STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

YVETTE ORTIZ AND ERICK ALBERTO ORTIZ, as parents and natural guardians of ERICK ALEJANDRO ORTIZ, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 03-1710N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
NORTHWEST MEDICAL CENTER, INC. and ALISON CLARKE-DeSOUZA, M.D.,	)	
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 26, 2004, in Plantation, Florida.

APPEARANCES

For Petitioners: Scott M. Sandler, Esquire
2701 South Bayshore Drive, Suite 402
Coconut Grove, Florida 33133

and

Robert J. Bryan, Esquire
155 South Miami Avenue, Suite 1100
Miami, Florida 33130

For Respondent: David W. Black, Esquire
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Plantation, Florida 33324

For Intervenor Northwest Medical Center, Inc.:

James S. Haliczer, Esquire
Haliczer Pettis, P.A.
101 Northeast 3rd Avenue, Sixth Floor
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For Intervenor Alison Clarke-DeSouza, M.D.:

Merrilee A. Jobes, Esquire
George, Hartz, Lundeen, Fulmer,
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STATEMENT OF THE ISSUES

1. Whether Respondent's proposal to accept the claim as compensable should be approved.

2. If so, the amount and manner of payment of the parental award, the amount owing for attorney's fees and costs incurred in pursuing the claim, and the amount owing for past expenses.

3. Whether notice was accorded the patient, as contemplated by Section 766.316, Florida Statutes (2000),[1] or whether the failure to give notice was excused because the patient had an "emergency medical condition," as defined by

Section 395.002(9)(b), Florida Statutes, or the giving of notice was otherwise not practicable.

PRELIMINARY STATEMENT

On May 2, 2003, Erick Alberto Ortiz and Yvette Ortiz, on behalf of and as parents and natural guardians of Erick Alejandro Ortiz (Erick), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). Pertinent to this case, apart from contending that Erick suffered an injury compensable under the Plan, Petitioners also sought to avoid a claim of Plan immunity in a civil action, by requesting a finding that the notice provisions of the Plan were not satisfied.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on May 12, 2003, and on October 21, 2003, following a number of extensions of time to do so, NICA gave notice that it agreed the claim was compensable, and requested that the issues of compensability and award be bifurcated. In the interim, Northwest Medical Center, Inc. (Northwest Medical Center), and Alison Clarke-DeSouza, M.D., requested and were accorded leave to intervene, and by Order of February 26, 2004, NICA's request for bifurcation was denied.

At hearing, Yvette Ortiz and Erick Alberto Ortiz testified on their own behalf, and Petitioners' Exhibits 1A, 1B, 1C, and 2-21, and Respondent's Exhibit 1 were received into evidence. No other witnesses were called, and no other exhibits were offered.

The transcript of the hearing was filed March 19, 2004, and the parties were accorded 10 days from that date to file proposed orders. Petitioners and Intervenors elected to file such proposals and they have been duly considered.

FINDINGS OF FACT

Findings related to compensability

1. Yvette Ortiz and Erick Alberto Ortiz are the natural parents and guardians of Erick Alejandro Ortiz, a minor. Erick was born a live infant on December 18, 2000, at Northwest Medical Center, a hospital located in Broward County, Florida, and his birth weight exceeded 2,500 grams.

2. Moulton Keane, 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(7), Florida Statutes, provided obstetrical services during the course of Mrs. Ortiz's labor, as well as Erick's delivery and resuscitation. Also providing obstetrical services during Mrs. Ortiz's labor was Alison Clarke-DeSouza, M.D.; however, Dr. DeSouza was not a participating physician in the Plan.

3. When it has been established that obstetrical services were provided by a participating physician at the infant's birth, coverage is afforded by the Plan if it is also shown the infant suffered a "birth-related neurological injury," defined as an "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." § 766.302(2), Fla. Stat. See also §§ 766.309 and 766.31(1), Fla. Stat.

4. In this case, it is undisputed, and the proof is otherwise compelling, that Erick suffered severe brain injury caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital which rendered him permanently and substantially mentally and physically impaired. Therefore, the claim is compensable and NICA's proposal to accept the claim is approved. §§ 766.309 and 766.31(1), Fla. Stat.

