

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

TRACIE TURNER JACKSON and )  
ULYSSES BERNARD JACKSON, on )  
behalf of and as parents and )  
natural guardians of JACQUELINE )  
SIMONE JACKSON, a minor, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 03-3008N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
ALEJANDRO J. PENA, M.D.; MARC )  
W. BISCHOF, M.D.; and PHYSICIAN )  
ASSOCIATES OF FLORIDA, INC., )  
 )  
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 November 4, 2004, by video teleconference, with sites in Tallahassee and Orlando, Florida.

APPEARANCES

For Petitioners: Darryl L. Lewis, Esquire  
Roselyn Sia Baker-Barnes, Esquire  
Searcy, Denney, Scarola,  
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For Respondent: M. Mark Bajalia, Esquire  
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For Intervenors: Henry W. Jewett, II, Esquire  
Jennings L. Hurt, III, Esquire  
Rissman, Weisberg, Barrett,  
Hurt, Donahue & McLain, P.A.  
201 East Pine Street, 15th Floor  
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STATEMENT OF THE ISSUES

1. Whether Jacqueline Simone Jackson (Jacqueline), a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).
2. If so, whether Petitioners' settlement of a civil suit against the hospital where Jacqueline was born for negligence associated with her birth bars them from recovery of an award under the Plan.
3. Whether the participating physicians complied with the notice provisions of the Plan.

PRELIMINARY STATEMENT

On August 15, 2003, Tracie Turner Jackson and Ulysses Bernard Jackson, on behalf of and as parents and natural

guardians of Jacqueline Simone Jackson, a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) to resolve whether their daughter suffered an injury that was covered by the Florida Birth-Related Neurological Injury Compensation Plan, and whether the participating physicians who provided obstetrical services during her birth (Alejandro J. Pena, M.D. and Marc W. Bischof, M.D.) complied with the notice provisions of the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on August 21, 2003, and on January 30, 2004, following a number of extensions of time within which to do so, NICA filed a Notice of Compensability and Request for Hearing on Compensability, wherein it agreed the claim was compensable and requested that a hearing be scheduled to resolve whether NICA's proposal to accept the claim should be approved. In the interim, Alejandro J. Pena, M.D.; Marc W. Bischof, M.D.; and Physician Associates of Florida, Inc., requested and were granted leave to intervene.

A hearing was scheduled for August 2-4, 2004, later rescheduled at the parties' request for November 4 and 5, 2004, to resolve whether the claim was compensable and whether the participating physicians complied with the notice provisions of the Plan. Left to resolve at a subsequent hearing were matters

related to an award, and the implications of Petitioners' settlement with the birthing hospital on Petitioners' entitlement to an award of benefits. Subsequently, the parties agreed the claim was compensable and, as appears more fully infra, agreed that given their settlement with the hospital Petitioners were not entitled to an award of benefits.

§ 766.304, Fla. Stat.

At hearing, Tracie Turner Jackson testified on Petitioners' behalf and Petitioners' Exhibits (marked Petitioners' or Plaintiffs') 1-3, and 5 were received into evidence.<sup>1</sup>

Intervenors called Marsha Burns and Liz Larson Posey as witnesses, and Intervenors' Exhibits (marked Intervenors' or "I") 1, 2, and 4-9 were received into evidence.<sup>2</sup> Respondent called no witnesses and offered no exhibits.

The transcript of the hearing was filed November 30, 2004, and the parties were accorded 10 days from that date to file proposed orders. The parties elected to file such proposals, and they have been duly considered.

#### FINDINGS OF FACT

##### Findings related to compensability

1. Tracie Turner Jackson and Ulysses Bernard Jackson are the natural parents and guardians of Jacqueline Simone Jackson, a minor. Jacqueline was born a live infant on December 8, 1999, at Orlando Regional Healthcare System, d/b/a Arnold Palmer

Hospital for Women and Children (Arnold Palmer Hospital), a licensed hospital located in Orlando, Florida, and her birth weight exceeded 2,500 grams.

2. The physicians providing obstetrical services at Jacqueline's birth were Alejandro J. Pena, M.D., and Marc W. Bischof, 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.

