STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CRAIG JOSHNICK AND DEBBIE JOSHNICK, as parents and natural guardians of AUSTIN K. JOSHNICK, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 03-0985N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
MICHAEL A. DAWSON, M.D.; DAVID O. PETERFREUND, M.D.; PATRICIA ST. JOHN, M.D.; BAY AREA WOMEN'S CARE, INC.; and MORTON PLANT HOSPITAL ASSOCIATION, INC.,	)	
Intervenors.	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a hearing in the above-styled case on January 20 and 21, 2004, in St. Petersburg, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

1. When, as here, obstetrical services were not provided by a "participating physician" at the infant's birth, does the administrative law judge have jurisdiction to resolve whether the Respondent may, nevertheless, be estopped to deny coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan), and, if so, whether the proof supports a claim of estoppel.

2. If the proof supports a claim of estoppel, whether Austin K. Joshnick (Austin), a minor, suffered a "birth-related neurological injury," as defined by the Plan.

PRELIMINARY STATEMENT

On March 14, 2003, Craig Joshnick and Debbie Joshnick, as parents and natural guardians of Austin K. Joshnick, a minor, filed a petition (claim) with the Division of Administrative

Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on March 25, 2003, and on April 16, 2003, NICA responded with a Motion for Summary Final Order, based on the premise that, indisputably, the physicians who provided obstetrical services during Austin's birth (Michael A. Dawson, M.D.; David O. Peterfreund, M.D.; and Patricia St. John, M.D.) were not "participating physician[s]," as defined by the Plan, and, consequently, Petitioners did not qualify for Plan coverage. §§ 766.309(1) and 766.31(1), Fla. Stat.[1]

Petitioners did not respond to the Motion for Summary Final Order, and on May 1, 2003, an Order to Show Cause was entered which provided "that within 10 days of the date of this Order, Petitioners show good cause in writing, if any they can, why the relief requested by Respondent should not be granted." Subsequently, Dr. Dawson; Dr. Peterfreund; Dr. St. John; Bay Area Women's Care, Inc.; and Morton Plant Hospital Association, Inc. (Morton Plant Hospital), requested and were accorded leave to intervene.

On June 30, 2003, the extended deadline, Petitioners filed their response to the Motion for Summary Final Order and Order to Show Cause, and averred that, if obstetric services were not

rendered by a participating physician at birth, Respondent was estopped to deny coverage. Petitioners' response also included a request for leave to file an amended petition to raise their claim of estoppel.

On July 28, 2003, a hearing was held to address Respondent's Motion for Summary Final Order and Petitioners' Motion to Amend Petition and to Supplement Petition. The results of that hearing were memorialized by Order of July 29, 2003, as follows:

> 1. Ruling on Respondent's motion is deferred for 15 days. Within such period, the parties are accorded a final opportunity to identify any participating physician who delivered obstetrical services in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital, or, if a teaching hospital, by a certified nurse midwife supervised by a participating physician. Sections 766.309(1) and 766.314(4)(c), Florida Statutes.
>
> 2. Respondent and Intervenors are accorded 10 days from the date of this order to file, if they be so advised, any response to Petitioners' claims of estoppel.
>
> 3. Petitioners' Motion to Amend Petition and to Supplement Petition is granted.

Subsequently, by Order of August 14, 2003, Respondent's Motion for Summary Final Order was denied. Respondent was accorded 20 days to file its response to the amended petition.

On November 7, 2003, the extended deadline, NICA filed its response to the amended petition. By its response, NICA averred Petitioners were not entitled to Plan coverage because

obstetrical services were not provided by a participating physician at birth and because Austin did not suffer a birth-related neurological injury. §§ 766.309(1) and 766.31(1), Fla. Stat. As for Petitioners' claim of estoppel, NICA was of the view that the administrative law judge was without jurisdiction to address the issue, and that the facts did not support a claim of estoppel. Subsequently, given the pleadings, a hearing was scheduled to resolve the issues of compensability and estoppel.

