STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JENNIFER CASTILLO AND PETER BOROWIAK, on behalf of and as parents and natural guardians of LIEVENS BOROWIAK, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 04-1533N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
UNIVERSITY OF MIAMI and PUBLIC HEALTH TRUST,	)	
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 2, 2005, in Miami, Florida.

APPEARANCES

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For Intervenor Public Health Trust:

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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 the hospital and the participating physicians gave the patient notice, as contemplated by Section 766.16, Florida Statutes, 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 April 23, 2004, Jennifer Castillo and Peter Borowiak, as parents and natural guardians of Lievens Borowiak (Lievens), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) to resolve whether their son suffered an injury covered by the Florida Birth-Related Neurological Injury Compensation Plan (Plan), and whether the healthcare providers 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 April 27, 2004, and on July 26, 2004, following a number of extensions of time within which to do so, NICA filed a Notice of Compensability and Request for Evidentiary Hearing on Compensability, wherein it agreed the claim was compensable. In

the interim, the University of Miami and the Public Health Trust were granted leave to intervene. Thereafter, by Notice of Hearing, dated August 24, 2004, a hearing was scheduled for February 2 and 3, 2005, to resolve the issues heretofore noted.

At hearing, Intervenors called Phyllisan Goodwin, LPN, and Charmin Campbell, LPN, as witnesses, and Intervenors' Exhibits 1-12[1]; Petitioners' Exhibits 1-4, 5A, 5B, and 6-16; and Respondent's Exhibits 1 and 2, were received into evidence. Post-hearing, Intervenors' Exhibit 13 was offered and received into evidence, without objection. No other witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed February 23, 2005, and the parties were initially accorded 10 days from that date to file proposed orders. However, at Petitioners' request the opportunity to file proposals was extended to March 14, 2005. The Petitioners and the University of Miami elected to file such proposals, and the Public Health Trust belatedly adopted the proposal filed by the University of Miami. The parties' proposals have been duly considered.

FINDINGS OF FACT

Findings related to compensability

1. Jennifer Castillo and Peter Borowiak, are the natural parents and guardians of Lievens Borowiak, a minor. Lievens was born a live infant on April 18, 2001, at Jackson Memorial

Hospital, a hospital owned and operated by the Public Health Trust in Miami, Dade County, Florida, and his birth weight exceeded 2,500 grams.

2. Obstetrical services were provided during the course of Lievens' birth by Salih Y. Yasin, M.D., Mary Jo O'Sullivan, M.D., Armando Hernandez, M.D., and Victor H. Gonzales-Quintero, M.D., who, at all times material hereto, were "participating physicians" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes. More particularly, Doctors Yasin, and O'Sullivan, were members of the faculty at the University of Miami, School of Medicine, and also held contracts with the Public Health Trust to provide, inter alia, supervision for physicians in the Trust's resident physician training program. These physicians, referred to as attending physicians, were "participating physician[s]" in the Plan, since the assessment required for participation had been paid on their behalf by the University of Miami. Doctors Hernandez and Gonzales-Quintero were "participating physician[s]," since they were residents in the Trust's postgraduate residence program in obstetrics and gynecology, and were exempt from payment of the assessment. §§ 766.302(7) and 766.313(4) and (5), Fla. Stat.

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 Lievens 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.

Findings related to an award

5. When it has been resolved that a claim is compensable, 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),[2] 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. However, such expenses shall not include:
>
> 1. Expenses for items or services that the infant has received, or is entitled to receive, under the laws of any state or the

> Federal Government, except to the extent such exclusion may be prohibited by federal law.
>
> * * *
>
> 3. Expenses for which the infant has received reimbursement, or for which the infant is entitled to receive reimbursement, under the laws of any state or the Federal Government, except to the extent such exclusion may be prohibited by federal law.
>
> * * *
>
> (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, Jennifer Castillo and Peter Borowiak, as the parents of Lievens, be awarded $100,000.00, to be paid in lump sum, and $8,321.44 for attorney's fees ($8,000.00) and costs ($321.44) incurred in connection with the filing of the claim. § 766.31(1)(b) and (c), Fla. Stat. The parties have further agreed that no monies are owing for past expenses, and that Respondent pay future expenses as incurred. § 766.31(1)(a) and (2), Fla. Stat.