3. Pertinent to this case, coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as an "injury to the brain . . . caused by oxygen deprivation . . . occurring in the course of labor, delivery, or resuscitation in the immediate 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, Fla. Stat.

4. Here, the parties have stipulated, and the proof is otherwise compelling, that Jacqueline suffered a "birth-related neurological injury." Consequently, since obstetrical services were provided by a "participating physician" at birth, the claim is covered by the Plan. §§ 766.309(1) and 766.31(1), Fla. Stat.

The settlement with Arnold Palmer Hospital

5. In 2002, Tracie Turner Jackson and Ulysses Bernard Jackson, individually and as parents and natural guardians of their minor daughter, Jacqueline Simone Jackson, Plaintiffs, filed a medical malpractice claim arising out of the birth of Jacqueline against Orlando Regional Health Care System, Inc., d/b/a Arnold Palmer Hospital for Women and Children; Alejandro J. Pena, M.D.; Marc W. Bischof, M.D.; Physician Associates of Florida, Inc.; T. Zinkil, R.N.; S. Furgus, R.N.; Nancy Ruiz, R.N.; L. Baker, R.N.; T. Flynn, R.N.; and Nancy Ostrum, R.N., Defendants, in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, Case No. 2002-CA-6770 Div. 34. A settlement was reached with Arnold Palmer Hospital, but the case against Dr. Pena, Dr. Bischof, and Physician Associates of Florida, Inc., remained pending.<sup>3</sup>

6. Given Petitioners' settlement with Arnold Palmer Hospital, and the provisions of Section 766.304, Florida Statutes (1999)<sup>4</sup>("An action may not be brought under ss. 766.301-766.316 if the claimant recovers or final judgment is entered."), Petitioners and Respondent stipulated that "Petitioners are not entitled to any actual payment or award from NICA, even if a finding is made that the claim is compensable and adequate notice was given." (Petitioners' letter of November 18, 2004, filed November 19, 2004, and

Respondent's letter of November 16, 2004, filed November 16, 2004.)

The notice provisions of the Plan

7. While the claim qualifies for coverage under the Plan, Petitioners have responded to the physicians' claim of Plan immunity by averring that the participating physicians who delivered obstetrical services at Jacqueline's birth (Doctors Pena and Bischof) failed to comply with the notice provisions of the Plan. Consequently, it is necessary to resolve whether either participating physician gave the required notice.

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, 880 So. 2d 1253 (Fla. 1st DCA 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

(Fla. 2d DCA 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 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. (See, e.g., Petitioners' Exhibit 2, the NICA brochure, "This brochure is prepared in accordance with the mandate of [Section] 766.316, Florida Statutes.")

Findings related to the participating physicians and notice

10. Mrs. Jackson received her prenatal care at the Longwood Center, one of 7 offices in the Orlando area operated by Physician Associates of Florida (PAF), a group practice comprised of 35 physicians, including 16 obstetrician-gynecologists. (See, e.g., Intervenors' Exhibits 1, 2, 4, and 6.) At the time, four obstetricians staffed the OB-GYN department at the Longwood Office, Dr. Marc Bischof, who provided obstetrical services during Jacqueline's birth; Dr. Robert Bowels; Dr. Peter Perry; and Dr. Jose Lopez-Cintron. However, as a group practice, all obstetricians rotated delivery calls at the hospital, so it was possible, as occurred in this case with Dr. Pena, that a doctor from a different office would participate in the delivery. Notably, all obstetricians associated with PAF were participating physicians in the Plan.

11. On April 12, 1999, Mrs. Jackson presented to the Longwood Center for her initial visit. At the time, consistent with established routine, the receptionist provided Mrs. Jackson with a packet of information that included a number of forms for

her to complete and sign, including: a Patient Information form; a Consent for Human Immunodeficiency Virus (HIV) Antibody Testing form; a Triple Test Form (a screening test for Down's Syndrome); a Prenatal Diagnosis Screening Questionnaire; and a Notice to Obstetrical Patient (to acknowledge receipt of the NICA brochure that was, indisputably, included in the packet).