At hearing, Petitioners Craig Joshnick and Debbie Joshnick testified on their own behalf, and called Teena Herschowsky, Keith Decker, Lisa Weisickle, Kelly Case, Helen K. Shipley, Paul Gatewood, M.D., and Robert Nahouraii, M.D., as witnesses. Petitioners' Exhibits 1-10, 12-25, and 27-37, were received into evidence.[2] Respondent called Michael Duchowny, M.D., as a witness, and Respondent's Exhibits 1-3, 5, 6, 8, 11A, 11B, 11C, and 12-14, were received into evidence.[3] No other witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed on February 20, 2004, and the parties were accorded, at their request, until March 8, 2004, to file proposed orders. Consequently, the parties waived the requirement that an order be rendered within 30 days after the transcript has been filed. See Fla. Admin. Code R. 28-106.216(2). The parties' proposals have been duly considered.

FINDINGS OF FACT

Preliminary findings

1. Craig Joshnick and Debbie Joshnick are the natural parents and guardians of Austin K. Joshnick, a minor. Austin was born a live infant on January 18, 2001, at Morton Plant Hospital, a hospital located in Pinellas County, Florida, and his birth weight exceeded 2,500 grams.

2. None of the physicians who provided obstetrical services during Austin's birth (Doctors Michael A. Dawson, David O. Peterfreund, or Patricia St. John) were "participating physician[s]" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.[4]

Coverage under the Plan

3. In resolving whether a claim is covered by the Plan, the administrative law judge must resolve "[w]hether the injury claimed is a birth-related neurological injury"[5] and "[w]hether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period." § 766.309(1), Fla. Stat. 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." § 766.31(1), Fla. Stat.

4. In this case, Petitioners and Intervenors are of the view that the claim is compensable since, in their opinion, Austin suffered a "birth-related neurological injury" (because he suffered an "injury to the brain . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period . . . which render[ed] . . . [him] permanently and substantially mentally and physically impaired"), and because, while obstetrical services were not rendered by a "participating physician" at Austin's birth, Respondent is estopped from denying coverage on that basis.

5. In contrast, NICA is of the view that the claim is not compensable since, in its opinion, Austin did not suffer a "birth-related neurological injury" (because his impairments are not associated with any event that occurred during labor, delivery, or resuscitation, and because Austin is not permanently and substantially mentally and physically impaired), and because obstetrical services were not rendered by a "participating physician" at Austin's birth. As for the claim of estoppel, NICA is of the opinion that the administrative law judge is without jurisdiction to address the issue and, if subject to resolution

in the administrative forum, the facts do not support a claim of estoppel.

6. Here, for reasons appearing in the Conclusions of Law, it is concluded that the issue of estoppel is appropriately resolved in the administrative forum. As for the claim of estoppel, it must be resolved, based on the Findings of Fact and Conclusions of Law which follow, that the record does not support such a claim. Consequently, given the lack of a participating physician at birth, the claim is not compensable, and it is unnecessary to address whether Austin suffered a birth-related neurological injury.

Findings relating to Austin's birth and the giving of NICA notice by the hospital

7. At or about 11:30 p.m., January 16, 2001, Mrs. Joshnick (with an estimated date of delivery of February 28, 2001, and the fetus at 34 weeks' gestation) experienced the onset of severe abdominal pain and was advised by her obstetrician (Dr. Peterfreund), to proceed to the hospital for evaluation. Mrs. Joshnick's husband called 911, and Mrs. Joshnick was transported by ambulance to Morton Plant Hospital, where she was received at 1:04 a.m., January 17, 2001.

8. On arrival, Mrs. Joshnick complained of uterine cramping (since 11:30 p.m., January 16, 2001) and severe pain. Initial evaluation revealed the membranes were intact, no vaginal

bleeding, and the cervix at 1 centimeter dilation, effacement at 30 percent, and the fetus at -3 station. Evaluation further revealed the fetus was active, and fetal monitoring revealed a reassuring fetal heart rate, with a baseline of 145-155 beats per minute.