The notice provisions of the Plan

7. While the claim qualifies for coverage under the Plan, Petitioners have responded to the healthcare providers' claim of Plan immunity in a pending civil action, by averring that the healthcare providers failed to comply with the notice provisions of 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, 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); Florida Birth-Related Neurological Injury Compensation Association v. Ferguson, 869 So. 2d 686 (Fla. 2d DCA 2004)(same); and, Bayfront Medical Center, Inc. v. Florida Birth-Related Neurological Injury Compensation

Association, 30 Fla.L.Weekly D452a (Fla. 2d DCA February 16, 2005)(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. Section 395.002(9)(b), Florida Statutes, defines "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.

The Plan does not define "practicable." However, "practicable" is a commonly understood word that, as defined by Webster's dictionary, means "capable of being done, effected, or performed; feasible." Webster's New Twentieth Century Dictionary, Second Edition (1979). See Seagrave v. State, 802 So. 2d 281, 286 (Fla. 2001)("When necessary, the plain and ordinary meaning of words [in a statute] can be ascertained by reference to a dictionary.")

10. Responding to Section 766.316, Florida Statutes, NICA developed a brochure, titled "Peace of Mind for an Unexpected Problem" (the NICA brochure), which included 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 the brochure to their obstetrical patients. (Intervenors' Exhibit 1)

11. Here, given the provision of Section 766.316, Florida Statutes, the hospital and attending physicians (Doctors Yasin and O'Sullivan), provided they had a reasonable opportunity to do so, were required to provide pre-delivery notice. Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 309 (Fla. 1997)("[A]s

a condition precedent to invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when practicable, give their obstetrical patients notice of their participation a reasonable time prior to delivery."); Board of Regents v. Athey, 694 So. 2d 46, 50 (Fla. 1st DCA 1997)("[H]ealth 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 . . . .). Doctors Hernandez and Gonzales-Quintero, as residents, deemed to be a participating physician under Section 766.314(4)(c), Florida Statutes, were not required to provide notice.

Findings related to notice

12. At or about 9:45 a.m., Wednesday, April 11, 2001, Ms. Castillo, aged 23, with an estimated delivery date of April 26, 2001, and the fetus at 38 weeks' gestation, presented to Jackson Memorial Hospital (JMH) on the advice of her primary care physician, as a high-risk pregnancy, secondary to cardiac dysfunction. Notably, Ms. Castillo had a history of congenital heart disease, with cardiac surgery at aged 10 for transposition of the great vessels, and a recent diagnosis of marked pulmonary hypertension and severe aortic insufficiency. Under the circumstances, Ms. Castillo's primary care physician concluded delivery at a community hospital was inadvisable, and he

referred her to JMH for evaluation, as to the timing of, as well as the management of, her delivery.

13. On presentation, Ms. Castillo was initially assessed in OB Triage. At the time, existing protocol required that, following initial assessment, "[t]he HUS/Nurse places the patient on the triage log (in the computer at JMH) and gives the 'Peace of Mind' (OB) and 'Advance Directives' brochures in their respective languages." (Petitioners' Exhibit 11) Here, the proof demonstrates that Phyllisan Goodwin, an LPN employed by the hospital, initially assessed Ms. Castillo in OB Triage, and completed the Triage Treatment Record, which documented that, consistent with existing protocol, she provided Ms. Castillo with a copy of the Advanced Directives pamphlet and the Peace of Mind (NICA) brochure. (Intervenors' Exhibits 3 and 10) At or about the same time, Nurse Goodwin gave Ms. Castillo a General Consent for Treatment form. (Intervenors' Exhibit 2) That form, insofar as Intervenors deem it pertinent to the notice issue, included the following provisions:

> 1. I, the undersigned patient or Jennifer Castillo (name of authorized representative acting on behalf of patient) consent to undergo all necessary tests, medication, treatments and other procedures in the course of the study, diagnosis and treatment of my illness(es) by the medial staff and other agents and/or employees of the Public Health Trust/Jackson Memorial Hospital (PHT/JMH) and the University of Miami School of Medicine, including medical students.