The Notice to Obstetric Patient provided, as follows:

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

I have been furnished information by Physician Associates of Florida prepared by the Florida Birth Related Neurological Injury Compensation Association, and have been advised that \_\_\_\_\_<sup>[5]</sup> is a participating physician in that program, wherein certain limited compensation is available in the event certain neurological injury may occur during labor, delivery or resuscitation. For specifics on the program, I understand I can contact the Florida Birth Related Neurological Injury Compensation Association (NICA), 1435 Piedmont Drive East, Suite 101, Tallahassee, Florida 32312 1-800-398-2129. I further acknowledge that I have received a copy of the brochure prepared by NICA.

DATED this \_\_\_\_ day of \_\_\_\_\_, 199\_\_.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
(NAME OF PATIENT)  
Social Security No.:

Attest:

\_\_\_\_\_  
(Nurse or Physician)

Date: \_\_\_\_\_

Mrs. Jackson completed each of the forms, including the Notice to Obstetric Patient, by providing the requested information, and then signing and dating the forms. (Petitioners' Exhibit 1).

12. Here, there is no dispute that Mrs. Jackson signed the Notice to Obstetric Patient or that she received a copy of the NICA brochure on her initial visit. There is likewise no dispute that, given the blank space, the notice form was inadequate to provide notice that Dr. Bischof, Dr. Pena, or any obstetrician associated with PAF was a participating physician in the Plan. Rather, what is disputed is whether, as contended by Intervenors, Mrs. Jackson was told during her initial visit that all obstetricians in PAF were participants in the Plan.<sup>6</sup>

13. Regarding Mrs. Jackson's initial visit, the proof demonstrates that, following completion of the paperwork, Mrs. Jackson was seen by Nurse Posey for her initial interview. Typically, such visits lasted approximately 45 minutes, with 30 minutes spent reviewing the patient's history, as well as the paperwork she received in the packet, and 15 minutes spent on a physical examination. According to Nurse Posey, she conducted a

minimum of two initial prenatal interviews daily, five days a week, and followed the same procedure during each interview.

14. As described by Nurse Posey, during the initial interview she always discussed each form (the Prenatal Diagnosis Screening Questionnaire, the Triple Test Form, Consent for Human Immunodeficiency Virus (HIV) Antibody Testing form, and the Notice to Obstetric Patient) individually, and when the form had been discussed she would co-sign the form. (Transcript, pp. 65-68) Moreover, as for the NICA program, Nurse Posey always confirmed that the patient had received the NICA brochure, and told the patient that PAF's obstetrical service was "a group practice; that anyone in the group could do the delivery; and that each member of the group was a participant in the NICA program." (Transcript, pp. 68-70) Finally, Nurse Posey documented her routine through an entry on the prenatal flow sheet (Intervenors' Exhibit 6), which noted she had provided the patient information on the various tests, as well as the NICA brochure and notification. Here, that entry read: "Pt given info on diet, exercise, HIV screening, triple test, NICA pamphlet & notification & cord blood storage." (Petitioners' Exhibit 1, Intervenors' Exhibit 6, and Transcript, pp. 70-78.) In this case, Nurse Posey was confident she had followed her routine, since she would not have co-signed the various

documents, such as the Notice to Obstetric Patient, or made the entry on the prenatal flow sheet unless she had done so.

15. In response to the evidence offered by Intervenors on the notice issue, Mrs. Jackson testified there was never a discussion of the NICA program, and she was never told the physicians associated with PAF's obstetrical program were participating physicians in the Plan. However, Mrs. Jackson acknowledged that Nurse Posey questioned her regarding her medical history, and that she explained the Prenatal Diagnosis Screening Questionnaire, the Triple Test Form, and the HIV form. (Transcript, pp. 141-145) As for the Notice to Obstetric Patient, Mrs. Jackson initially denied having read it; then testified she may have read it "briefly," but "didn't go into details" or "seek out specifics"; and finally stated she could not remember reading the form, but could not deny that she may have read it. (Transcript, pp. 150, 151, 156-159)