9. Mrs. Joshnick was admitted for evaluation and pain relief, and at 7:50 a.m., Terbutaline was started to discourage premature labor. Evaluation by renal ultrasound was negative, without evidence of stone, mass, or hydronephrosis, and urinalysis failed to reveal any evidence of infection. Nevertheless, Mrs. Joshnick was started on antibiotics, with the expectation that if her pain was associated with a urinary tract infection, it would resolve with the antibiotics.

10. However, Mrs. Joshnick's abdominal pain persisted, and at 5:00 p.m., her attending obstetrician (Dr. Dawson) made the following observations:

> . . . abd[ominal] pain - ? etology- doubt kidney stone or U[terine] T[ract] I[nfection] @ present . . . in light of fetal tachycardia (although variability reassuring) and abdominal pain w/uterine irritability - must consider possible abruption or chorioamnionities [an infection of the placental and fetal membranes] . . . .
>
> D[iscussed]/W[ith] pt. above differential . . . [and] decision made to proceed w/amnio[centesis] to evaluate F[etal] L[ung] M[aturity]/infection.

11. At 6:30 p.m., the amniocentesis was performed by Dr. Dawson, with Dr. St. John assisting. The amniocentesis revealed a large number of maternal blood cells, and Dr. Dawson made the following observations:

> . . . in light of continued pain/uterine irritability & blood on amnio & fetal tachycardia consider at least partial placental separation - will plan for delivery @ this time by induction[.] Will monitor baby closely for sym[ptoms] of intolerance to labor or fetal distress. Pt & husband aware of R[isks]/B[enefits]/A[lternatives] of expectant mgmt vs active induction/augmentation of labor of preterm infant. They are aware of risks of fetal lung immaturity, interventricular hemorrhage & necrotizing enterocolitis. They were understanding & agree w/plan to proceed w/induction of labor. Will start Petocin for augmentation.

At 7:15 p.m., Mrs. Joshnick was admitted to labor and delivery for active induction/augmentation of labor.

12. Following admission, at or about 10:00 p.m., the labor and delivery nurse on duty at the time, Cynthia Collins, R.N., presented three forms for Mrs. Joshnick or, if she were unable to do so, Mr. Joshnick's signature: an Informed Consent for Epidural Anesthesia Authorizing Anesthesia Associates of Pinellas County to administer an epidural anesthetic; a Record of Informed Consent and Consent for Procedure, authorizing Mrs. Joshnick's obstetrician to perform a vaginal delivery with possible episiotomy, forceps-assisted vaginal delivery, or vacuum

extraction or cesarean section, and acknowledgment of receipt of a "NICA Pamphlet"; and a Record of Informed Consent for Procedure, authorizing Austin's circumcision. (Petitioners' Exhibit 2, Tab 2, page 5, and Tab 3, pages 3 and 4). Mrs. Joshnick signed the consent for epidural anesthesia, and Mr. Joshnick, who was present at the time, signed the consent for procedure and acknowledgment of receipt of the NICA pamphlet, as well as the consent for Austin's circumcision. Notably, it is the circumstances surrounding the giving of NICA notice, discussed infra, which form the predicate for Petitioners' claim of estoppel.[6]

13. At or about 2:17 a.m., January 18, 2001, following execution of the consents, hydration and other preparations, epidural anesthetic was started, and, at 3:30 a.m., Petocin was started via pump. Thereafter, Mrs. Joshnick's labor steadily progressed, and at 12:46 p.m.,[7] Austin was delivered.[8]

Petitioners' claim of estoppel

14. In this case, Petitioners' claim of estoppel, although occasionally blurred, is two-fold. First, Petitioners contend that certain comments made by Nurse Collins when she delivered the NICA pamphlet, together with Mrs. Joshnick's reliance on those statements in deciding not to insist on a cesarean section, support a finding of coverage by estoppel. On that issue, Mrs. Joshnick offered the following testimony, at hearing:

Q. Did you have medical care during the pregnancy?

A. Yes.

* * *

Q. . . . who was your primary obstetrician?

A. Dr. St. John.

* * *

Q. On one of your initial visits, did Dr. St. John discuss anything with you?

A. Yeah. She discussed the fact that I had a small pelvis and that they had to use smaller speculums, so must likely I'd be having a C-section.