> 2. I have been told the name of the physician who has primary responsibility for my care, as well as the names, professional status and professional relationships of other individuals who will be involved in my care. It has been explained to me that in a large teaching hospital environment like the Public Health Trust/Jackson Memorial Hospital, there may be additional or other physicians and staff involved in my care as well.

The consent was signed by Ms. Castillo, and witnessed by Nurse Goodwin, at 11:32 a.m., April 11, 2001.

14. Following triage, Ms. Castillo was admitted to the antepartum floor for further evaluation and management. There, Ms. Castillo was evaluated by Charmin Campbell, LPN, who completed the OB Nursing Admission Assessment, which included the observation that Ms. Castillo had previously received the Advanced Directives and the Peace of Mind brochures. (Intervenors' Exhibit 4) Ms. Castillo's subsequent hospital course was summarized in Dr. Yasin's Discharge Summary, as follows:

> The Patient was admitted for a cardiology workup in preparation for a controlled delivery. She was seen by both anesthesia and cardiology. Cardiology recommended an echocardiogram to evaluate heart function which was done and the patient was found to have sever pulmonary hypertension with moderate right ventricular dysfunction and dilatation in addition to a moderate aortic insufficiency. The patient also had an official ultrasound which showed IUGR [intrauterine growth retardation] . . . .

> After long consultation with both anesthesia and cardiology the plan was made on April 13th to induce the patient in a controlled setting on [Monday] April 16th. It was felt that the patient would benefit from a central line and that she would deliver on the labor floor, because with the IUGR should the patient need a cesarean section it could potentially be stat, and a better outcome would be ensured by delivering the patient on the labor floor as opposed to the cardiac care unit. The patient while on antepartum had daily NST'S [nonstress tests]. She was followed closely both by cardiology and anesthesia. On April 16th the patient went to the labor floor for an induction. The induction continued and the patient delivered on April 18th. It was a baby boy with Apgar scores of 2 4 5. The infant weighed 2,641 grams. The delivery was vacuum assisted secondary to poor maternal effort, and it was noted that there was a tight nuchal cord times one. Both anesthesia and cardiology were present at the delivery. Postpartum the patient went to the cardiac care unit for close monitoring. The following day she was sent to the normal postpartum floor. The patient was doing incredibly well. She was asymptomatic. No shortness of breath. She had no chest pain. She was ambulating without difficulty. She was discharged home on postpartum day number two.

(Petitioners' Exhibit 5A, page 004.) See also Petitioners' Exhibit 5A, pages 024-027, Dr. Yasin's progress note of April 13, 2001, and Petitioners' Exhibit 5A, pages 093-095, Dr. Yasin's Vaginal Delivery Record.

15. Notably, during the 5 days that preceded induction of labor, Ms. Castillo was continuously monitored by hospital staff; underwent numerous evaluations, by cardiology, radiology,

and anesthesiology, among others; and was called upon to sign a number of forms, in addition to the General Consent for Treatment form discussed supra, including: an Advance Directives Checklist, on April 11, 2001; a Consent to Operations or Procedures for a chest x-ray, at 5:00 p.m., April 11, 2001; a Release of Liability for Loss of Personal Property, at 12:45 a.m., April 12, 2001; a Consent Form for sterilization, on April 13, 2001; a Consent to Operations or Procedures for the delivery of her child, at 6:30 a.m., April 16, 2001; and, a Consent to Operation or Procedures for a chest x-ray, at 10:50 a.m., April 16, 2001. (Petitioners' Exhibit 5B) Moreover, the record reveals that during that 5-day period, Doctors Yasin and O'Sullivan, the attending physicians, provided obstetrical services to Ms. Castillo on numerous occasions; on April 16, 2001, Dr. Yasin supervised Ms. Castillo's induction; and on April 18, 2001, Dr. Yasin delivered Lievens. Consequently, the hospital and the attending physicians had numerous opportunities to provide notice to Ms. Castillo.

