STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JUANITA RUIZ AND MIGUEL ANGEL RUIZ, as parents and natural guardians of MICHAEL A. RUIZ, a minor, and JUANITA RUIZ and MIGUEL ANGEL RUIZ, individually,	)	
Petitioners,	)	
	)	Case No. 03-2749N
vs.	)	
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
PUBLIC HEALTH TRUST OF DADE COUNTY, d/b/a JACKSON NORTH MATERNITY CENTER and UNIVERSITY OF MIAMI, d/b/a UNIVERSITY OF MIAMI SCHOOL OF MEDICINE,	)	
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 June 17, 2004, by video teleconference, with sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioners: Lincoln J. Connolly, Esquire
Charles H. Baumberger, Esquire
Rossman, Baumberger & Reboso, P.A.
44 West Flagler Street, Suite 2300
Miami, Florida 33130-1808

For Respondent: David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest 6 Court
Plantation, Florida 33324

For Intervenor Public Health Trust of Dade County, d/b/a Jackson North Maternity Center:

Stephen A. Stieglitz, Esquire
Metro-Dade Center
111 Northwest First Street, Suite 2800
Miami, Florida 33128-1993

For Intervenor University of Miami, d/b/a University of Miami School of Medicine:

Steven E. Stark, Esquire
Marc J. Schleier, Esquire
Fowler, White, Burnett, P.A.
Bank of America Tower, 17th Floor
100 Southeast Second Street
Miami, Florida 33131

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 766.16, Florida Statutes (Supp. 1998),

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 (Supp. 1998), or the giving of notice was otherwise not practicable.

PRELIMINARY STATEMENT

On July 17, 2003, Juanita Ruiz and Miguel Angel Ruiz, as parents and natural guardians of Michael A. Ruiz (Michael), a minor, and Juanita Ruiz and Miguel Angel Ruiz, individually, 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 Michael suffered an injury compensable under the Plan, Petitioners also sought to avoid a claim of Plan immunity in a civil action, by averring that, and requesting a finding that, "Petitioners were provided with notice of Jackson North Maternity Center's participation in . . . [the Plan] prior to the birth, but were never provided notice of the University of Miami's, or its physicians' participation in . . . [the Plan]."

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on July 30, 2003, and on March 29, 2004, following a number of extensions of time to do so, NICA filed a Notice of Compensability, wherein it agreed the claim was compensable, and

requested that the issues of compensability and notice be bifurcated from those related to an award. In the interim, by Order of March 3, 2004, the Public Health Trust of Dade County, d/b/a Jackson North Maternity Center and the University of Miami, d/b/a University of Miami School of Medicine, were accorded leave to intervene.

On April 7, 2004, Petitioners served an amended petition which, apart from contending that Michael suffered an injury compensable under the Plan, also sought to avoid Plan immunity by averring that, and requesting a finding that, Jackson North Maternity Center, the facility at which the birth occurred, was not a "hospital," as that term is used in the Plan; that neither Paul Norris, M.D., nor Bel Barker, M.D., physicians who provided obstetrical services at birth, was a "participating physician," as that term is defined by the Plan; and that neither the physicians nor Jackson North Maternity Center gave notice, as required by the Plan. NICA responded to the amended petition on April 8, 2004, wherein it again agreed the claim was compensable, and requested that the issues of compensability and notice be bifurcated from those related to an award. By Order of April 13, 2004, NICA's request for bifurcation was denied, and the case progressed toward a scheduled June 17 and 18, 2004, hearing date. Notably, prior to hearing, Petitioners agreed that Jackson North Maternity Center was a "hospital," as that

term is used in the Plan, and that Doctors Norris and Barker were "participating physicians," as that term is defined by the Plan. Consequently, the case proceeded to hearing on the issues heretofore set forth in the Statement of the Issues.

At hearing, Juanita Ruiz testified on her own behalf, and Petitioners' Exhibits 1, 2, 4-9, 11-17, 19, and 20, were received into evidence.[1] Respondent's Exhibits 1-3, Intervenor Public Health Trust of Dade County's (PHT's) Exhibits 1-6, and Intervenor University of Miami's Exhibits 1, 2 (except the Public Health Trust of Dade County's answer to Interrogatory 1(c)), 3 and 4, were received into evidence. No other witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed July 9, 2004, and the continued deposition of Barry Materson, M.D., was filed July 23, 2004. Consequently, the parties were initially accorded 10 days from July 23, 2004, to file proposed final orders; however, at their request, the time for filing proposed orders was later extended to August 9, 2004. Petitioners and Intervenor University of Miami elected to file such proposals and they have been duly considered.