* * *

Q. . . . [A]t the time you got the NICA pamphlet [were you in pain?]

A. Oh, yeah. I was out of it. I would say I was in severe pain.

Q. Had you been sedated?

A. No. I wasn't given any drugs up until -- you know, after that pamphlet and signatures came.

Q. No drugs for pain?

A. No.

Q. And you were in substantial pain?

A. Yes.

Q. In fact, did you sign the receipt for the NICA pamphlet?

A. I think I had Craig handle that. I believe Craig signed for it . . . .

* * *

Q. What did Nurse Collins say to you about the NICA pamphlet?

A. She said it was like an insurance policy. We were covered if anything were wrong with the baby at delivery.

Q. Okay. Had Dr. St. John mentioned any -- for reasons to do a vaginal delivery in your discussions? Did she mention any problems you might have?

A. She -- when I questioned her about the C-section, she said that I was in grave condition and I had lost too much blood. And I said, really, because I didn't realize I had lost that much blood. So I was like, okay. I believed that I was in grave condition and lost too much blood to have a C-section.

Q. So in short, you understood that there were dangers to you from a Cesarean Section?

A. Yes.

Q. Okay. At the same time, you had testified you were entertaining the possibility of leaving the hospital?

A. I had said to my brother, Keith, quite frankly, get me some drugs or get me the hell out of here; there's a problem. I felt we were going on too long without pain medication, and the baby was in duress [sic] and all these other things. I wanted some action taken.

* * *

Q. I guess I'm leading up to the question. Did you feel even at that stage that you had options?

A. Yes.

Q. And what did those options include?

A. Leaving -- you mean leaving the hospital? My options were to, you know, seek other medical advice or get a second opinion or do something, because I felt it was lagging. I felt that this was going terribly wrong.

Q. Okay. Okay. Did the NICA pamphlet and the nurse's explanation give you some comfort?

A. Yes.

* * *

Q. And that's not your signature on the . . . [receipt for the NICA pamphlet?]

A. No.

Q. And that signature, is that of your husband?

A. Correct.

Q. So this nurse comes in; you were in severe pain; you were in and out of it, as you said before, but you specifically remember the nurse coming in and describing this NICA pamphlet?

A. Yes.

Q. Now, do you recall where your husband signed this? Was this at the bedside, or did -- because earlier you testified that you told your husband, just take care of it, which I guess is one reason why his signature's on it. Did they step to the side

and sign it, or did he sign it right there at the bedside with you?

A. I believe what happened was he stepped to the side -- the nurse came over here in the corner. There was a sink on this side, if I remember correctly.

* * *

Q. . . . [Y]ou testified that Dr. St. John consulted with four other doctors --

A. Correct.

Q. . . . Do you remember what that consultation was about?

A. About natural delivery versus the C-section.

Q. And it was those four doctors that agreed that you were to have a vaginal delivery; isn't that correct?

A. That was my interpretation, yes.

* * *

Q. . . . so it's fair to say that you had a lot of faith and confidence in Dr. St. John?

A. Yes. I trusted her.

Q. And she advised you that a vaginal delivery was the best means to go; is that correct?

A. Well, yeah. She told me that's what I was having.

Q. So regardless of you ever seeing a NICA pamphlet, you followed Dr. St. John's orders on her advices; is that correct?

A. Well, I was relying upon my doctor's final say.

Q. Okay. Which was to have a vaginal delivery; is that correct?
A. Correct.

* * *

Q. Earlier, you testified that the two times that you signed for the receipt of the NICA pamphlet, as we've been calling it, neither of those times you ever read the pamphlet; is that correct?[9]

A. That's correct.

Q. And you didn't read the pamphlet until, you would say, two weeks or a week after --

A. I would say the first week . . . .

15. Also speaking to the estoppel issue was Mr. Joshnick, who testified at hearing, as follows:

Q. This is the consent . . . and also . . . a receipt for the NICA form. Is that your signature?

A. Yes, it is.

Q. Okay. Why did you sign this document?

A. Well, the nurse handed me the pamphlet of the NICA and gave a brief explanation for what it was, and I figured, well, I guess I should sign.