16. It is also notable that, on presentation to JMH at 9:45 a.m., April 11, 2001, Ms. Castillo was not in labor, and insofar as the record reveals she was not thereafter in labor until sometime after 11:55 a.m., April 16, 2001, when labor was induced, with Petocin. More particularly, there was no

"evidence of the onset and persistence of uterine contractions[3] or rupture of the membranes[4]" until after her labor was induced. Moreover, there was no proof that, upon admission or until her labor was induced, "there was inadequate time to effect safe transfer to another hospital prior to delivery" or "[t]hat a transfer may pose a threat to the health and safety of the patient or fetus." Consequently, until some time after 11:55 a.m., April 16, 2001, some 5 days after she presented to the hospital, Ms. Castillo did not have an "emergency medical condition," as defined by Section 395.002(9)(b), Florida Statutes, that would have excused the giving of notice. Moreover, there was no proof to support a conclusion that the giving of notice was not practicable.

Resolution of the notice issue, with regard to the hospital

17. With regard to the hospital and the notice issue, the more persuasive evidence supports the conclusion that, more likely than not, Nurse Goodwin, consistent with established practice, provided Ms. Castillo a copy of the NICA brochure in OB Triage. In so concluding, it is noted that the giving of notice in OB Triage was an established protocol (Petitioners' Exhibit 11); the Triage Treatment Record prepared by Nurse Goodwin documented that the NICA brochure was provided (Intervenors' Exhibit 3); except for the entry regarding the

NICA brochure, Ms. Castillo acknowledged the information Nurse Goodwin entered in the Triage Treatment Record was accurate (Intervenors' Exhibit 7, pages 52-53); it is unlikely, given such consistency, Nurse Goodwin would not have also provided Ms. Castillo with the NICA brochure; and Ms. Castillo's possession of the NICA brochure, following OB Triage, was confirmed by Nurse Campbell on the Nursing Assessment Record, when Ms. Castillo was admitted to the antepartum floor (Intervenors' Exhibit 4). Consequently, the proof compels the conclusion that the hospital complied with the notice provisions of the Plan.

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

18. With regard to the attending physicians and the notice issue, it is undisputed that the attending physicians never provided notice, and relied on the hospital to provide notice on their behalf.[5] Therefore, to demonstrate compliance, Intervenors posit that, "under the circumstances of this case," the notice the hospital provided was sufficient to satisfy both its notice obligation, and that of the attending physicians. (Intervenors' Amended Joint Pre-Hearing Stipulation, paragraph B) The "circumstances" were stated to be, as follows:

> 10. Upon presenting at the OB Triage, Ms. Castillo was provided an English-language NICA Peace of Mind brochure by Phyllisan Goodwin, LPN, who electronically

> notated Ms. Castillo's chart on the triage treatment record to that effect.
>
> 11. At or about the same time that she received the NICA brochure, Ms. Castillo signed an English-language General Consent for Treatment form, wherein Ms. Castillo consented to undergo all necessary tests, medication, treatments and other procedures in the course of the study, diagnosis and treatment by the medial staff and other agents and/or employees of the Public Health Trust/Jackson Memorial Hospital and the University of Miami School of Medicine.