FINDINGS OF FACT

Findings related to compensability

1. Juanita Ruiz and Miguel Angel Ruiz, are the natural parents and guardians of Michael A. Ruiz, a minor. Michael was

born a live infant on August 14, 1998, at Jackson North Maternity Center, a hospital located in Dade County, Florida, and his birth weight exceeded 2,500 grams.

2. Among the physicians providing obstetrical services at Michael's birth were Paul Norris, M.D., and Bel Barker, M.D., who, at all times material hereto, were "participating physician[s]" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes (1997).[2]

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 . . . of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation . . . 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 Michael 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 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, 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 $190.65 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 $10,580.33, 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 2001); Tabb v. Florida Birth-Related Neurological Injury Compensation Association, 29 Fla. L. Weekly D1982b (Fla. 1st DCA August 30, 2004). 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, 863 So. 2d 450 (Fla. 2d DCA 2004) (certifying conflict); Florida Health Sciences Center, Inc. v. Division of Administrative Hearings, 871 So. 2d 1062 (Fla. 2d DCA 2004)(same); and Florida Birth-Related Neurological Injury Compensation Association v. Ferguson, 869 So. 2d 686 (Fla. 2d DCA 2004)(same).

8. At all times material hereto, Section 766.316, Florida Statutes (Supp. 1998), 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)][3] or when notice is not practicable.

9. Pertinent to this case, Section 395.002(9)(b), Florida Statutes (Supp. 1998), defined "emergency medical condition" to mean:

> (b) With respect to a pregnant woman:
>
> 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.

10. Responding to Section 766.316, Florida Statutes, NICA developed a brochure, titled "Peace of Mind for an Unexpected Problem" (the NICA brochure), which contained a clear and concise 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 of it to their obstetrical patients. (Petitioners' Exhibit 15, the NICA brochure, "This brochure is prepared in accordance with the mandate of § 766.316, Florida Statutes.")

Findings related to the hospital and notice

11. Pertinent to the hospital and the notice issue, the proof demonstrates that on Wednesday, July 22, 1998, Mrs. Ruiz, accompanied by her husband, presented for pre-registration at Jackson North Maternity Center, a hospital owned and operated by the Public Health Trust of Dade County at 14701 Northwest 27th Avenue, Opa Locka, Florida. At the time, consistent with established practice, Mrs. Ruiz was interviewed by a health service representative, and asked to provide pertinent personal and financial information for herself and her husband, including address, telephone number, place of employment, monthly wages and expenses, and the identity of any commercial insurer, so the service representative could complete a number of forms. At this time, the service representative also entered pertinent data regarding the Ruizes in the hospital computer data base.

12. During the interview process, four or six forms were routinely completed, depending on whether the patient had commercial coverage, in which case four forms were completed, or whether the patient desired to apply for Medicaid, in which case six forms were completed. (Petitioners' Exhibit 6, pages 24-29 and Petitioners' Exhibit 5, pages 18 and 20). According to the proof, the first form was referred to as "Chronological notes," on which the service representative noted the need for any additional information or follow-up, and is not pertinent to

this case. The second, third, and fourth forms that were completed in all cases, were the Application for Credit (on which the service representative noted the personal and financial information provided for the patient and her guarantor, here, Mr. Ruiz, including address, telephone number, place of employment, monthly wages and expenses, and the identity of any commercial insurer, and to which the patient and her guarantor attested by signing), the Indigent Income Attestation form (on which the service representative noted the gross family income for the past 12 months, as disclosed by the patient, and to which the patient and her guarantor attested by signing), and the Patient Funding Source form (on which the patient and her spouse attested that they had no other source of funding, other than that disclosed on the insurance benefits worksheet). (Petitioners' Exhibit 6, pages 24-29 and PHT's Exhibit 1, Exhibits 5-7). If the patient wished to apply for Medicaid, the service representative completed a Referral to Medicaid for the patient's signature (form five) and gave the patient an Application for Medicaid (form six) to complete and sign.[4] Here, there is no compelling proof that Mrs. Ruiz chose to apply for Medicaid at pre-registration. Indeed, the only forms she signed at pre-registration, that are of record, are the Application for Credit, Indigent Attestation form, and Patient Funding Source form, and the only Medicaid Assistance

Referral form of record was dated August 14, 1998, following Michael's birth. (PHT's Exhibit 1, Exhibits 5-7 and 9, and Petitioners' Exhibit 5, pages 18-22).