* * *

THE COURT: . . . When did you ultimately read the pamphlet?

THE WITNESS: Actually, I really didn't read the pamphlet until quite a while later when I -- when we were realizing that things had gone wrong.

THE COURT: You're talking about months later?

THE WITNESS: I really don't even know how long [it] was.

THE COURT: After Austin's discharge from the hospital?

THE WITNESS: Yes.

* * *

Q. What do you recall the nurse -- Nurse Collins saying about the pamphlet, the NICA?

A. Just saying that it was somewhat like an insurance policy. If things went wrong with delivery and all that we'd be covered to a certain degree.

* * *

Q. And when you signed for that, did you sign for that at the bedside or away from the bedside?

A. At the bedside.

Q. Were you given any other papers to sign?

A. It's very possible. It's quite a while ago. I don't really recall. A lot of things were happening.

Q. And did the nurse describe any of those other papers that you saw?

A. I really don't recall anything on that, no.

Q. So you recall the nurse discussing the NICA pamphlet but no other documentation; is that correct?

A. Correct.

16. Contrasted with Petitioners' testimony, Respondent offered the deposition testimony of Nurse Collins. Not unexpectantly, Nurse Collins did not recall the incident, but offered the following testimony regarding her normal practice:

> Q. . . . What was your normal business practice of saying to patients about the NICA pamphlet?
>
> A. I would hand them the form that needed to be signed, and I would tell them there were two places that needed to be signed. The first one, I would usually hand them the pamphlet and say -- customarily say, "Here is this pamphlet. You are signing that you received this pamphlet; not that you've read it, just that you've received it. And you need to sign here, and then you need to sign down at the bottom here for consent for these procedures," and I would read over those procedures with them.
>
> Q. Would you volunteer anything about the pamphlet?
>
> A. If I volunteered anything at all, it would only have been that if it was the neurological information -- well, what is it? --Neurological Injury Compensation Association, and that if somebody [sic] happened, you might have the possibility of being covered.
>
> * * *
>
> Q. In your normal practice, what is your understanding of the NICA pamphlet . . . [?]
>
> A. I didn't really -- I never read the pamphlet. But I guess my understanding was that if during the course of the birth of a baby there was some neurological accident or impairment, there might possibly be some compensation available to them.

17. Finally, in the opinion of Dr. St. John, which stands uncontradicted, there was no medical justification to deliver Austin by cesarean section, and absent medical justification surgery would be contraindicated and against her ethical obligations. (Respondent's Exhibit 6, pages 21, 27 and 30).

18. Here, the testimony and other proof offered on the issue of estoppel, predicated on Nurse Collins' remarks, have been carefully considered, and found less than compelling on some key issues. First, the proof failed to demonstrate, with the requisite degree of certainty, that Nurse Collins made an affirmative assurance, without limitation, as opposed to a general comment as to the nature of the program. In so concluding, it is noted that, given the passage of time and anxieties of the moment, it is unlikely either Mr. or Mrs. Joshnick would recall any comment Nurse Collins made regarding the NICA program, much less recall her remarks with any degree of accuracy, and that the remarks they attribute to her are so general, as not to reasonably support an assurance of coverage, without limitation. Moreover, given Mrs. Joshnick's condition on presentation to the hospital, and the events that ensued, it is evident that it was Dr. St. John's opinion that vaginal delivery, not cesarean delivery was medically appropriate, that Petitioners accepted that opinion, and that

Petitioners did not rely in whole or in part on NICA coverage in deciding not to insist on a cesarean delivery.