Findings related to the award

5. When, as here, it has been resolved that a claim qualifies for coverage under the Plan, the administrative law judge is required to make a determination of how much compensation should be awarded. § 766.31(1), Fla. Stat.

Pertinent to this case, Section 766.31(1), Florida Statutes (2000), provided for an award of compensation for the following items:

> (a) Actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, residential, and custodial care and service, for medically necessary drugs, special equipment, and facilities, and for related travel . . . .
>
> (b) Periodic payments of an award to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury, which award shall not exceed $100,000. However, at the discretion of the administrative law judge, such award may be made in a lump sum.
>
> (c) Reasonable expenses incurred in connection with the filing of a claim under ss. 766.301-766.316, including reasonable attorney's fees, which shall be subject to the approval and award of the administrative law judge . . . .

6. In this case, Petitioners and NICA have agreed that, should Petitioners elect to accept benefits under the Plan, Petitioners recover the following award:

> (a) Reimbursement of actual expenses already incurred in the sum of $1,258.16 together with the right to receive reimbursement of actual expenses for future medical bills pursuant to § 766.31(1)(a), Fla. Stat.
>
> (b) A lump sum payment of $100,000.00 to the Petitioners in accordance with § 766.31(1)(b), Fla. Stat.
>
> (c) Reimbursement of reasonable expenses, inclusive of attorney's fees and costs to the

Petitioners, in the total sum of $7,500.00, pursuant to § 766.31(1)(c), Fla. Stat.

The notice provisions of the Plan

7. While the claim qualifies for coverage under the Plan, Petitioners have responded to the health care providers' claim of Plan immunity in a pending civil action, by averring that the health care providers failed to give notice, as required by the Plan. Consequently, it is necessary to resolve whether the notice provisions of the Plan were satisfied. O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, 757 So. 2d 624, 627 (Fla. 5th DCA 2000)("All questions of compensability, including those which arise regarding the adequacy of notice, are properly decided in the administrative forum.") Accord University of Miami v. M.A., 793 So. 2d 999 (Fla. 3d DCA 2000). See also Behan v. Florida Birth-Related Neurological Injury Compensation Association, 664 So. 2d 1173 (Fla. 4th DCA 1995). But see All Children's Hospital, Inc. v. Department of Administrative Hearings, 29 Fla. L. Weekly D227a (Fla. 2d DCA Jan. 14, 2004) (certifying conflict); Florida Health Sciences Center, Inc. v. Division of Administrative Hearings, 29 Fla. L. Weekly D216 (Fla. 2d DCA Dec. 17, 2003)(same); and Florida Birth-Related Neurological Injury Compensation Association v. Ferguson, 29 Fla. L. Weekly D226a (Fla. 2d DCA Jan. 14, 2004)(same).

8. At all times material hereto, Section 766.316, Florida Statutes, prescribed the notice provisions of the Plan, as follows:

> Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(9)(b) or when notice is not practicable.

9. Responding to Section 766.316, Florida Statutes, NICA developed a form (the NICA brochure), which contained an explanation of a patient's rights and limitations under the Plan, and distributed the brochure to participating physicians and hospitals so they could furnish a copy it to their obstetrical patients.

Findings related to notice

10. Mrs. Ortiz received her prenatal care at South Florida Women's Health Associates, a group practice dedicated to obstetrics and gynecology. Tara Solomon, M.D., and Moulton Keane, M.D., were among the physicians who practiced with the group.

11. Pertinent to the notice issue, the proof demonstrates that from March 25, 2000, the date of Mrs. Ortiz's first visit to South Florida Women's Health Associates, until her presentation at Northwest Medical Center on December 17, 2000, for Erick's birth, Mrs. Ortiz was primarily seen by Dr. Solomon, who was not a "participating physician" in the plan. However, on three occasions Mrs. Ortiz was seen by Dr. Keane: once when Dr. Solomon was not available for Mrs. Ortiz's regular appointment with Dr. Solomon, and thereafter on June 21, 2000, for an amniocentesis and on October 17, 2000, for an ultrasound. Notably, although Dr. Keane was a "participating physician" in the Plan, Mrs. Ortiz was never provided a copy of the NICA brochure or notice of Dr. Keane's participation in the Plan, either during her prenatal care or Erick's birth.