13. Following completion of the interview process, Mrs. Ruiz was given three pamphlets, an Advance Directives brochure (a pamphlet that explained the living will), a NICA brochure, in Spanish, titled "Peace of Mind for an Unexpected Problem,"[5] and a Patient's Bill of Rights brochure. According to the proof, the pamphlets were stapled together, with the Advance Directives brochure, being the longest, on the bottom, followed by the NICA brochure, which was a little smaller, and then the Patient's Bill of Rights brochure, which was the smallest, on top. As configured, all three brochures were visible when presented or held. Contemporaneously, Mrs. Ruiz was asked to sign a form acknowledging receipt of the NICA brochure. (PHT's Exhibit 1, pages 26 and 27). That form provided, as follows:

> He recibido el folleto intitulado "Tranquilidad Mental" preparado por la Asociacion de Compensaciones por Lestones Neurologicas Relacionadas con el Nacimiento, del Estado de la Florida (Florida Birth-Related Neurological Injury Compensation Association).
>
> _____
> Firma del Paciente
>
> Fecha: _____
>
> Testigo: _____

Mrs. Ruiz signed the form, acknowledging receipt of the NICA brochure, and the service representative witnessed and dated the form.[6] Thereafter, the service representative provided Mrs. Ruiz with a gift package for expectant mothers, and the pre-registration process was completed. In all, pre-registration typically took 10 to 15 minutes to complete.

Findings related to the participating physicians and notice

14. Pertinent to the participating physicians and the notice issue, the proof demonstrates that the participating physicians in this case (Doctors Paul Norris and Bel Barker) held appointments as full-time members of the faculty at the University of Miami, with the rank of assistant professors of clinical obstetrics and gynecology, and also held contracts with the Public Health Trust to provide, inter alia, supervision for physicians in the Trust's resident physician training program. (Petitioners' Exhibits 13 and 14, and PHT's Exhibits 4 and 5). Among the terms of their agreement with the Public Health Trust, Doctors Norris and Barker, as attending physicians in the resident physician training program, agreed

> 4. To supervise medical care to patients provided by resident physicians to regularly review the medical charges of these patients.
>
> 5. To supervise the completion of medical records by residents physicians.

Of note, at all times material hereto, Doctor Norris was the medical director of Jackson North Maternity Center and, together with Dr. Barker and others, an attending physician in the Public Health Trust's resident training program at the facility.

15. Regarding Michael's birth, the proof demonstrates that at or about 4:00 p.m., August 13, 1998, with the fetus at term, Mrs. Ruiz presented to Jackson North Maternity Center, in labor. Following an initial assessment, Mrs. Ruiz was examined by Wayne McCreath, a physician in the resident training program, who noted the cervix at 2 centimeters dilation, effacement at 90 percent, and the fetus at -1 station, and regular uterine contractions every 3 minutes. Membranes were noted to have ruptured spontaneously at 3:00 a.m. Dr. McCreath's impression was intrauterine pregnancy, at 39+ weeks gestation, in labor, and he proposed to admit Mrs. Ruiz to labor and delivery. Dr. McCreath's assessment and proposal to admit Mrs. Ruiz was reviewed by Dr. Norris, the attending physician at the time, and approved.

16. Dr. McCreath continued to provide medical care for Mrs. Ruiz, under the supervision of Dr. Norris, until the 7:00 p.m., shift change, when Dr. Barker assumed the duties of attending (supervising) physician, and some time thereafter George Butler, another physician in the resident training program, was noted to be providing medical care. Ultimately, at

6:01 a.m., August 14, 1998, Michael was delivered by cesarean section, due to arrest in descent and a nonreassuring fetal heart rate pattern. The operating report names Dr. Barker as the attending surgeon and Dr. Butler as a resident surgeon. Notably, with regard to the notice issue, neither Doctor Norris nor Doctor Barker provided NICA notice to Mrs. Ruiz at or following her admission of August 13, 1998, and the only notice she received was that provided by the hospital at pre-registration.