16. Here, giving due consideration to the proof, it must be resolved that the more persuasive proof supports the conclusion that, more likely than not, Nurse Posey, consistent with her routine, discussed the NICA program with Mrs. Jackson on her initial visit, and informed Mrs. Jackson that the physicians associated with PAF's obstetrical program were participating physicians in the Plan. In so concluding, it is noted that, but for the NICA program, Mrs. Jackson acknowledged

Nurse Posey otherwise followed her routine; that it is unlikely, given such consistency, Nurse Posey would not have also discussed the NICA program; that Nurse Posey, as was her routine, co-signed each of the forms she discussed with Mrs. Jackson, including the Notice to Obstetric Patient; that Nurse Posey, as was her routine, documented her activity on the prenatal flow sheet; and that Mrs. Jackson evidenced little recall of the documents she signed or the discussions she had with Nurse Posey. Finally, Nurse Posey's testimony was logical, consistent, and credible, whereas Mrs. Jackson's testimony was often equivocal.

#### CONCLUSIONS OF LAW

##### Jurisdiction

17. 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

18. 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.

19. "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.

20. Here, it has been established that Dr. Pena and Dr. Bischof, physicians who provided obstetrical services at Jacqueline's birth, were "participating physician[s]," and that Jacqueline suffered a "birth-related neurological injury." Consequently, the claim is covered by the Plan, and the administrative law judge is required to make an award of compensation unless Petitioners are barred from pursuing an award because they recovered damages, through settlement of a civil action with Arnold Palmer Hospital, for medical malpractice associated with Jacqueline's birth. §§ 766.304, 766.309, and 766.31, Fla. Stat.

The statutory bar to recovery (§ 766.304, Fla. Stat.)

21. The Florida Birth-Related Neurological Injury Compensation Plan was enacted by the Legislature to address "a perceived medical malpractice . . . crisis affecting obstetricians and to assure the continued availability of essential obstetrical services." Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 855 (Fla. 2d DCA 1995); § 766.301(1), Fla. Stat. As enacted, the Plan "establishes an administrative system that provides compensation on a no-fault basis for an infant who suffers a narrowly defined birth-related neurological injury." Humana of Florida, Inc. v. McKaughan, 652 So. 2d at 855; § 766.301(2), Fla. Stat.



22. The Plan is a substitute, a "limited no-fault alternative," for common law rights and liabilities. § 766.316, Fla. Stat. See also § 766.303(2), Fla. Stat.; Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974 (Fla. 1996). Regarding the exclusiveness of the remedy afforded by the Plan, Subsection 766.303(2), provides:

(2) The rights and remedies granted by this plan on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representatives, parents, dependents, and next of kin, at common law or otherwise, against any person or entity directly involved with the labor, delivery, or immediate postdelivery resuscitation during which such injury occurs, arising out of or related to a medical malpractice claim with respect to such injury; except that a civil action shall not be foreclosed where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property, provided that such suit is filed prior to and in lieu of payment of an award under ss. 766.301-766.316. Such suit shall be filed before the award of the division becomes conclusive and binding as provided for in s. 766.311.

23. Effective July 1, 1998, the Legislature adopted Chapter 98-113, Laws of Florida, which amended Sections 766.301 and 766.304, Florida Statutes.<sup>7</sup> 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 reacted "adversely to the result reached in McKaughan," wherein the Supreme Court

concluded that an administrative law judge did not have exclusive jurisdiction to determine whether a new-born infant suffered a "birth-related neurological injury," and mandated that coverage be resolved exclusively in the administrative forum. O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, 757 So. 2d 624, 627 (Fla. 5th DCA 2000). Additionally, by amending Section 766.304, Florida Statutes, to provide that "[a]n action may not be brought under ss. 766.301-766.316 if the claimant recovers or final judgment is entered," the Legislature evidenced its intent to adopt an election of remedies clause to avoid future claims such as those pursued in Gilbert v. Florida Birth-Related Neurological Injury Compensation Association, 724 So. 2d 688 (Fla. 2d DCA 1999), wherein the court held that a claimant could receive the proceeds of a settlement with the defendants in a civil suit and still pursue a claim for benefits under the Plan. Romine v. Florida Birth-Related Neurological Injury Compensation Association, 842 So. 2d 148, 152 (Fla. 5th DCA 2003). In all, by the amendments to the Plan, the Legislature evidenced its intention that "[t]he administrative law judge has exclusive jurisdiction to determine whether a claim . . . is compensable," that "[n]o civil action may be brought . . . [or continued, if Plan exclusivity is raised as a defense] until the determinations under s. 766.309 have been resolved by the

