STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARIBENNY DIANDERAS AND ARTURO DIANDERAS, individually, and as parents and natural guardians for ISABELLE DIANDERAS, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 04-3652N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
ADVENTIST HEALTH SYSTEM/SUNBELT, INC., d/b/a FLORIDA HOSPITAL; LOCH HAVEN OB/GYN GROUP; and NATASHA M. KNIGHT, M.D.,	)	
Intervenors.	)	

FINAL ORDER ON COMPENSABILITY AND NOTICE

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a hearing in the above-styled case on December 13 and 14, 2005, in Orlando, Florida.

APPEARANCES

For Petitioners: Scott McMillen, Esquire
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Orlando, Florida 32801

For Respondent: Stanley L. Martin, Esquire
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Tampa, Florida 33602

For Intervenors Adventist Health System/Sunbelt, Inc., d/b/a Florida Hospital; Loch Haven OB/GYN Group; and Natasha M. Knight, M.D.:

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STATEMENT OF THE ISSUES

1. Whether Isabelle Dianderas, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

2. If so, whether the hospital and the participating physician gave the patient notice, as contemplated by Section 766.316, Florida Statutes, or whether notice was not required because the patient had an "emergency medical condition," as defined by Section 395.002(9)(b), Florida Statutes, or the giving of notice was not practicable.

PRELIMINARY STATEMENT

On October 8, 2004, Maribenny Dianderas and Arturo Dianderas, individually, and as parents and natural

guardians of Isabelle Dianderas (Isabelle), a minor, filed a petition with the Division of Administrative Hearings (DOAH) to resolve whether Isabelle qualified for compensation under the Plan and, if so, whether the healthcare providers complied with the notice provisions of the Plan. More particularly, with regard to notice, the petition alleged:

> 5. Petitioners allege that they did not receive pre-delivery notice from Natasha M. Knight, M.D. or the hospital about the NICA Plan. Additionally or alternatively, Petitioners allege that any such notice that the hospital or Dr. Knight may allege they gave the Petitioners was inadequate as a matter of law because it failed to include a "clear and concise explanation of a patient's rights and limitations under the plan" as is required by Section 766.316, Florida Statutes.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition on October 8, 2004, and on January 14, 2005, following a number of extensions of time within which to do so, NICA responded to the petition and gave notice that it was of the view that the claim was compensable, and requested that an order be entered "finding that Petitioners' claim is compensable and enter an award of benefits, and for such further relief as . . . [the administrative law judge] deems just and appropriate."

Initially, a hearing was scheduled for June 28, 2005, to address all issues related to compensability, notice, and award.

However, at the parties' request, the hearing was continued, and ultimately held on December 13 and 14, 2005, and at Petitioners' request, the proceeding was bifurcated to address compensability and notice first, and to address an award, if any, in a separate proceeding. § 766.309(4), Fla. Stat. In the interim, Adventist Health System/Sunbelt, Inc., d/b/a Florida Hospital; Loch Haven OB/GYN Group; and Natasha M. Knight, M.D., were granted leave to intervene.

At hearing, Petitioners offered the testimony of Maribenny Dianderas and Arturo Dianderas, and proffered the testimony of Ronald Gilbert; Respondent offered the testimony of Michael Duchowny, M.D., and Donald Willis, M.D.; and Intervenors offered the testimony of Sally Ackley, Beverly Bailey, Iris Miranda (by publication of her deposition testimony), Natasha Knight, M.D., Cynthia Hall, R.N., and Kathleen Ohland. Joint Exhibits 1-6, Petitioners' Exhibits 1 and 2, and Intervenors' Exhibits 1A (pages 1 and 2), 1B (pages 1 and 2), and 2-6 were received into evidence. Intervenors' Exhibits 1A (page 3) and 1B (page 3) were marked for identification only.

The transcript of the hearing was filed March 1, 2006, and the parties were initially accorded 10 days from that date to file proposed orders. However, at Petitioners' request, and with Respondent's and Intervenors' agreement, the time for filing was extended to April 10, 2006. Respondent and

Intervenors elected to file such proposals, and they have been duly-considered.

