

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLARICE TABB (Mother),)
individually and as next friend)
of DYLAN TABB, a minor,)
)
Petitioners,)
)
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.)
_____)

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 February 18, 2003, and May 28, 2003, in Jacksonville, Florida.

APPEARANCES

For Petitioners: Richard L. Nichols, Esquire
3000 Hartley Road, Suite 5
Jacksonville, Florida 32257

For Respondent: Ronald A. Labasky, Esquire
Landers & Parsons, P.A.
310 West College Avenue
Tallahassee, Florida 32301

For Intervenor Grace Valente, M.D.:

Mary Bland Love, Esquire
Gobelman, Love, Gavin, Blazs & Mathis
815 South Main Street, Suite 300
Jacksonville, Florida 32207

For Intervenor Memorial Healthcare Group, Inc., d/b/a
Memorial Hospital Jacksonville:

James C. Rinaman, Jr., Esquire
Marks Gray, P.A.
Post Office Box 447
Jacksonville, Florida 32201

STATEMENT OF THE ISSUES

1. Whether Dylan Tabb, a minor, qualifies for coverage under the Florida-Birth Related Neurological Injury Compensation Plan (Plan) and, if so, the amount of compensation that should be awarded.

2. Whether the notice provisions of the Plan were satisfied by the participating physician and the hospital.

PRELIMINARY STATEMENT

On August 19, 2002, Clarice Tabb, individually and as mother and next friend of Dylan Tabb (Dylan), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan. Pertinent to this case, apart from contending that Dylan suffered an injury compensable under the Plan,

Petitioners also sought an opportunity to avoid any claim of Plan immunity by contending that, and requesting a finding that, the participating physician and hospital failed to comply with the notice provisions of the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on August 20, 2002, and on November 7, 2002, NICA served its response to the petition and agreed the claim was compensable. In the interim, Grace Valente, M.D., and Memorial Healthcare Group, Inc., d/b/a Memorial Hospital Jacksonville (Memorial Hospital) were accorded leave to intervene.

Given the pleadings, a hearing was held on February 18, 2003, and May 28, 2003, to resolve whether NICA's proposal to accept the claim for compensation should be approved; how much compensation, if any, should be awarded; and whether the notice provisions of the Plan were satisfied by the participating physician and the hospital.

At hearing, Clarice Tabb testified on her own behalf, and called Grace Valente, M.D., Diana Bartlett, Abigail Mohammed, Nicole Hicks, and Melanie R. Milton, as witnesses. Petitioners' Exhibits 1A-F (the medical records filed with DOAH on August 19, 2002) and 2-16 were received into evidence. Respondent called no witnesses; however, its Exhibits 1-3 were received into evidence. Intervenor Grace Valente, M.D., testified on her own behalf, and

called Erica Shearn as a witness, and Intervenor Memorial Hospital called Clarice Tabb and Leslie Joseph as witnesses. Dr. Valente's Exhibits (Doctor's Exhibits) 1-7 and Memorial Hospital's Exhibits (Hospital's Exhibits) 1-5 were received into evidence.

The hearing transcripts were filed April 29, 2003, and June 19, 2003, and the parties were initially accorded until June 30, 2003, to file proposed orders. However, at the request of Intervenor Grace Valente, M.D., the time for filing was subsequently extended to July 11, 2003. Here, all parties elected to file proposed orders and they have been duly considered.

FINDINGS OF FACT

Findings related to compensability

1. Petitioner, Clarice Tabb, is the natural mother and guardian of Dylan Tabb, a minor. Dylan was born a live infant on September 26, 2001, at Memorial Hospital, a hospital located in Jacksonville, Florida, and his birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Dylan's birth was Grace Valente, M.D., who, at the time, was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.

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." Section 766.302(2), Florida Statutes. See also Section 766.309(1) (a), Florida Statutes.

4. Here, the parties have stipulated, and the proof is otherwise compelling, that Dylan suffered a "birth-related neurological injury," as that term is defined by the Plan. Consequently, since obstetrical services were provided by a participating physician at birth, the claim is compensable. Sections 766.309(1) and 766.31(1), Florida Statutes.

Findings related to the award

5. 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, he is required to make a determination as to how much compensation should be awarded. Section 766.31, Florida Statutes. Here, should Petitioners elect to accept benefits under the Plan, the parties have stipulated to the following award:

A. There are no past medical expenses recoverable under Section 766.31(1)(a), Florida Statutes, since any such expenses have been paid by Medicaid.

B. Petitioner, Clarice Tabb, as the natural mother and guardian of Dylan Tabb, a minor, be accorded a lump sum award of \$100,000.00, pursuant to Section 766.31(1)(b), Florida Statutes.

C. NICA pay Petitioners the sum of \$9,465.26, which represents reasonable attorney's fees (\$7,500.00) and costs (\$1,965.26) incurred in connection with the filing of the claim. Section 766.31(1)(c), Florida Statutes.

D. NICA, consistent with Section 766.31(1)(a), Florida Statutes, shall pay all future expenses as incurred. Section 766.31(2), Florida Statutes.

The notice requirements of the Plan

6. 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. See Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 309 (Fla. 1997) ("[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.") 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).

7. Pertinent to this case, at the time of Ms. Tabb's initial visit to Dr. Valente's office (February 19, 2001), as well as at the time of Dylan's birth, Section 766.316, Florida Statutes, prescribed the notice requirement, as follows:

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. 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(9)(b) or when notice is not practicable.