Resolution of the notice issue, with regard to the hospital

17. Petitioners do not dispute that the hospital provided Mrs. Ruiz with a copy of the NICA brochure at pre-registration or that she signed the form acknowledging receipt of the brochure. Rather, they contend, first, that Mrs. Ruiz did not receive notice because she never read the documents she signed or the NICA brochure, and that her failure to read the documents or NICA brochure was reasonable or excusable given that, in their opinion, the procedure the hospital employed to secure her signature and deliver the brochure was not adequate to alert her to their significance. Second, Petitioners contend that neither the acknowledgment form nor the brochure was sufficient, for reasons hereafter addressed, to satisfy the hospital's notice obligation under the Plan.

18. To support their first contention, Petitioners offered the testimony of Mrs. Ruiz who, to support Petitioners' contention that her failure to read the documents she signed and the NICA brochure she received was reasonable, observed that the service representative (Machele Lockhart Wadley) simply flipped the bottom up of each page she wanted Mrs. Ruiz to sign, never gave Mrs. Ruiz time to read before signing, never gave Mrs. Ruiz the documents to read before signing or told her to read before signing, and never told Mrs. Ruiz the documents were of any legal significance. Moreover, as for the NICA brochure, Mrs. Ruiz observed that, at the time, she was of the opinion it was simply another baby advertisement, and of no significance.

19. Considering the proof, Petitioners' first contention, and the testimony of Mrs. Ruiz that was offered to support it, must be rejected for a number of reasons. First, given the routine nature of pre-registration and the passage of time since it occurred, it is unlikely that Mrs. Ruiz would have any specific recollection of the events that transpired at the time. Moreover, given the limited number of forms Mrs. Ruiz signed during the interview process, discussed supra, and the fact that her husband also signed as guarantor or spouse, it is also unlikely that the process was hurried or that Mrs. Ruiz was seriously deprived of an opportunity to read the forms or the NICA brochure had she chosen to do so. Finally, and most

pertinent to the notice issue, Mrs. Ruiz acknowledged in her testimony that, while she did not read the acknowledgment form, she was specifically advised that by signing the form she was agreeing that she received the NICA brochure. (PHT's Exhibit 1, pages 26 and 27). Under such circumstances, and considering that the brochure was also delivered with two other pamphlets of legal significance (the Advance Directives brochure and the Patient's Bill of Rights brochure), if Mrs. Ruiz failed to accord the NICA brochure significance, her act of doing so was not reasonable.

20. Petitioners' second contention, regarding the adequacy of notice with regard to the hospital, was premised on their view that, as worded, neither the acknowledgment form nor the NICA brochure was adequate to satisfy the notice provisions of the Plan. As for this contention, Petitioners first posit that, since the NICA brochure stated only injuries that "have occurred in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital" (emphasis added) were covered, Mrs. Ruiz was not on notice that delivery at Jackson North Maternity Center was covered by the Plan because Jackson North Maternity Center was not described as a hospital in the acknowledgment form, the NICA brochure, the facility signage, or otherwise. Petitioners also posit that, because neither the acknowledgment form nor the NICA brochure states

that Jackson North Maternity Center has participating physicians on its staff, Mrs. Ruiz was not on notice that delivery at Jackson North Maternity Center was covered by the Plan.

21. Here, Petitioners' second contention must also be rejected. First, Petitioners have stipulated that Jackson North Maternity Center is a hospital, as that terms is used in the Plan, and there is no evidence of record that Mrs. Ruiz suffered any confusion over Jackson North Maternity Center's status as a hospital. Second, there is no requirement under the notice provisions of Section 766.316, Florida Statutes, for the hospital to advise patients that it has participating physicians on staff. Rather, such is presumed if notice is given, and the obligation to disclose their participating status rests with the physician.