FINDINGS OF FACT

Findings related to compensability

1. Maribenny Dianderas and Arturo Dianderas are the natural parents and guardians of Isabelle Dianderas, a minor. Isabelle was born a live infant on October 8, 2002, at Florida Hospital, a hospital located in Orlando, Florida, and her birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Isabelle's birth was Natasha M. Knight, M.D., who, at all times material hereto, was a "participating physician" 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(1) and 766.31(1), Fla. Stat.

4. Here, the proof is compelling, and uncontroverted, that Isabelle suffered an injury to the brain caused by oxygen

deprivation in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital that rendered her permanently and substantially mentally and physically impaired. (Joint Exhibits 1-4; Transcript, pages 125-145). Consequently, the record demonstrated that Isabelle suffered a "birth-related neurological injury" and, since obstetrical services were provided by a "participating physician" at birth, the claim is compensable. §§ 766.309(1) and 766.31(1), Fla. Stat.

The notice issue

5. While the claim qualifies for coverage under the Plan, Petitioners would prefer to pursue their civil remedies, and avoid a claim of Plan immunity by the healthcare providers in a civil action. Therefore, Petitioners have averred, and requested a finding that, the hospital and the participating physician who delivered obstetrical services at Isabelle's birth, failed to comply with the notice provisions of the Plan. See 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 in the plan a reasonable time prior to delivery.") Consequently,

it is necessary to resolve whether the notice provisions of the Plan were satisfied.[1]

The notice provisions of the Plan

6. At all times material hereto, Section 766.316, Florida Statutes, prescribed the notice requirements 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.

7. 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[2] or rupture of the membranes.

8. 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.").

The NICA brochure

9. Responding to Section 766.316, Florida Statutes, NICA developed a brochure (as the "form" prescribed by the Plan), titled "Peace of Mind for an Unexpected Problem" (the NICA brochure), which contained an explanation of a patient's rights and limitations under the Plan, and distributed the brochure to participating physicians and hospitals so they could furnish a copy of it to their obstetrical patients. (Joint Exhibit 5).

Pertinent to this case, the NICA brochure applicable to Mrs. Dianderas' prenatal care and Isabelle's birth provided:

> The birth of a baby is an exciting and happy time. You have every reason to expect that the birth will be normal and that both mother and child will go home healthy and happy.
>
> Unfortunately, despite the skill and dedication of doctors and hospitals, complications during birth sometimes occur. Perhaps the worst complication is one which results in damage to the newborn's nervous system - called a "neurological injury." Such an injury may be catastrophic, physically, financially and emotionally.
>
> In an effort to deal with this serious problem, the Florida Legislature, in 1988, passed a law which created a Plan that offers an alternative to lengthy malpractice litigation processes brought about when a child suffers a qualifying neurological injury at birth. The law created the Florida Birth-Related Neurological Injury Compensation Association (NICA).
>
> EXCLUSIVE REMEDY
>
> The law provides that awards under the Plan are exclusive. This means that if an injury is covered by the Plan, the child and its family are not entitled to compensation through malpractice lawsuits.
>
> CRITERIA AND COVERAGE
>
> Birth-related neurological injuries have been defined as an injury to the spinal cord or brain of a live-born infant weighing at least 2500 grams at birth. In the case of multiple gestation, the live birth weight is 2000 grams for each infant. The injury must have been caused by oxygen deprivation or mechanical injury, which occurred in the

course of labor, delivery or resuscitation in the immediate post delivery period in a hospital. Only hospital births are covered.

The injury must have rendered the infant permanently and substantially mentally and physically impaired. The legislation does not apply to genetic or congenital abnormalities. Only injuries to infants delivered by participating physicians, as defined in s. 766.302(7), Florida Statutes, are covered by the Plan.

COMPENSATION

Compensation may be provided for the following:

Actual expenses for necessary and reasonable care, services, drugs, equipment, facilities and travel, excluding expenses that can be compensated by state or federal government or by private insurers.

In addition, an award, not to exceed $100,000 to the infant's parents or guardians.

Funeral expenses are authorized up to $1,500.

Reasonable expenses for filing the claim, including attorney's fees.

NICA is one of only two (2) such programs in the nation, and is devoted to managing a fund that provides compensation to parents whose child may suffer a qualifying birth-related neurological injury. The Plan takes the "No-Fault" approach for all parties involved. This means that no costly litigation is required and the parents of a child qualifying under the law who file a claim with the Division of Administrative Hearings may have all actual expenses for medical and hospital care paid by the Plan.