administrative law judge," and that if a claimant persists and "recovers or final judgment is entered," as in this case, she or he may not pursue an award under the Plan. Gugelmin v. Florida Birth-Related Neurological Injury Compensation Association, 882 So. 2d 517, 520 (Fla. 4th DCA 2004)("Following the 1998 amendments to NICA, it is clear that a plaintiff's acceptance of a civil settlement bars a claim for NICA benefits.")

25. Here, consistent with the provisions of Section 766.304, Florida Statutes (1999), Petitioners and Respondent have stipulated that, having received a settlement with Arnold Palmer Hospital for damages associated with Jacqueline's birth, Petitioners have "recovered," as that word is commonly understood, and are not entitled to Plan benefits. See Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)("When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning."); Abramson v. Florida Psychological Association, 634 So. 2d 610, 612 (Fla. 1994)("Administrative agencies have the authority to interpret the laws which they administer, but such interpretation cannot be contrary to clear legislative intent.") Consequently, while Jacqueline suffered an injury covered by the Plan, Petitioners are not entitled to an award of benefits.

The notice provisions of the Plan

26. While Jacqueline qualifies for coverage under the Plan, Petitioners have sought to avoid the participating physicians' attempt to invoke the Plan as Petitioners' exclusive remedy by averring that the participating physicians failed to comply with the notice provisions of the Plan. Consequently, it was necessary for the administrative law judge to resolve whether, as alleged by the participating physicians, appropriate notice was given. O'Leary v. Florida Birth-Related Neurological Injury Compensation Plan, supra. As the proponent of such issue, the burden rested on the participating physicians to demonstrate, more likely than not, that the notice provisions of the Plan were satisfied. Tabb v. Florida Birth-Related Neurological Injury Compensation Association, 880 So. 2d 1253 (Fla. 1st DCA 2004). See also Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 311 (Fla. 1997)("[T]he assertion of NICA exclusivity is an affirmative defense."); Id., at page 309 ("[A]s a condition precedent to invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan a reasonable time prior to delivery."); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1997)("[T]he burden of proof, apart from

statute, is on the party asserting the affirmative issue before an administrative tribunal.") Here, for reasons appearing in the Findings of Fact, the participating physicians demonstrated that they complied with the notice provisions of the Plan.

#### CONCLUSION

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

ORDERED that the claim for compensation filed by Tracie Turner Jackson and Ulysses Bernard Jackson, on behalf and as parents and natural guardians of Jacqueline Simone Jackson, a minor, qualifies for coverage under the Plan; however, given Petitioners' recovery from Arnold Palmer Hospital, they may not pursue or recover an award of benefits.

It is further ORDERED that with regard to the participating physicians, Doctors Alejandro J. Pena and Marc W. Bischof, the notice provisions of the Plan were satisfied.

DONE AND ORDERED this 6th day of January, 2005, in  
Tallahassee, Leon County, Florida.



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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 6th day of January, 2005.

ENDNOTES

- 1/ Petitioners' Exhibit 4 was marked for identification only.
- 2/ Intervenors' Exhibits 1 and 2 were received into evidence post-hearing, after Petitioners had an opportunity to review the exhibits and gave notice (by letter) they had no objection. Intervenors' Exhibit 3 was marked for identification only.
- 3/ In response to NICA's First Set of Interrogatories, dated April 2, 2004, Petitioners filed the following answer on May 14, 2004:

Interrogatory No. 2

Have you ever sued any party for any of the injuries alleged in the Petition? If so, please identify:

(a) the style and case number of the lawsuit along with the state and county in which it was filed;

TRACIE TURNER JACKSON and ULYSSES BERNARD JACKSON, individually and as parents and natural guardians of their minor daughter [sic], JACQUELINE SIMONE JACKSON, Plaintiffs,

vs.