Resolution of the notice issue, with regard to the participating physicians

22. With regard to the participating physicians, it is undisputed that Mrs. Ruiz was never given notice by Doctors Norris and Barker that they were participating physicians in the Plan, and that the only NICA notice she received was that provided by the hospital at pre-registration, which failed to identify any physician associated with the hospital, or reveal their status as participating physicians.[7] Nevertheless, it was the position of Intervenors that the acknowledgment form signed

by Mrs. Ruiz at pre-registration, and delivery of the NICA brochure, satisfied the notice provisions of the Plan for the hospital, as well as the participating physicians. Alternatively, the Intervenors were of the view that the participating physicians were not required to give notice, since Mrs. Ruiz presented to the hospital on August 13, 1998, with an "emergency medical condition," as defined by Section 395.002(a)(b), Florida Statutes, or the giving of notice was "not practicable." § 766.316, Fla. Stat.

23. Given the proof, it must be resolved that Doctors Norris and Barker failed to comply with the notice provisions of the Plan. In so concluding, it is noticed that Intervenors' contention that the giving of notice by the hospital also satisfied the participating physicians' independent obligation to give notice must be rejected as lacking a rational basis in fact or, stated otherwise, any compelling proof that a patient, similarly situated as Mrs. Ruiz, would reasonably conclude, from the hospital's notice, that notice was also given on behalf of Doctors Norris and Barker. Notably, the acknowledgment form signed by Mrs. Ruiz at pre-registration did not reveal that it was also given on behalf of any physician associated with the hospital and did not reveal that any physician associated with the hospital was a participating physician in the Plan. Under such circumstances, the giving of notice by the hospital could

not satisfy the participating physicians' independent obligation to provide notice.[8] With regard to the Intervenors' contention that the giving of notice was not required or was not practicable, it is noted that, while the Legislature 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 previously available. Consequently, while Doctors Norris and Barker were not required to give notice when they assumed Mrs. Ruiz's care at the hospital, because there was "evidence of the onset and persistence of uterine contractions or rupture of the membranes," they nevertheless failed to comply with the notice provisions of the Plan because, although there was a reasonable opportunity for them to do so, they failed to give Mrs. Ruiz notice at pre-registration.[9] See Galen of Florida, Inc. v. Braniff, 696 So. 2d 308 (Fla. 1997); Board of Regents of the State of Florida v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997); Schur v. Florida Birth-Related Neurological Injury Compensation Association, 832 So. 2d 188 (Fla. 1st DCA 2002); Turner v. Hubrich, 656 So. 2d 970 (Fla. 5th DCA 1995).

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.

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 physicians who provided obstetrical services at Michael's birth were "participating physician[s]," and that Michael suffered a "birth-related neurological injury." Consequently, Michael 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 (Supp. 1998), 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), Florida Statutes (Supp. 1998), to mean:

> (b) With respect to a pregnant woman:
>
> 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. Under circumstances similar to those presented in this case, the court in Board of Regents v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997), spoke to the independent obligation of the participating physician and the hospital to accord the patient notice, as mandated by Section 766.316, Florida Statutes, as follows:

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

Id. at 49. The court concluded that "health care providers who have a reasonable opportunity to give notice and fail to give pre-delivery notice under section 766.316, will lose their NICA exclusivity . . . ." Id. at 50. Accord Schur v. Florida Birth-Related Neurological Injury Compensation Association, 832 So. 2d 188 (Fla. 1st DCA 2002). Consequently, as noted in the Findings of Fact, the hospital demonstrated that it complied with the notice provisions of the Plan, but the participating physicians, who had a reasonable opportunity to do so, did not.

CONCLUSION

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

ORDERED that the claim for compensation filed by Juanita Ruiz and Miguel Angel Ruiz, as parents and natural guardians of Michael A. Ruiz, a minor, and Juanita Ruiz and Miguel Angel Ruiz, individually, be and the same is hereby approved.

It is FURTHER ORDERED that the hospital complied with the notice provisions of the Plan, but the participating physicians did not.

It is FURTHER ORDERED that the following benefits are awarded:

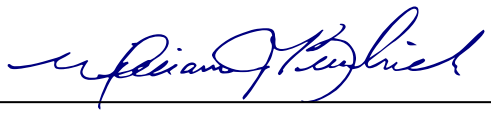
1. Petitioners, Juanita Ruiz and Miguel Ruiz, are awarded $190.65 for expenses previously incurred. § 766.31(1)(a), Fla. Stat. Such award shall be paid immediately, and all future expenses shall be paid as incurred. § 766.31(2), Fla. Stat.

2. Petitioners, Juanita Ruiz and Miguel Ruiz, are awarded a lump sum of $100,000.00. § 766.31(1)(b), Fla. Stat.

3. Petitioners, Juanita Ruiz and Miguel Ruiz, are awarded $10,580.33 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 28th day of September, 2004, in Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of September, 2004.