> You are eligible for this protection if your doctor is a participating physician in the NICA Plan. If your doctor is a participating physician, that means that your doctor has purchased this benefit for you in the event that your child should suffer a birth-related neurological injury, which qualifies under the law. If your health care provider has provided you with a copy of this informational form, your health care provider is placing you on notice that one or more physician(s) at your health care provider participates in the NICA Plan.

(Joint Exhibit 5).

10. Here, Petitioners contend the brochure prepared by NICA was insufficient to satisfy the notice provision of the Plan (which requires that the form "include a clear and concise explanation of a patient's rights and limitations under the plan"), because it failed to include an explanation of the civil remedies a patient would forego if she chose a participating provider. (Transcript, pages 11-13). However, neither Galen of Florida, Inc. v. Braniff, 696 So. 2d 308 (Fla. 1997), the authority relied upon by Petitioners, nor the notice provision of the Plan, place such an obligation on NICA in the formulation of the brochure.

11. In Galen, supra, the Court had for consideration the following question certified to be of great public importance:

> WHETHER SECTION 766.316, FLORIDA STATUTES (1993), REQUIRES THAT HEALTH CARE PROVIDERS GIVE THEIR OBSTETRICAL PATIENTS PRE-DELIVERY NOTICE OF THEIR PARTICIPATION IN THE FLORIDA BIRTH RELATED NEUROLOGICAL INJURY

> COMPENSATION PLAN AS A CONDITION PRECEDENT TO THE PROVIDERS' INVOKING NICA AS THE PATIENTS' EXCLUSIVE REMEDY?

Id. at 308. In answer to the certified question, the Court held:

> . . . as a condition precedent to invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan a reasonable time prior to delivery.

Id. at 309. The Court reasoned, as follows:

> Section 766.316 provides in pertinent part:
>
> Each hospital with a participating physician on its staff and each participating physician . . . under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients thereof 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.
>
> Without exception the district courts of appeal that have addressed the issue have read section 766.316 to require pre-delivery notice . . . .
>
> We agree with the district courts that the only logical reading of the statute is that before an obstetrical patient's remedy is limited by the NICA plan, the patient must be given pre-delivery notice of the health care provider's participation in the plan. Section 766.316 requires that obstetrical patients be given notice "as to the limited no-fault alternative for birth-related

neurological injuries." That notice must "include a clear and concise explanation of a patient's rights and limitations under the plan." § 766.316. This language makes clear that the purpose of the notice is to give an obstetrical patient an opportunity to make an informed choice between using a health care provider participating in the NICA plan or using a provider who is not a participant and thereby preserving her civil remedies. Turner v. Hubrich, 656 So. 2d 970, 971 (Fla. 5th DCA 1995). In order to effectuate this purpose a NICA participant must give a patient notice of the "no-fault alternative for birth-related neurological injuries" a reasonable time prior to delivery, when practicable.

Our construction of the statute is supported by its legislative history. Florida's Birth-Related Neurological Injury Compensation Plan was proposed by the 1987 Academic Task Force for Review of the Insurance and Tort Systems. In its November 6, 1987 report, the Task Force recommended adoption of a no-fault compensation plan for birth-related neurological injuries similar to the then newly enacted Virginia plan (1987 Va. Acts Ch. 540). Academic Task Force for Review of the Insurance and Tort Systems, *Medical Malpractice Recommendations* 31 (Nov. 6, 1987)(hereinafter Task Force Report).

However, the Task Force was concerned that the Virginia legislation did not contain a notice requirement and recommended that the Florida plan contain such a requirement. The Task Force believed that notice was necessary to ensure that the plan was fair to obstetrical patients[1] and to shield the plan from constitutional challenge.[2] The Task Force explained in its report:

> The Virginia statute does not require participating physicians and hospitals to give notice to obstetrical patients that