12. Also pertinent to the notice issue, the proof demonstrates that on August 25, 2000, Mrs. Ortiz presented for pre-registration at Northwest Medical Center, a facility at which she had been told the physicians associated with South Florida

Women's Health Associates had staff privileges. At that time, Mrs. Ortiz supplied pertinent pre-admission data, presumably similar to that requested by Northwest Medical Center's pre-admission form (Petitioners' Exhibit 17); signed a Conditions and Consent for Treatment form (Petitioners' Exhibit 12); and was given an advance directives booklet (Petitioners' Exhibit 14) and a Northwest Medical Center Patient Handbook (Petitioners' Exhibit 13). Notably, none of the materials Mrs. Ortiz signed or was given referred to the Plan, and she was not otherwise advised of the Plan or provided a copy of the NICA brochure.

13. On December 17, 2000, with the fetus at term (41+ weeks gestation), Mrs. Ortiz presented at Northwest Medical Center, where she was received in labor and delivery at 6:07 p.m. At the time, Mrs. Ortiz complained of uterine contractions every 10 to 13 minutes since noon, and denied bleeding or rupture of the membranes. Vaginal examination revealed the cervix at fingertip, effacement at 70 percent, and the fetus at -3 station, and contractions were noted as mild, at a frequency of 2-4 minutes, with a duration of 50-60 seconds. Dr. DeSouza, who was covering for Dr. Keane, was called and given a report on Mrs. Ortiz's status.

14. At 7:50 p.m., Dr. DeSouza was noted at bedside. At the time, contractions were strong, at a frequency of 1 to 5 minutes, with a duration of 40 to 80 seconds, and vaginal examination

revealed the cervix at 1 centimeter dilation, effacement at 75 percent, and the fetus at -2 station. Artificial rupture of the membranes did not reveal any fluid draining. Routine labor room admitting orders were issued by Dr. DeSouza, and Mrs. Ortiz, who had previously been monitored as an outpatient, was admitted as an impatient, to labor and delivery. Notably, as a matter of course, the hospital did not provide NICA notice, although it could easily have done so, prior to admission as an inpatient.

15. Following admission, the labor and delivery nurse on duty at the time, Patricia Thomas, R.N., presented two forms for Mrs. Ortiz's signature, as well as a Patient Questionnaire (also referred to as an anesthesia questionnaire in this proceeding) for her to complete. The first form was a two-sided document, the front of which contained a Consent for Anesthesia and the back of which contained a Consent for Surgery/Blood Transfusion (the consent form), which were signed by Mrs. Ortiz and witnessed by Nurse Thomas at 8:20 p.m., and 8:30 p.m., respectively. The second form presented for signature was a Notice to Obstetric Patient, regarding the Florida Birth-Related Neurological Injury Compensation Plan.

16. The Notice to Obstetric Patient provided, as follows:

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

I have been furnished information by
NORTHWEST MEDICAL CENTER prepared by the

> Florida Birth-Related Neurological Injury Compensation Association (NICA), wherein certain limited compensation is available in the event certain neurological injury may occur during labor, delivery or resuscitation.
>
> Not all OB/GYN physicians participate in NICA. 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 and will read a copy of the brochure prepared by NICA.
>
> _____
> Name of Patient
>
> _____
> Signature
>
> _____
> Date/Time
>
> _____
> Witness
>
> _____
> Date/Time

Contemporaneously with the notice, Mrs. Ortiz was given a copy of the NICA brochure.[2]

17. Here, there is no dispute Mrs. Ortiz signed the Notice to Obstetric Patient form (notice form) and no compelling proof that she was not also provided a copy of the NICA brochure. What is disputed is whether the notice form and NICA brochure were provided contemporaneously with the consent form. Petitioners

also contend the notice form and the NICA brochure were not provided a reasonable time prior to delivery.

18. Lending confusion to when the notice form and NICA brochure were provided is the fact that the notice form does not include, as the form requires, the time it was signed. Supportive of the conclusion that the notice form was not provided or executed contemporaneously with the consent form is the fact that it was not witnessed by Nurse Thomas, as one would reasonably expect, but by Mr. Ortiz, who was not present at the time the consent form was executed, and who was not present until sometime between 9:30 p.m. and 10:00 p.m. Under the circumstances, the record is not compelling that the notice form or NICA brochure was provided to Mrs. Ortiz prior to 9:30 p.m., and no compelling proof to demonstrate when, thereafter, the NICA notice was provided by the hospital.