ENDNOTES

1/ Petitioners' Exhibit 3 (the deposition of Paul Norris, M.D.) was initially marked for identification, but was physically withdrawn and is not among Petitioners' exhibits. However, Dr. Norris' deposition is of record, having been marked and received into evidence as University of Miami's Exhibit 1. Petitioners' Exhibits 10 and 18 were marked for identification but, given the objection of Intervenor University of Miami, not received into evidence. Petitioners' Exhibit 20, the continued deposition of Barry Materson, M.D., was taken post-hearing, on June 28, 2004, and, there being no objection, received into evidence.

2/ All citations are to Florida Statutes (1997) unless otherwise indicated.

3/ Re-designated as Section 395.002(9)(b), from Section 395.002(8)(b), to conform to amendments by Chapter 98-89, Section 23, Laws of Florida, and Chapter 98-171, Section 37, Laws of Florida. See § 766.316, Fla. Stat. (Supp. 1998), note 2.

4/ The Application for Medicaid was a simple fill-in-the-blank form that should have required no more than two minutes to complete and sign. (Petitioners' Exhibit 6, page 28).

5/ Mrs. Ruiz was conversant and literate in Spanish, but no other language.

6/ Translated, the form read, as follows:

> I have received the brochure entitled 'Peace of Mind' prepared by the Association of Compensation for Neurological Injuries Related to Birth of the State of Florida (Florida Birth-Related Neurological Injury Compensation Association).

(Transcript, pages 84 and 85, and PHT's Exhibit 1, pages 65 and 66).

7/ The acknowledgment form signed by Mrs. Ruiz is actually stamped on a Jackson Memorial Hospital form C-255 (Progress Record). (PHT's Exhibit 3). In the lower right hand corner of the Progress Record appears a "Patient imprint," which includes Mrs. Ruiz's name, as well as the name of Dr. Norris. Notably, the Patient imprint is not generated or applied to the patient's medical records, until admission. (Petitioners' Exhibit 6, pages 47-50). Consequently, the Patient imprint was not on the document when it was signed by Mrs. Ruiz.

8/ In so concluding, the participating physicians' expectation that the hospital would provide notice on their behalf, generally before admission, has not been overlooked. (PHT's Exhibit 2, pages 24-34). However, as heretofore noted, the hospital's notice did not reveal that it was also given on behalf of the physicians or that any physicians were participating physicians in the Plan. Consequently, although joint notice may have been the intention of the hospital, and the participating physicians, the notice provided was inadequate to achieve that result.

9/ In so concluding, it is noted that all attending physicians at the hospital were participating physicians in the Plan; services at the hospital were limited to maternity services, as well as some outpatient gynecological services, but no prenatal care was provided; and, typically, the first services a patient received followed the onset of labor, when the patient presented to the hospital for the birth of her child. (PHT's Exhibit 2, page 65, Petitioners' Exhibit 9, pages 6 and 15, Petitioners' Exhibit 6, pages 12 and 20). Consequently, it was commonly known that the only contact a patient had with the hospital prior to the onset of labor, and the only opportunity the hospital and the physicians it employed had to give notice prior to the onset of labor, was at pre-registration

COPIES FURNISHED:
(By certified mail)

Charles H. Baumberger, Esquire
Rossman, Baumberger & Reboso, P.A.
44 West Flagler Street, Suite 2300
Miami, Florida 33130-1808

David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest 6 Court
Plantation, Florida 33324

Kenney Shipley, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
1435 Piedmont Drive, East, Suite 101
Post Office Box 14567
Tallahassee, Florida 32308

Stephen A. Stieglitz, Esquire
Metro-Dade Center
111 Northwest First Street, Suite 2800
Miami, Florida 33128-1993

Steven E. Stark, Esquire
Fowler, White, Burnett, P.A.
Bank of America Tower, 17th Floor
100 Southeast Second Street
Miami, Florida 33131

Bel Barker, M.D.
Jackson North Maternity Center
14701 Northwest 27th Avenue
Opa Locka, Florida 33054

Jackson North Maternity Center
14701 Northwest 27th Avenue
Opa Locka, Florida 33054

Ms. Charlene Willoughby
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275

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.