> they are participating in the limited no-fault alternative for birth-related neurological injuries. The Task Force recommends that health care providers who participate under this plan should be required to provide reasonable notice to patients of their participation. *This notice requirement is justified on fairness grounds and arguably may be required in order to assure that the limited no fault alternative is constitutional.*
>
> Task Force Report at 34 (emphasis added). Since Florida's NICA plan was the result of the Task Force's report, it is only logical to conclude that the plan's notice requirement was included in the Florida legislation as a result of this recommendation and therefore was intended to be a condition precedent to immunity under the plan.
>
> * * *
>
> Under our reading of the statute, in order to preserve their immune status, NICA participants who are in a position to notify their patients of their participation a reasonable time before delivery simply need to give the notice in a timely manner. In those cases where it is not practicable to notify the patient prior to delivery, pre-delivery notice will not be required.
>
> Whether a health care provider was in a position to give a patient pre-delivery notice of participation and whether notice was given a reasonable time before delivery will depend on the circumstances of each case and therefore must be determined on a case-by-case basis . . . .
>
> Accordingly, we answer the certified question as explained herein and approve the decision under review.

Id. at 309-311.

_____

[1] *The Task Force obviously believed that because not all health care providers are required to participate in the NICA plan, fairness requires that the patient be made aware that she has limited her common law remedies by choosing a participating provider.*

[2] *The Task Force also must have recognized that failure to require notice would open the plan up to constitutional attack. For example, the Braniffs argue that if pre-delivery notice is not a condition precedent to immunity under the plan, patients will be deprived of their common law remedies without due process. However, because of our resolution of the notice issue, we need not reach the merit of this procedural due process challenge.*

12. Notably, the Court was not asked to resolve, and did not resolve, whether the obligation to provide a form that "include[d] a clear and concise explanation of a patient's rights and limitations under the plan," required an explanation of the civil remedies a patient would forego if she chose a participating provider. Moreover, the unambiguous language the Legislature chose evidences no such intention. Rather, the Plan requires that the form "include a clear ['[f]ree from doubt or confusion'][3] and concise ['[e]xpressing much in few words; succinct'][4] explanation ['the process of making plain or comprehensible'][5] of the patients' rights and limitations under the plan," and does not include an obligation to explain a patient's potential civil remedies at common law or otherwise.

Rinella v. Abifaraj, 908 So. 2d 1126, 1127 (Fla. 1st DCA 2005)("Where the plain and ordinary meaning of statutory language is unambiguous, we cannot construe the statute in a manner that would extend, modify, or limit its express terms or its reasonable and obvious implications."); Seagrave v. State, 802 So. 2d 281, 287 (Fla. 2001)(quoting Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999))("[I]t is a basic principle of statutory construction that Courts 'are not at liberty to add words to statutes that are not placed there by the Legislature.'"); Crutcher v. School Board of Broward County, 834 So. 2d 228, 232 (Fla. 1st DCA 2002)("When a court construes a statute, its goal is to ascertain legislative intent, and if the language of the statute under scrutiny is clear and unambiguous, there is no reason for construction beyond giving effect to the plain meaning of the statutory words."); American Bankers Life Assurance Company of Florida v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968)("Words of common usage should be construed in their plain and ordinary sense."). The brochure prepared by NICA satisfies the legislative mandate. Jackson v. Florida Birth-Related Neurological Injury Compensation Association, 31 Fla. L. Weekly D8676 (Fla. 5th DCA March 24, 2006)("The ALJ properly recognized that NICA developed a pamphlet titled 'Peace of Mind for an Unexpected Problem.' The pamphlet contains a clear and concise explanation of a patient's rights and

limitations under the NICA plan, as is required by the terms of the statute.")(petition for rehearing pending).

Findings related to the participating physician and notice

13. Mrs. Dianderas received her prenatal care at Loch Haven OB/GYN Group, Orlando, Florida, a group practice comprised of a number of physicians, including Natasha M. Knight, M.D., and dedicated to the practice of obstetrics and gynecology. At the time, Loch Haven, like Florida Hospital, was owned by Adventist Health System/Sunbelt, Inc.; however, patients, including Mrs. Dianderas, were not noticed, by signage or otherwise, of the relationship the business entities shared.