8. Responding to Section 766.316, Florida Statutes, NICA developed a brochure titled "Peace of Mind for an Unexpected Problem" (the NICA brochure) to comply with the statutory mandate, and distributed the brochure to participating physicians and hospitals so they could furnish the brochure to their obstetrical patients.¹

The dispute regarding notice

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 NICA brochure and the notice provisions of the Plan were satisfied. See, e.g., Watson v. Freeman Decorating, Co., 455 So. 2d 1097, 1099 (Fla. 1st DCA 1984) ("There is a general presumption that the ordinary course of business has been followed absent a showing to the contrary.")

Findings related to the participating physician and notice

10. With regard to the participating physician, it must be resolved that the proof fails to support the conclusion that Dr. Valente satisfied the notice provisions of the Plan. Such conclusion is based on the more persuasive proof which demonstrated that on February 19, 2001, when Ms. Tabb presented to Dr. Valente's office for her initial visit, Dr. Valente's office did not have, as she contends, a routine practice whereby,

on their initial visit, obstetrical patients were provided a NICA brochure (either at the front desk at check-in or in a "goody bag" at the end of their first visit),² and that Ms. Tabb was never provided a NICA brochure prior to Dylan's birth.³

Findings related to the hospital and notice.

11. 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 included a copy of the NICA brochure. Consequently, there being no compelling proof to the contrary, it must be resolved that, she presented for pre-registration, the hospital provided Ms. Tabb a copy of the NICA brochure. Watson v. Freeman Decorating Co., supra.

CONCLUSIONS OF LAW

12. 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.

13. The Florida Birth-Related Neurological Injury Compensation 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.

14. The injured "infant, her or his personal representative, parents, dependents, and next of kin" may seek compensation under the Plan by filing a claim for compensation with 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, 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.

15. 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.

16. 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 the birth." Section 766.31(1), Florida Statutes.

17. 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.

18. As the proponents of the issue, the burden rested on Petitioners to demonstrate compensability. 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.")

19. 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 Dylan suffered a "birth-related neurological injury," as that term is defined by the Plan. Consequently, Dylan qualifies for coverage under the Plan. Sections 766.309 and 766.31, Florida Statutes.

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 demonstrated that it complied with the notice provisions of the Plan, but Dr. Valente did not.

21. 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, he is required to make a determination as to how much compensation, if any, should be awarded. Section 766.31, Florida Statutes. In this case, the parties have stipulated to the award, as set forth in paragraph 5 of the

Findings of Fact. Such award is reasonable, and it is hereby approved.

CONCLUSION

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

ORDERED that the claim for compensation filed by Clarice Tabb, individually and as mother and next friend of Dylan Tabb, a minor, and NICA's proposal to accept the claim as compensable be and the same are hereby approved.

It is FURTHER ORDERED that, should Petitioners elect to accept compensation under the Plan, the following benefits are awarded:

1. Petitioner, Clarice Tabb, is accorded a lump sum award of One hundred thousand dollars (\$100,000.00). Section 766.31(1)(b), Florida Statutes.
2. Petitioner is accorded an award of Nine thousand four hundred sixty-five dollars and twenty-six cents (\$9,465.26) for attorney's fees and other expenses incurred in pursuing the subject claim. Section 766.31(1)(c), Florida Statutes.
3. There being no past medical expenses recoverable under Section 766.31(1)(a), Florida Statutes, no award is made for past medical expenses. Section 766.31(2), Florida Statutes.
4. NICA, consistent with Section 766.31(1)(a), Florida Statutes, shall pay all future expenses, as incurred. Section 766.31(2), Florida Statutes.

It is FURTHER ORDERED that Memorial Hospital complied with the notice provisions of the Plan, but Dr. Valente (the participating physician) did not.

It is FURTHER ORDERED that the Division of Administrative Hearings retains jurisdiction over this matter to resolve any disputes, should they arise, regarding the parties' compliance with the terms of this Final Order. Section 766.312, Florida Statutes.

DONE AND ORDERED this 17th day of July, 2003, 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 17th day of July, 2003.

ENDNOTES

1/ NICA also developed a sample form titled "Notice to Obstetric Patient," which hospitals and participating physicians could adapt for their use and have their obstetrical patients sign acknowledging receipt of the brochure. NICA also distributed that form to participating physicians and hospitals. The form developed by NICA provided, as follows:

NOTICE TO OBSTETRIC PATIENT
(See Section 766.316, Florida Statutes)

I have been furnished information by NAME OF DOCTOR/AND OR HOSPITAL prepared by the Florida Birth Related Neurological Injury Compensation Association (NICA), and have been advised that (NAME OF DOCTOR) is a participating physician in that program, wherein certain limited compensation is available in the event certain neurological injury may occur during labor, delivery or resuscitation. For specifics on the program, I understand I can contact the Florida Birth Related Neurological Injury Compensation Association, P.O. Box 14567, Tallahassee, Florida 32317-4567, 1-800-398-2129. I further acknowledge that I have received a copy of the brochure prepared by NICA.

DATED this ____ day of _____, 200__.

Signature of Patient

(Printed name of patient)

Social Security No.: _____

Attest:

Nurse or Physician

Date: _____

This form is informational only, and each person, participating physician or hospital should contact their own attorney to ensure compliance with Section 766.315, Florida Statutes.

2/ Dr. Valente also contended that, at the time of Ms. Tabb's initial visit, her office routinely had the patient sign a Notice to Obstetric Patient form, acknowledging receipt of the NICA brochure; however, the more persuasive proof is to the contrary. Accordingly, it is unnecessary to address Dr. Valente's explanation for the absence of such a form in Ms. Tabb's file.

3/ Briefly stated, the testimony of Dr. Valente and her office manager (Erica Shearn) on the issue was less than credible, and the testimony offered on behalf of Petitioners was most persuasive and consistent with the other proof of record.

COPIES FURNISHED:
(By certified mail)

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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.