ORLANDO REGIONAL HEALTHCARE SYSTEM, INC., d/b/a ARNOLD PALMER HOSPITAL FOR WOMEN AND CHILDREN; ALEJANDRO J. PENA, M.D.; MARC W. BISCHOF, M.D.; and PHYSICIAN ASSOCIATES OF FLORIDA, INC., T. ZINKIL, R.N.; S. FURGUS, R.N.; NANCY RUIZ, R.N.; L. BAKER, R.N.; T. FLYNN, R.N.; and NANCY OSTRUM, R.N., Defendants,

This case was filed in the Circuit Court of the 9th Judicial Circuit in and for Orange County, Florida

Case No. 2002-CA-6770 Div. 34

(b) the deposition of that action (pending, settled, dismissed, etc.);

A settlement was reached with Orlando Regional Healthcare System, Inc., d/b/a Arnold Palmer Hospital.

Litigation against Defendants, Alejandro J. Pena, M.D.; Marc W. Bischof, M.D.; And Physician Associates of Florida, Inc. is still pending.

(c) the factual legal basis for recovery . . . .

Medical malpractice claim arising out of the birth of Jacqueline Jackson and injuries to Tracie and Jacqueline Jackson.

These facts were not disputed and, consistent with the undersigned's letter of December 6, 2004, and there being no objection, judicial recognition was taken of these facts.



4/ In 2003, the Legislature amended the election of remedies clause to read, as follows:

. . . An award action may not be made or paid brought under ss. 766.301-766.316 if the claimant recovers under a settlement or a final judgment is entered in a civil action . . . .

Ch. 2003-416, § 75, Laws of Fla. However, the Legislature expressly provided that "the changes to chapter 766, Florida Statutes, shall apply only to any medical incident for which a notice of intent to initiate litigation is mailed on or after the effective date of this act." Ch. 2003-416, § 86, Laws of Fla. Here, given a civil case number of 2002-CA-6770 Div. 34, Petitioners' notice of intent to initiate litigation was mailed well prior to the September 15, 2003, effective date of the act. Consequently, the provisions of Section 766.304, Florida Statutes, as it existed prior to the 2003 amendments apply in this case.

5/ Blank space in the original document.

6/ Here, Intervenors offered evidence of the routine practiced by Elizabeth Posey, R.N. (the advanced registered nurse practitioner who interviewed Mrs. Jackson during her initial visit), to support an inference that Mrs. Jackson was told that all obstetricians in PAF were participants in the Plan. See McKeithan v. HCA Health Services of Florida, Inc., 879 So. 2d 47, 49 (Fla. 4th DCA 2004)("Although section 90.406, Florida Statutes (2003), does not apply to the routine practice of an individual, it is 'left to the court to determine as a matter of circumstantial evidence whether there was sufficient probative value to allow the admission of the habit evidence.'"); Charles W. Ehrhardt, Florida Evidence § 406.1, at 267 (2004 ed.)("When dealing with the habits of a person which are offered to show his conduct on a specific situation, as opposed to the routine practice of a business organization or its employees, Florida courts have held that habit evidence is admissible when it corroborates other substantial evidence of the occurrence of the event.")

7/ As for the effective date of the amendments, Chapter 98-113, Section 6, Laws of Florida, provided that "[t]he amendments to sections 766.301 and 766.304, Florida Statutes, shall take effect July 1, 1998, and shall apply only to claims filed on or after that date and to that extent shall apply retroactively

regardless of date of birth." However, in Romine v. Florida Birth-Related Neurological Injury Compensation Association, 842 So. 2d 148 (Fla. 5th DCA 2003), the court resolved that retroactive application of the amendment to a child born prior to its effective date, to preclude a NICA claim when the claimant made a civil recovery (through settlement of a civil suit), was not constitutionally permissible. Here, the child was born December 8, 1999, and the claim was filed August 15, 2003. Consequently, the amendments apply to this case.

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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.