14. On February 14, 2002, Mrs. Dianderas presented to Loch Haven for her initial visit. At the time, consistent with established practice for new obstetric patients, Mrs. Dianderas was given a copy of the NICA brochure, together with a Notice to Obstetric Patient (to acknowledge receipt of the NICA brochure). The Notice to Obstetric Patient provided, as follows:

Notice to Obstetric Patient

> I have been furnished with information by the Loch Haven OB/GYN as prepared by the Florida Birth-Related Neurological Injury Compensation Association and have been advised that the physicians of the Loch Haven OB/GYN Group are participating members in the Florida Birth-Related Neurological Injury Compensation Association. This Plan provides that certain limited compensation is available in event certain birth-related

neurological injuries may occur during labor, delivery or post-delivery resuscitation, irrespective of fault. For specifics on the Plan, I understand I can contact the Florida Birth-Related Neurological Injury Compensation association (NICA), Post office Box 14567, Tallahassee, Florida 32317-04567, (904) 488-8191 or 1-800-3982129: I further acknowledge that I have received a copy of the form brochure prepared and furnished by the Florida Birth-Related Neurological Injury Compensation Association.

_____

Patient Signature Date

_____

Print Name

_____

Social Security Number D.O.B.

_____

Witness Date

Mrs. Dianderas completed the form, by providing the requested information (name, social security number, and date of birth), and then signed and dated the form. Beverly Bailey, the medical assistant who saw Mrs. Dianderas on her initial visit, witnessed her signature.

15. Here, Mrs. Dianderas acknowledges she signed the Notice to Obstetric Patient, but has no current recollection of having done so, and has no current recollection of whether she was or was not given a copy of the NICA brochure. (Transcript, pages 39-41 and 54-58). Moreover, Petitioners candidly concede,

they can offer no proof to rebut the presumption that the notice provisions were met by the participating physician. (Transcript, pages 9, 55, 56, and 278). Consequently, since the NICA brochure complied with the requirements of Section 766.316, Florida Statutes, the participating physician satisfied the notice provisions of the Plan. However, notwithstanding the common ownership of Loch Haven and Florida Hospital by Adventist, they were separate business entities, and the notice by Loch Haven (on behalf of its physicians) did not satisfy Florida Hospital's obligation to give notice. § 766.316, Fla. Stat. ("Each hospital with a participating physician on its staff and each participating physician . . . shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries."); Board of Regents v. Athey, 694 So. 2d 46, 49 (Fla. 1st DCA 1997)("Under section 766.316 . . . 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.)

Findings related to the hospital and notice

16. To support an inference that it complied with the notice provisions of the Plan, the hospital offered proof of the

practice it followed to provide a copy of the NICA brochure and Notice to Obstetric Patient form (acknowledgment form)[6] to each patient who presented to labor and delivery.[7] See Tabb v. Florida Birth-Related Neurological Injury Compensation Association, 880 So. 2d 1253 (Fla. 1st DCA 2004). Here, Mrs. Dianderas presented to the labor and delivery on two occasions (September 29, 2002, and October 7, 2002), during which the hospital had an opportunity to provide notice, and during which the hospital claims it provided notice.[8]

17. With regard to Mrs. Dianderas' first admission, the proof demonstrates that at or about 7:25 p.m., Sunday, September 29, 2002, Mrs. Dianderas, with an estimated delivery date of October 14, 2002, and the fetus at 37+ weeks' gestation, presented to labor and delivery, at Florida Hospital, with complaints of contractions. At the time, the finance window was closed, as it had been since 11:00 p.m., Friday, and would be until 6:00 a.m., Monday, and Mrs. Dianderas was admitted to the triage unit by Cynthia Hall, R.N., the on-duty triage nurse. Notably, Nurse Hall, who was responsible for completing all paperwork associated with Mrs. Dianderas' admission, attended Mrs. Dianderas from 7:25 p.m., until her discharge (after it was resolved Mrs. Dianderas was not in labor) at 12:19 a.m., September 30, 2002, except for a brief period (between

9:17 p.m., and 10:20 p.m.) when Mrs. Dianderas was taken for an ultrasound.

18. With regard to notice, Nurse Hall, who routinely works weekends, testified that it was her practice, during her initial evaluation in triage, to provide the patient a copy of the NICA brochure, as well as an acknowledgment form and Consent to Treatment form to complete and sign. According to Nurse Hall, the forms were routinely signed in her presence, were routinely witnessed by her, and she routinely made a photocopy of the acknowledgment form and placed it on the finance clerk's desk (that was adjacent to her desk), so finance could update their computer records on Monday to reflect that the NICA brochure had been given. The original documents, including the original acknowledgment form, were placed in the patient's chart.