19. Finally, apart from Nurse Collins' comments, Petitioners contend that NICA should be estopped to deny coverage based on the NICA brochure. Pertinent to this claim, the brochure provided:

> Criteria and Coverage
>
> Birth-related neurological injuries have been defined as an injury to the spinal cord or brain of a live-born infant weighing at least 2500 grams at birth. In the case of multiple gestation, the live birth weight is 2000 grams for each infant. The injury must have been caused by oxygen deprivation or mechanical injury, which occurred in the course or labor, delivery or resuscitation in the immediate post delivery period in a hospital. Only hospital births are covered.
>
> The injury must have rendered the infant permanently and substantially mentally and physically impaired. The legislation does not apply to genetic or congenital abnormalities. Only injuries to infants delivered by participating physicians, as defined in s. 766.302(7), Florida Statutes, are covered by the Plan.
>
> * * *
>
> You are eligible for this protection if your doctor is a participating physician in the NICA Plan. If your doctor is a participating physician, that means that your doctor has purchased this benefit for you in the event that your child should suffer a birth-related neurological injury, which qualifies under the law. If your health care provider has provided you with a copy of this informational form, your health care provider

> is placing you on notice that one or more physician(s) at your health care provider participates in the NICA Plan.

(Petitioners' Exhibit 3) According to Petitioners:

> A reasonable person would have concluded, "If [Morton Plant] has provided [Petitioners] with a copy of [the Pamphlet], . . . one or more physician(s) at [Morton Plant] participates in the NICA Plan." A fair reading of the Pamphlet as a whole, is that this participation of a Morton Plant physician--regardless of particular obstetricians' participation--was enough to give Petitioners NICA coverage.

(Petitioners' Proposed Findings of Fact & Conclusions of Law, paragraph 20) However, a "fair reading" of the NICA pamphlet does not support Petitioners' interpretation. Rather, the brochure provides, unequivocally, that "[o]nly injuries to infants delivered by participating physicians, as defined in s. 766.302(7), Florida Statutes, are covered by the Plan." Moreover, Petitioners never read the pamphlet until well after Austin's birth and, therefore, could not have relied, detrimentally or otherwise, on its provisions.

CONCLUSIONS OF LAW

Jurisdiction

20. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. § 766.301, et seq., Fla. Stat.

Compensability

21. In resolving whether a claim is covered by the Plan, 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 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.

§ 766.309(1), Fla. Stat. 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." § 766.31(1), Fla. Stat.

22. Here, even though admittedly obstetrical services were not delivered by a participating physician at Austin's birth and, consequently, the claim is not covered by the Plan, Petitioners

contend they are entitled to recover under a theory of coverage by estoppel. In response, NICA contends the Division of Administrative Hearings is without jurisdiction to address the issue of estoppel or, alternatively, that the facts do not support a claim of estoppel. For the reasons that follow, it is resolved that the Division of Administrative Hearings has jurisdiction to decide the issue of estoppel, but that the facts do not support such a claim.

Jurisdiction to resolve the issue of estoppel

23. Effective July 1, 1998, the Legislature adopted Chapter 98-113, Laws of Florida, which amended Sections 766.301 and 766.304, Florida Statutes. Pertinent to this case, the amendments (underlined) to Sections 766.301 and 766.304, Florida Statutes, were, as follows:

> 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.
>
> * * *
>
> 766.304 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 . . . . An action may not be brought under ss. 766.301-766.316 if the claimant recovers or final judgment is entered . . . .

Ch. 98-113, § 1, at 524, Laws of Fla.

24. By the amendments to Sections 766.301 and 766.304, Florida Statutes, the Legislature expressed its intention that the administrative law judge resolve all issues relative to coverage. Fundamentally, whether the "infant . . . sustained a birth-related neurological injury" and whether "obstetrical services were delivered by a participating physician at birth," are clearly questions related to coverage. § 766.31(1), Fla. Stat. Moreover, promissory estoppel may, under certain circumstances, also support a claim of coverage. See Crown Life Insurance Co. v. McBride, 517 So. 2d 660 (Fla. 1988)(The general rule is that the doctrine of estoppel based upon the conduct of an insurer or its agent does not operate to create coverage where coverage does not exist. There is, however, a narrow exception

to this general rule, as when to refuse to enforce a promise would sanction the perpetration of fraud or other injustice.) Accord Wheeland v. State Farm Fire & Casualty Co., 668 So. 2d 337 (Fla. 3d DCA 1996). Consequently, given the language used by the Legislature in its amendment to the Plan, it is resolved that all questions of coverage, including those related to coverage by estoppel, are properly decided in the administrative forum. See, e.g., Warren v. Department of Administration, 554 So. 2d 568 (Fla. 5th DCA 1989).