(Intervenors' Amended Joint Pre-Hearing Stipulation, paragraphs E10 and 11). Given such "circumstances," Intervenors contend that a patient, similarly situated as Ms. Castillo, would reasonably conclude from the delivery of the NICA brochure and the General Consent for Treatment form, that the brochure was given on behalf of the hospital and the attending physicians. (Hospital Proposed Final Order, paragraph 18) However, Intervenors do not suggest, and the proof does not support a conclusion that, the notice also disclosed, or compelled a conclusion that, the attending physicians were "participating physician[s]" in the Plan.

19. Here, contrary to Intervenors' contention, it must be resolved that the notice provided by the hospital did not satisfy the attending physicians' obligation. In so concluding, it is noted that the General Consent for Treatment form is clearly unrelated to NICA notice, and the duality of purpose

Intervenors contend the brochure was intended to serve, as notice for the hospital and the participating physicians, was not communicated to the patient. Moreover, a reading of the brochure would not, absent speculation, lead one to believe the brochure was also given on behalf of the physicians, and the brochure did not inform the patient that any physician was a "participating physician" in the Plan. Indeed, the brochure simply stated:

> You are eligible for this protection if your doctor is a participating physician in the Association. Membership means that your doctor has purchased this benefit for you in the event that your child should suffer a birth-related neurological injury, which qualifies under the law. (Emphasis added)

Consequently, although joint notice may have been the intention of the hospital, and the expectation of the attending physicians, the notice provided was inadequate to achieve that purpose.[6]

CONCLUSIONS OF LAW

Jurisdiction

21. 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

22. 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.

23. "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.

24. In this case, it has been established that the physicians who provided obstetrical services at Lievens' birth were "participating physician[s]," and that Lievens suffered a "birth-related neurological injury." Consequently, Lievens 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

25. 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 provisions of the Plan were satisfied. Tabb v. Florida Birth-Related Neurological Injury Compensation Association, 880 So. 2d

1253, 1260 (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 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.")

26. 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.

27. 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.

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 regardless of whether the circumstances precluded the patient making an effective choice of provider at the time notice was provided." Id. at 50. Accord Schur v. Florida Birth-Related Neurological Injury Compensation Association, 832 So. 2d 188, 192 (Fla. 1st DCA 2002)("This court in Athey established a bright-line rule requiring pre-delivery notice from each health care provider in order to preserve his or her NICA plan immunity.") Here, for reasons noted in the Findings of Fact, the hospital demonstrated that it complied with the notice provisions of the Plan, but the attending 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 Jennifer Castillo and Peter Borowiak, as parents and natural guardians of Lievens Borowiak, a minor, 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 who were required to give notice (Doctors Yasin and O'Sullivan) did not.

It is FURTHER ORDERED that the following benefits are awarded:

1. Since no monies are owing for past expenses, no award is made for expenses previously incurred. § 766.31(1)(a), Fla. Stat. As for future expenses, Respondent shall pay all future expenses as incurred. § 766.31(2), Fla. Stat.

2. Petitioners, Jennifer Castillo and Peter Borowiak, are awarded a lump sum of $100,000.00. § 766.31(1)(b), Fla. Stat.

3. Petitioners, Jennifer Castillo and Peter Borowiak, are awarded $8,321.44 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 the Stipulation and Joint Petition Between Petitioners and Respondent with Respect to the Claim Arising Out of Florida Birth-Related Neurological Injury Pursuant to Chapter 766, Florida Statutes (the Stipulation), filed January 27, 2005, is approved and the parties are directed to comply with the provisions thereof.

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 and the Stipulation filed January 27, 2005.

DONE AND ORDERED this 22nd day of March, 2005, 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 22nd day of March, 2005.