19. Here, Nurse Hall is confident she followed her routine, and Mrs. Dianderas' chart does include a Consent to Treatment form signed by Mrs. Dianderas and witnessed by Nurse Hall. However, the chart does not include a signed acknowledgment form, as it should if Nurse Hall followed her routine practice, and she could offer no explanation for its absence. Also inexplicably, the finance records related to this visit (Intervenors' Exhibit 1A, pages 1 and 2), reveal that at 8:48 p.m. (20:48), September 29, 2002, a finance clerk identified as "RLCEE8" updated Mrs. Dianderas' record to reflect

that a copy of the NICA brochure had been provided. Notably, according to Nurse Hall, who was in a position to know, the finance office (in which she would have placed a copy of the acknowledgment form) was not staffed at the time, and she could not explain those entries (which she did not and was not authorized to make). Moreover, at hearing, the hospital made no effort to identify "RLCEE8" or to otherwise explain how these entries occurred. Consequently, given such irregularities it cannot be inferred, with any sense of confidence, that the hospital or Nurse Hall's routine was followed during Mrs. Dianderas' September 29, 2002, admission, or that she was provided a copy of the NICA brochure.

20. With regard to Mrs. Dianderas' second admission, which ultimately led to Isabelle's birth, the proof demonstrates that at 2:00 p.m., October 7, 2002, Mrs. Dianderas, with the fetus at 39 weeks' gestation, presented to labor and delivery, at Florida Hospital, on referral from her obstetrician for a nonstress test (NST), secondary to decreased fetal movement. At the time, the finance window was open, and Iris Miranda, a financial services representative was on duty.

21. With regard to notice, Ms. Miranda testified (by publication of her deposition) regarding the routine she would have followed when Mrs. Dianderas presented to the finance window that afternoon. According to Ms. Miranda, that routine

would have included giving Mrs. Dianderas a Consent for Treatment form to sign, as well as a copy of the NICA brochure and an acknowledgment form to sign and give to the nurse in labor and delivery.

22. Here, Ms. Miranda is confident she followed her routine, and Mrs. Dianderas' chart does include a Consent to Treatment form signed by Mrs. Dianderas and witnessed by Ms. Miranda. Moreover, the finance department's records (Intervenors' Exhibit 1B, pages 1 and 2) include a computer entry at 2:03 p.m. (14:03), October 7, 2002, by Ms. Miranda (identified as "IVM76B") noting that a NICA brochure was provided. However, again the chart does not include a signed acknowledgment form, as it should if the hospital's routine was followed, and no compelling explanation for its absences was presented.[9] Consequently, given the lack of a reasonable explanation for the irregularities that have been shown regarding the finance department's computer entries, as well as the absence of the acknowledgment form, it cannot be inferred with any sense of confidence that the hospital's routine was followed during Mrs. Dianderas' admission of October 7, 2002, or that Mrs. Dianderas was given a NICA brochure

23. Finally, with regard to the hospital and the notice issue, it is noted that on presentation to Florida Hospital at 2:00 p.m., October 7, 2002, Mrs. Dianderas was not in labor, and

insofar as the record reveals she was not thereafter in labor until sometime after her membranes were ruptured, at 4:55 p.m. More particularly, there was no "evidence of the onset and persistence of uterine contractions or rupture of the membranes" from 2:00 p.m., until 4:55 p.m., October 7, 2002. Moreover, there was no proof that, upon admission or until her membranes ruptured, "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 4:55 p.m., when her membranes were ruptured, Mrs. Dianderas 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.

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 for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate

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

27. In this case, it has been established that the physician who provided obstetrical services at Isabelle's birth was a "participating physician," and that Isabelle suffered a "birth-related neurological injury." Consequently, Isabelle qualifies for coverage under the Plan, and Petitioners are entitled to an award of compensation. §§ 766.309 and 766.31, Fla. Stat. However, in this case, the issues of compensability and notice, and issues related to an award were bifurcated. Accordingly, absent agreement by the parties, and subject to the approval of the administrative law judge, a hearing will be necessary to resolve any disputes regarding the amount and manner of payment of "an award to the parents . . . of the infant," the "[r]easonable expenses incurred in connection with the filing of . . . [the] claim . . ., including reasonable attorney's fees," and the amount owing for "expenses previously incurred." § 766.31(1), Fla. Stat. Nevertheless, since the notice of intent to initiate civil litigation related to Isabelle's birth was mailed on or after September 15, 2003, the determinations of compensability and notice constitute final

agency action which is subject to appellate court review.[10] § 766.309(4), Fla. Stat.; Ch. 2003-416, § 77, Laws of Fla.