19. At 8:45 p.m., Dr. Keane, who had assumed Mrs. Ortiz's care, called to inquire about her status. At the time, Dr. Keane was notified that no accelerations were present, variability was decreased, the fetal heart rate baseline was 150-153 beats per minute, and no fluid was draining. Dr. Keane gave orders for observation and pain medication.

20. At 10:10 p.m., vaginal examination revealed little progress, with the cervix at 1 centimeter, effacement at 80 percent, and the fetus at -2 station. Dr. Keane was beeped

and returned the call at 10:20 p.m. At the time Dr. Keane was informed of the results of the vaginal examination; that Mrs. Ortiz was on continuous oxygen, left lateral position; and that there was no change in variability, no accelerations, and occasional late decelerations. Dr. Keane requested the fetal monitor strip be faxed to him.

21. According to the labor record, the strip was faxed to Dr. Keane at 10:30 p.m., and at 10:45 p.m., he called to say he had reviewed the strips. At the time, the labor record notes:

> . . . M.D. states that at the moment delivery was not indicated. Orders received for pain medication. MD notified that patient was on continuous oxygen . . . via face mask . . . [no] fluid draining; left lateral position[;] occ[asional] late decels; [and no] spontaneous accel[erations].

22. At 12:10 a.m., December 18, 2000, Dr. Keane was informed that late deceleration had been noted, with decreased variability, and no accelerations. Dr. Keane ordered a labor epidural, as requested by Mrs. Ortiz.

23. Thereafter, at 12:55 a.m., Dr. Keane was informed fetal heart monitoring revealed repetitive late decelerations, with occasional decreased variability; Dr. Keane ordered preparations for a cesarean section; at 1:35 a.m., Dr. Keane was at bedside; at 1:53 a.m., Mrs. Ortiz was moved to the operating room; and at 2:26 a.m., Erick was delivered.

CONCLUSIONS OF LAW

Jurisdiction

24. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. § 766.301, et seq., Fla. Stat. (1999)

Compensability and award

25. 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.

26. "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.

27. In this case, it has been established that the physician who provided obstetrical services at Erick's birth was a "participating physician," and that Erick suffered a "birth-related neurological injury." Consequently, Erick qualifies for coverage under the Plan, and Petitioners are entitled to an award of compensation. §§ 766.309 and 766.31, Fla. Stat. Here, the parties have stipulated to such award, as set forth in paragraph 6 of the Findings of Fact.

Notice

28. While the claim qualifies for coverage, Petitioners have sought the opportunity to avoid a claim of Plan immunity in a civil action, by requesting a finding that the notice provisions of the Plan were not satisfied. As the proponent of

the immunity claim, the burden rested on the health care providers to demonstrate, more likely than not, that the notice provision 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 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, 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.")

29. At all times material hereto, Section 766.316, Florida Statutes, prescribed the notice provisions of the Plan, as follows:

> Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a

> patient's rights and limitations under the plan. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(9)(b) or when notice is not practicable.

"Emergency medical condition" is defined by Section 395.002(9)(b) to mean:

> 1. That there is inadequate time to effect safe transfer to another hospital prior to delivery;
>
> 2. That a transfer may pose a threat to the health and safety of the patient or fetus; or
>
> 3. That there is evidence of the onset and persistence of uterine contractions or rupture of the membranes.

30. Pertinent to this case, the Florida Supreme Court described the legislative intent and purpose of the notice requirement, as follows:

> . . . the only logical reading of the statute is that before an obstetrical patient's remedy is limited by the NICA plan, the patient must be given pre-delivery notice of the health care provider's participation in the plan. Section 766.316 requires that obstetrical patients be given notice "as to the limited no-fault alternative for birth-related neurological injuries." That notice must "include a clear and concise explanation of a patient's rights and limitations under the plan." § 766.316. This language makes clear that the purpose of the notice is to

> give an obstetrical patient an opportunity to make an informed choice between using a health care provider participating in the NICA plan or using a provider who is not a participant and thereby preserving her civil remedies. Turner v. Hubrich, 656 So. 2d 970, 971 (Fla. 5th DCA 1995). In order to effectuate this purpose a NICA participant must give a patient notice of the "no-fault alternative for birth-related neurological injuries" a reasonable time prior to delivery, when practicable.

Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 309 (Fla. 1997). The Court further observed:

> Under our reading of the statute, in order to preserve their immune status, NICA participants who are in a position to notify their patients of their participation a reasonable time before delivery simply need to give the notice in a timely manner. In those cases where it is not practicable to notify the patient prior to delivery, pre-delivery notice will not be required.
>
> Whether a health care provider was in a position to give a patient pre-delivery notice of participation and whether notice was given a reasonable time before delivery will depend on the circumstances of each case and therefore must be determined on a case-by-case basis.

Id. at 311. 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.

Id. at 309.

31. Here, with regard to Dr. Keane, the participating physician, it must be resolved that he failed to comply with the notice provisions of the Plan. In so concluding, it is noted that while the Legislature has clearly expressed its intention in Section 766.316, Florida Statutes, that notice was not required when a patient presented with an "emergency medical condition," the Legislature did not absolve a health care provider from the obligation to give notice when the opportunity was otherwise available. Consequently, while Dr. Keane was not required to give notice when he assumed Mrs. Ortiz's care at the hospital, because there was "evidence of the onset and persistence of uterine contractions or rupture of the membranes," he nevertheless failed to comply with the notice provisions of the Plan because, although he had a reasonable opportunity to do so, he failed to give Mrs. Ortiz notice during the course of her prenatal care. See Galen of Florida, Inc. v. Braniff, supra; Board of Regents of the State of Florida v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997); Turner v. Hubrich, 656 So. 2d 970 (Fla. 5th DCA 1995).

32. As for the hospital, it likewise was not required to give notice following Mrs. Ortiz's presentation to the hospital on December 17, 2000, since there was "evidence of the onset and persistence of uterine contractions," and the notice it gave following Mrs. Ortiz's admission as an inpatient was not

effective, or, stated otherwise, did not satisfy the notice provisions of the Plan. Such conclusion is premised on the notion that, if notice is not required when a patient presents with an "emergency medical condition," it logically follows that notice, if given at that time, is not effective because, given the emergent nature of the situation, the patient does not have a reasonable opportunity to make an informed choice between using a health care provider participating in the Plan or one who was not. Consequently, since the hospital otherwise had a reasonable opportunity to provide notice at pre-registration, prior to Mrs. Ortiz's presentation to the hospital for Erick's delivery, the hospital failed to comply with the notice provisions of the Plan. See Galen of Florida, Inc. v. Braniff, supra; Board of Regents of the State of Florida v. Athey, supra; Turner v. Hubrich, supra. Alternatively, if the hospital could provide effective notice notwithstanding Mrs. Ortiz's emergent condition, it failed to demonstrate that the notice it provided was given a reasonable time prior to delivery, because it failed to offer compelling proof as to when, prior to delivery, the notice was given.

CONCLUSION

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

ORDERED that the claim for compensation filed by Erick Alberto Ortiz and Yvette Ortiz, on behalf of and as parents

and natural guardians of Erick Alejandro Ortiz, a minor, be and the same is hereby approved.

It is FURTHER ORDERED that the participating physician and hospital failed to comply with the notice provisions of the Plan.

It is FURTHER ORDERED that the following benefits are awarded:

1. Petitioners, Erick Alberto Ortiz and Yvette Ortiz, are awarded $1,258.16 for expenses previously incurred. § 766.31(1)(a), Fla. Stat. Such award shall be paid immediately, and all future expenses shall be paid as incurred. § 766.31(2), Fla. Stat.

2. Petitioners, Erick Alberto Ortiz and Yvette Ortiz, are awarded a lump sum of $100,000.00. § 766.31(1)(b), Fla. Stat.

3. Petitioners, Erick Alberto Ortiz and Yvette Ortiz, are awarded $7,500.00 for attorney's fees and other expenses incurred in connection with the filing of the claim. § 766.31(1)(c), Fla. Stat.

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 27th day of April, 2004, 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 27th day of April, 2004.

ENDNOTES

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

2/ Given the proof regarding the hospital's routine practice, as well as Mrs. Ortiz's signature on the form acknowledging receipt of the NICA brochure, and there being no compelling proof to the contrary, the record supports no other conclusion. See 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.); § 766.316, Fla. Stat. ("The hospital or 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.")

COPIES FURNISHED:
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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.