ENDNOTES

1/ With regard to Intervenors' Exhibit 7, the deposition of Jennifer Castillo, Petitioners reserved certain objections, and were directed to designate post-hearing, by page and line number, the questions and answers to which they had objection. (Transcript, pages 134 and 135) On March 14, 2005, Petitioners filed their objections to the following questions and answers: page 24, lines 8-25; page 25, lines 1-25; page 65, lines 12-25; page 66, lines 1-25; page 67, lines 1-4; page 72, lines 14-25; and page 73, lines 1-5. Upon review, it is resolved that such inquiry impermissibly invites conjecture. Drackett Products, Co. v. Blue, 152 So. 2d 463 (Fla. 1963). As importantly, given the objective standard established by the court in Athey, such line of inquiry is not relevant. See Braniff v. Galen of Florida, Inc., 694 So. 2d 46, 50 (Fla. 1st DCA 1997), approved, Galen of Florida, Inc. v. Braniff, 696 So. 2d 308 (Fla. 1997), (The giving of notice is a condition precedent to the health care provider invoking the Plan as the patient's exclusive remedy. "In short, we reject the notion that a NICA health care provider can ignore the notice requirement and then assert NICA exclusivity to defeat a civil action."); Board of Regents v. Athey, 694 So. 2d 46, 50 (Fla. 1st DCA 1997), ("We believe the use of a bright-line rule . . . will be most in keeping with the legislative intent of the notice requirement in section 766.16.

We hold 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 regardless of whether the circumstances precluded the patient making an effective choice of provider at the time notice was provided . . . . [Stated otherwise, h]aving failed to take advantage of a reasonable opportunity to provide pre-delivery notice, a health care provider will not be heard to complain that notice, if given, would have been ineffective.") Accord Schur v. Florida Birth-Related Neurological Injury Compensation Association, 832 So. 2d 188, 192 (Fla. 1st DCA 2002)("This court in Athey establish a bright-line rule requiring pre-delivery notice from each health care provider in order to preserve his or her NICA plan immunity.") Consequently, Petitioners' objections are sustained.

2/ Subsequent amendments to paragraph (b) of subsection (1) of Section 766.31, Florida Statutes, are not applicable to this proceeding. Ch. 2001-277, § 150, Laws of Fla.; Ch. 2003-416, Laws of Fla.

3/ The first stage of "labor" is commonly understood to begin "with the onset of regular uterine contractions " Dorland's Illustrated Medical Dictionary, Twenty-eight Edition (1994).

4/ Ms. Castillo's membranes were artificially ruptured at 12:51 p.m., April 17, 2001. (Petitioners' Exhibit 5A, page 153)

5/ According to the proof, all University of Miami obstetricians were participating physicians in the Plan, and whether they gave notice of their participation depended on whether they were functioning as a private practitioner, when the patient would be seen at a University of Miami Medical Group office, or as an attending physician at Jackson Memorial Hospital. When functioning as a private physician, the patient was always provided a copy of the NICA brochure on her initial visit, was advised the physicians were participating physicians in the Plan, and signed a form acknowledging receipt of the brochure. As an attending physician at Jackson Memorial Hospital, the physicians never gave notice, and relied on the hospital to give notice on their behalf. Usually, it was expected notice would be given on the patient's first prenatal visit to a trust facility or upon admission to the hospital. (Intervenors' Exhibits 8, 9, and 10)

6/ In their Proposed Final Order, at paragraph 20, Intervenors contend, alternately, that "even if the Petitioners' contention

that the participating physicians failed to satisfy the notice requirements was correct, such failure should not preclude NICA exclusivity under the circumstances." The predicate for their contention was stated, as follows:

> The purpose of the notice requirement 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." Galen of Florida v. Braniff, 696 So. 2d 308, 309-10 (Fla. 1997); Schur v. Florida Birth-Related Neurological, 832 So. 2d 188, 192 (Fla. 1st DCA 2002); Turner v. Hubrich, 656 So. 2d 970, 971 (Fla. 5th DCA 1995). Ms. Castillo, however, testified several times under oath that she would have accepted care and treatment from her physicians regardless of whether they were participants in the NICA Plan . . . . [Consequently, Intervenors conclude] the purpose of the notice requirements was fulfilled.

Intervenors' alternative contention is rejected. See Endnote 1, and cases cited therein.

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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.