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 by the healthcare providers. As the proponent of the immunity claim, the burden rested on the healthcare providers to demonstrate, more likely than not, that the notice provisions of the Plan were satisfied. See Tabb v. Florida Birth-Related Neurological Injury Compensation Association, 880 So. 2d 1253, 1260 (Fla. 1st DCA 2004)("The ALJ . . . properly found that '[a]s the proponent of the issue, the burden rested on the health care provider to demonstrate, more likely than not, that the notice provisions of the Plan were satisfied.'"); 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.") Here, for reasons appearing in the Findings of Fact, the participating physician

demonstrated that she complied with the notice provision of the Plan, but the hospital did not.

CONCLUSION

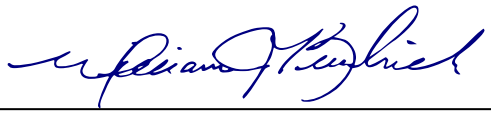
Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the claim for compensation filed by Maribenny Dianderas and Arturo Dianderas, individually, and as parents and natural guardians of Isabelle Dianderas, a minor, be and the same is hereby approved.

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

It is FURTHER ORDERED that the parties are accorded 30 days from the date of this order to resolve, subject to approval by the administrative law judge, the amount and manner of payment of an award to the parents, the reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees, and the amount owing for expenses previously incurred. If not resolved within such period, the parties shall so advise the administrative law judge, and a hearing will be scheduled to resolve such issues. Once resolved, an award will be made consistent with Section 766.31, Florida Statutes.

DONE AND ORDERED this 8th day of May, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of May, 2006.

ENDNOTES

1/ 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 Gugelmin v. Division of Administrative Hearings, 815 So. 2d 764 (Fla. 4th DCA 2002); Behan v. Florida Birth-Related Neurological 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, 893 So. 2d 636 (Fla. 2d DCA 2005)(same). See also Senate Bill (SB) 542, approved by the Governor May 2, 2006, which provided in pertinent part, as follows:

> Section 1. Paragraph (d) is added to subsection (1) of section 766.309, Florida Statutes, to read:
>
> 766.309 Determination of claims; presumption; findings of administrative law judge binding on participants.--
>
> (1) The administrative law judge shall make the following determinations based upon all available evidence:
>
> (d) Whether, if raised by the claimant or other party, the factual determinations regarding the notice requirements in s. 766.316 are satisfied. The administrative law judge has the exclusive jurisdiction to make these factual determinations.
>
> Section 2. It is the intent of the Legislature that the amendment to s. 766.309, Florida Statutes, contained in this act, clarifies that since July 1, 1998, the administrative law judge has had the exclusive jurisdiction to make factual determinations as to whether the notice requirements in s. 766.316, Florida Statutes, are satisfied. [Words underlined are additions.]

2/ The first stage of "labor" is commonly understood to "begin[] with the onset of regular uterine contractions." Dorland's Illustrated Medical Dictionary, 28th Edition, 1994. "Regular," is commonly understood to mean "[o]ccurring at fixed intervals, periodic." The American Heritage Dictionary of the English Language, New College Edition (1979). Similarly, "persistent," as that term is used in Section 395.002(9)(b)3, Florida Statutes, is commonly understood to mean "[i]nsistently repetitive or continuous." Id.

3/ See "clear," The American Heritage Dictionary of the English Language, New College Edition (1979).

4/ See "concise," Id.

5/ See "explanation," Id.

6/ The acknowledgment form used by the hospital provided:

NOTICE TO OBSTETRIC PATIENT
Pursuant to Florida Statute 766.316

I have been furnished with information by Florida Hospital that was prepared by the Florida Birth Related Neurological Injury Compensation Association (NICA). Under the Association's NICA program, certain limited compensation is available in the event that certain neurological injury may occur to my infant during labor, delivery or resuscitation. I have also been informed that Florida Hospital, its related or affiliated organizations, and their employed physicians are participants in the NICA program.