Petitioners' claim of estoppel

25. When, as here, a party claims coverage by estoppel, they must establish the facts necessary to support such claim by clear and convincing evidence. Jarrard v. Associates Discount Corp., 99 So. 2d 272, 277 (Fla. 1957). ("[T]he burden of proving all the facts essential to the working of an estoppel rests on the party asserting it or on whose behalf it is applied . . . . Before an estoppel can be raised, there must be certainty and the facts necessary to constitute it cannot be taken by argument or inference, nor supplied by intendment. They must be clearly and satisfactorily proved.") Accord Barber v. Hatch, 380 So. 2d 536 (Fla. 5th DCA 1980). That standard requires that "the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in

confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). In this case, Petitioners failed to sustain their burden or proof.

26. As heretofore noted, Petitioners' claim of estoppel is two-fold. First, Petitioners contend that the comments made by Nurse Collins when she delivered the NICA pamphlet, together with Mrs. Joshnick's reliance on those statements in deciding not to insist on a cesarean section, support a finding of estoppel. Moreover, Petitioners contend, since NICA provided the pamphlet to the hospital for distribution to its patients, NICA cloaked Nurse Collins with apparent agency to act on its behalf and is bound by her representations. Petitioners' contentions are unpersuasive.

27. "Florida case law provides that an insurer may be held accountable for the actions of those it cloaks with 'apparent agency'." Almerico v. RLI Insurance Company, 716 So. 2d 774, 777 (Fla. 1998). "Further, a review of the case law on agency indicates that evidence of indicia of agency may be demonstrated if the insurer furnishes an insurance agent or agency with 'any blank forms, applications, stationery, or other supplies to be used in soliciting, negotiating, or effecting contracts of

insurance'." Id. Indicia of agency may likewise be demonstrated when the company holds a person out to the public as an agent by printing and delivering business cards designating him as such. Hughes v. Pierce, 141 So. 2d 280 (Fla. 1st DCA 1961).

28. In this case, Nurse Collins was not NICA's agent or employee, and the only evidence relied upon by Petitioners to establish apparent agency was the pamphlet NICA prepared and delivered to the hospital for distribution to its obstetrical patients; notably, the pamphlet developed by NICA and furnished to participating physicians and hospitals, such as Morton Plant Hospital, so they could furnish a copy of the brochure to their obstetrical patients, was required by law.[10] § 766.316, Fla. Stat. Under such circumstances, the pamphlet did not cloak Nurse Collins, or any other employee of the hospital, with apparent authority to bind NICA, and it would be unreasonable to conclude otherwise. Consequently, there being no other evidence relied upon by Petitioners to establish apparent authority, their claim of apparent agency is rejected. Moreover, Petitioners' claim of estoppel, based on the substance of Nurse Collins' statement, must also fail.

29. To demonstrate estoppel, the following elements must be established: "1. A representation as to a material fact that is contrary to a later-asserted position; 2. A reasonable reliance on that representation; and 3. A change in position detrimental

to the party claiming estoppel caused by the representation and reliance thereon." Warren v. Department of Administration, 545 So. 2d at 570.

30. As noted in the Findings of Fact, the proof failed to demonstrate, with the requisite degree of certainty, that Nurse Collins made an affirmative assurance, without limitations, as opposed to a general comment on the nature of the program. Moreover, given the general nature of Nurse Collins' remarks, without further elaboration or inquiry, it would not have been reasonable to rely on her remarks as an affirmative assurance of coverage. Additionally, as noted in the Findings of Fact, Petitioners' testimony that Dr. St. John changed from a planned cesarean delivery, to a vaginal delivery, or that Petitioners relied in whole or in part on NICA coverage, not to insist on a vaginal delivery, is not compelling or credible. Consequently, the proof also failed to support a claim of estoppel based on Nurse Collins' remarks.

