Tabb was confident she did not receive it.³

11C. In addition to denying receipt of the NICA brochure, Petitioner offered other proof which cast doubt on whether one could reliably conclude that the hospital's practice to include a NICA brochure in the pre-admission packet was followed in this instance. In this regard, the proof

demonstrated that the pre-registration packets were assembled, at various times, by either of two clerks employed in the registration office at the Women's Center, as well as either of two auxiliary workers, but little appears of record regarding their training and experience, or the procedures they followed.⁴ Moreover, the record reveals the clerks were never trained "to know what the NICA program was and what it meant," and there is no reason to believe the significance of the NICA brochure was ever explained to them.⁵ Consequently, although instructed to include a NICA brochure in the pre-registration packet, it is doubtful the clerks or auxiliary workers would have accorded the NICA brochure any particular significance or considered an occasional lack of NICA brochures to be a significant event. Also of note, prior to Ms. Tabb's pre-registration, the hospital's last request for copies of the NICA brochure was in July 1997, when NICA provided 1,000 copies.⁶ Therefore, by September 2001, when Ms. Tabb pre-registered, and most likely well before that, the hospital had exhausted its stock of color brochures, and was providing black and white copies made, when requested by a registration clerk, in the hospital's print shop. The hospital's failure to maintain a supply of the color brochures raises the likelihood that there were occasions when the brochure was not available or not provided. Finally, also casting doubt on the importance accorded the brochure is the fact that apart from pre-registrants or patients who elected to tour the facility, no other maternity patients (i.e., those who only presented to the registration office for admission to labor and delivery) were provided a copy of the brochure, although NICA had previously advised the hospital of the need to give all obstetrical patients a copy of the brochure before an infant's birth, and no patient, including pre-registrants, were asked to sign a form acknowledging receipt of the NICA brochure, although NICA had previously

advised the hospital of the importance of such a procedure. Accordingly, under the facts of this case, the proof fails to permit a conclusion to be drawn, with any sense of confidence, that, more likely than not, Ms. Tabb was provided a copy of the NICA brochure when she pre-registered.

3. Paragraph 20 of the Final Order is vacated, and the following paragraph is adopted in its stead:

20. While Dylan qualifies for coverage under the Plan, Petitioners have sought to avoid the health care providers' attempt to invoke the Plan as Petitioners' exclusive remedy by averring that the participating physician and hospital failed to comply with the notice provisions of the Plan. Consequently, it was necessary for the administrative law judge to resolve whether, as alleged by the health care providers, appropriate notice was given. 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."); Id., at page 309 ("[A]s 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."); Balino v. Department of Health and Rehabilitative Services, *supra*, ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.") Here, for reasons appearing in the Findings of Fact, Memorial Hospital and Dr. Valente failed to demonstrate that they complied with the notice provisions of the Plan.

4. The provision in the Conclusion of the Final Order that reads "It is FURTHER ORDERED that Memorial Hospital complied with the notice provisions of the Plan, but Dr. Valente (the participating physician) did not" is vacated, and the following provision is substituted in its stead:

It is FURTHER ORDERED that Memorial Hospital and Dr. Valente (the participating physician) failed to comply with the notice provisions of the Plan.

DONE AND ORDERED this 1st day of November, 2004, in Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of November, 2004.

ENDNOTES

1/ Ms. Tabb elected to fill out the Maternity Pre-Admission Form at the hospital, before she toured the Women's Center (the

hospital's maternity unit) the evening of September 20, 2001, and left the form at the front desk, rather than mail it to the hospital.

2/ Transcript of the February 18, 2003, hearing, at page 108.

3/ Memorial Hospital's counsel questioned Ms. Tabb regarding her recollection of each document customarily included in the packet. With regard to the NICA brochure, the following question was posed and the following answer was given:

Q. . . . And then this NICA brochure, you've already looked at before, and you testified -
- do you recall receiving that at the Memorial Hospital preregistration?

A. I've never seen this until I got a lawyer. I never knew anything about NICA until I discussed that with a lawyer.

4/ At the time Ms. Tabb pre-registered, the hospital employed two clerks in the registration office at its Women's Center. Those clerks were Leslie Joseph, who testified at hearing and worked the 6:00 a.m. to 2:30 p.m. shift, and Tina Brybold, who worked the 9:30 a.m. to 6:00 p.m. shift.

5/ Transcript of February 18, 2003, hearing, at page 114.

6/ From 1996 through 2001, Memorial Hospital requested color brochures from NICA on four occasions, and they were sent, as follows:

<u>Date</u>	<u>Number of brochures sent</u>
July 23, 1996	number unknown
November 20, 1996	number unknown
March 4, 1997	number unknown
July 25, 1997	1,000 sent
No request in 1998	none
No request in 1999	none
No request in 2000	none
No request in 2001	none

(Doctor's Exhibit 7, pages 36-38) Of note, in 2001 alone, Memorial Hospital had 1,963 live births. (Doctor's Exhibit 7, page 44)

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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 the original of a notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 766.311, 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.