I acknowledge and understand that my personal physician, or an on-call physician who [sic] I have been assigned to, may or may not participate in the NICA program. I understand that I may seek clarification from my physician as to his/her participation in the NICA program. I understand it is my responsibility to discuss this with my physician.

For specifics on the program, I understand that I can contact the Florida Birth Related Neurological Compensation Association (NICA), 1435 East Piedmont Drive, Suite 101, Tallahassee, Florida 32312 (904) 488-8191, which is also listed in the NICA brochure. I further acknowledge that I have received a copy of the NICA brochure called "Peace of Mind for an Unexpected Problem" from Florida Hospital prepared by NICA.

_____/_____ _____
Date Time Patient/Legally Authorized Person Signature

_____ _____
Witness Patient's Name Printed

(Joint Exhibit 6).

7/ Pertinent to a resolution of the notice issue, is an understanding of the physical layout of the labor and delivery area, as well as an understanding of two differing circumstances under which notice may be provided at labor and delivery, and by whom.

Regarding the physical layout of the labor and delivery area, the proof demonstrates that the area includes an anteroom or waiting area, with a registration window (also referred to as the finance window) that, during normal business hours, is staffed by a financial services representative (also referred to as a finance clerk or an admissions clerk during the course of this proceeding). The finance window looks into a small office, occupied by the finance clerk, which is actually in labor and delivery and abuts the office of the triage nurse. Entrance to labor and delivery is gained through a door in the waiting area, when admitted by clinical staff.

The circumstances under which notice is provided, and by whom, is two-fold. First, during normal business hours, and absent an emergency, the finance clerk will greet the patient, alert clinical staff to her needs, and (under the hospital's practice) provide the patient a demographics form to complete, a Consent to Treatment and Authorizations and Guarantee form (Consent to Treatment form) to sign, a copy of the NICA brochure and a copy of the acknowledgment form to complete. However, the finance clerk does not insist that the patient sign the acknowledgment form in her or his presence, but directs the patient to the waiting area, where she is told to sign the form after she has read the brochure, and to give the form to the nurse when she is called into labor and delivery. Under the hospital's practice, the completed acknowledgment form is to be placed and retained in the patient's chart.

On those occasions when the finance window is closed, and no finance clerk is on duty, such as weekends (from 11:00 p.m., Friday, until 6:00 a.m., Monday), clinical staff are required to complete the additional paperwork (that would otherwise have been done by the finance clerk), after the patient is received in labor and delivery. That paperwork (under the hospital's practice) includes a brief demographic form, the Consent to Treatment form, the provision of the NICA brochure, and the completion of the acknowledgment form. Again, the original acknowledgment form is to be placed and retained in the patient's chart.

8/ Petitioners also offered proof that Mrs. Dianderas was at the hospital on two prior occasions during her pregnancy with Isabelle, and was not provided notice. On one such occasion, Mrs. Dianderas had a tour of the obstetrical unit in connection with her birthing classes, but the circumstances of that visit were not further described and it cannot be resolved whether her presence on that occasion provided a reasonable opportunity for the hospital to give notice. On another occasion, Mrs. Dianderas preregistered at the hospital, and it is reasonable to infer the hospital had a meaningful opportunity to provide notice at that time, but failed to do so. However, such failure was inconsequential, since whether notice was given on September 29, 2002, or October 7, 2002, is dispositive of the notice issue with regard to the hospital.

9/ Apparently, the hospital is of the view that the absent forms do not evidence a breakdown in routine, but simply a loss of the forms or, in the case of Mrs. Dianderas' October 7, 2002, admission, that Mrs. Dianderas failed to give the nurse the signed acknowledgment form. However, if the practice was routine, one would expect the nurse to request the form when Mrs. Dianderas entered on October 7, 2002 (since the form was required and had to be placed in the patient's chart), and it is unlikely such an important form would be unaccounted for on one occasion, much less on two occasions. Rather, a more likely explanation, given that Mrs. Dianderas evidenced no reluctance to sign any form the hospital presented to her, is that neither the NICA brochure nor the acknowledgment form was provided.

10/ Transcript, pages 5 and 6, wherein the parties stipulated that the notice of intent was mailed on May 6, 2004.

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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.