31. Finally, Petitioners' claim of estoppel, predicated on the NICA pamphlet, must also be rejected for two reasons. First, as previously noted, the wording of the pamphlet is not misleading, as Petitioners contend. Rather, the pamphlet is unequivocal that "[o]nly injuries to infants delivered by participating physicians, as defined in s. 766.302(7), Florida Statutes, are covered by the Plan." Second, the wording of the

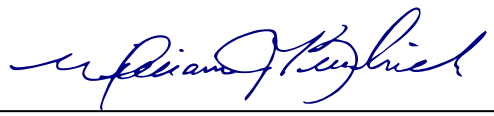
pamphlet would not under any circumstance support a claim of estoppel, since Petitioners did not read the pamphlet until well after Austin's birth and could not have detrimentally relied on its provisions. Consequently, the wording of the pamphlet does not and could not support a claim of estoppel.

CONCLUSION

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

ORDERED that the claim for compensation filed by Craig Joshnick and Debbie Joshnick, as parents and natural guardians of Austin K. Joshnick, a minor, is dismissed with prejudice.

DONE AND ORDERED this 7th day of April, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of April, 2004.

ENDNOTES

1/ All citations are to Florida Statutes (2000) unless otherwise indicated.

2/ Petitioners' Exhibits 11 and 26 were marked for identification only, and were not moved into evidence.

3/ With the parties' agreement, by Order of March 1, 2004, Dr. Nahourii's deposition, marked as Respondent's Exhibit 11A at hearing, and the exhibits to that deposition, marked as Respondent's Exhibits 11B and 11C at hearing, were received into evidence. Respondent's Exhibit 4 (the deposition of Keith Decker) and Exhibit 7 (the deposition of Lisa Weisickle) were marked for identification but, given Petitioners' objection, not received into evidence. Respondent's Exhibit 9A (the deposition of Dr. Duchowny) and 9B (the exhibits to Dr. Duchowny's deposition) were marked for identification, but not moved into evidence. Respondent's Exhibit 10 (the deposition of Kelly Chase) was initially marked for identification, but was physically withdrawn and is not a part of the record developed at hearing.

4/ "Participating physician" is defined by Section 766.302(7), Florida Statutes, to mean:

> . . . a physician 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 the birth-related neurological injury compensation plan for the year in which the injury occurred. Such term shall not apply to any physician who practices medicine as an officer, employee, or agent of the Federal Government.

5/ "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 postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

6/ At some time following Mrs. Joshnick's presentation to Morton Plan Hospital at 1:04 a.m., January 17, 2001, and most likely the morning of January 17, 2001, Mrs. Joshnick signed a Patient Admission Agreement and Consent, which also included an acknowledgment of "Receipt of NICA Information." (Petitioners' Exhibit 2, Tab 2, pages 3 and 4). Here, the parties have stipulated that Mrs. Joshnick also received a copy of the NICA pamphlet on the signing of this document; however, there was no proof offered regarding the circumstances surrounding the giving of this notice, and it does not form a basis for Petitioners' claim of estoppel.

7/ The hour of Austin's birth is noted on the Delivery Record by Dr. St. John as 12:44 p.m., but otherwise noted in the medical records as 12:46 p.m.

8/ Since it was unnecessary to address whether Austin suffered a "birth-related neurological injury," details regarding Mrs. Joshnick's labor, as well as Justin's delivery and subsequent development have been omitted.

9/ See Endnote 6.

10/ Pertinent to this case, at the time of Austin's birth, Section 766.316, Florida Statutes, prescribed, as it does today, 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. (Emphasis added)

Responding to Section 766.316, NICA developed a pamphlet titled "Peace of Mind for an Unexpected Problem" (the NICA pamphlet 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. See, e.g., Florida Birth-Related Neurological Injury Compensation Association v. Feld, 793 So. 2d 1070, 1071 (Fla. 4th DCA 2001)("NICA was required by statute to furnish physicians forms providing notice to obstetrical patients that the physicians' participation would limit . . . [their] remedy for . . . [birth-related neurological injuries]".)

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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.