STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JANELL COBLE AND DAVID COBLE, AS NATURAL PARENTS AND LEGAL GUARDIANS OF JORY COBLE, A MINOR, AND INDIVIDUALLY,

Petitioners,

vs.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,

Respondent,

and

WELLINGTON REGIONAL MEDICAL CENTER, INC. and OB/GYN SPECIALISTS OF THE PALM BEACHES,

Intervenors.

Case No. 06-3883N

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 April 4, 2007, by video teleconference, with sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

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

2. If so, whether the hospital provided the patient notice, as contemplated by Section 766.316, Florida Statutes, or whether any failure to give notice was excused because the patient had an emergency medical condition, as defined in

Section 395.002(8)(b), Florida Statutes, or the giving of notice was not practicable.

3. Whether "the NICA Act is in and of itself, unconstitutional in general and unconstitutional as it specifically is applied to the claim of the Petitioners"; whether "the composition of the NICA Board of Directors is, on its face, evidence of an unconstitutional deprivation of due process and access to the Courts"; whether "the NICA Statute is unconstitutional because it does not provide pain and suffering to Janell Coble and David Coble"; and whether "the $100,000.00 cap on non-economic damages is a violation of equal access to the Courts, due process and patently inadequate." (Joint Pre-Hearing Stipulation, Petitioners' Position.)

PRELIMINARY STATEMENT

On October 6, 2006, Janell Coble and David Coble, on behalf of and as parents and natural guardians of Jory Coble (Jory), a minor, and Janell Coble and David Coble, individually, filed a petition with the Division of Administrative Hearings (DOAH) to resolve whether Jory qualified for compensation under the Plan and, if so, whether the hospital and the participating physician complied with the notice provisions of the Plan. Additionally, the petition, and ultimately the parties' Joint Pre-Hearing Stipulation, raised the constitutional issues noted in the Statement of the Issues.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on October 10, 2006, and on December 20, 2006, following an

extension 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 a hearing be scheduled to resolve the issue. In the interim, OB/GYN Specialists of the Palm Beaches, as the employer of the participating physician (Steven J. Fern, M.D.) who delivered obstetrical services at Jory's birth, was accorded leave to intervene.

Given that the petition specifically denied the claim fell "within the parameters of the NICA statute," a hearing was scheduled for April 4, 2007, to address issues related to compensability and notice, and to afford the parties an opportunity to make a record with regard to the constitutional issues that had been raised.

At the commencement of the hearing, Petitioners withdrew their contention that Dr. Fern and OB/GYN Specialists of the Palm Beaches failed to give notice. (Transcript, pages 10-12.) Consequently, the only issue regarding notice that remained pending related to the hospital.

At hearing, Petitioners' Exhibit 1, Respondent's Exhibits 1-3, Wellington Regional Medical Center's (Hospital's) Exhibits 1 and 2, and OB/GYN Specialists of the Palm Beaches' (OB/GYN's) Exhibit 1, were received into evidence. OB/GYN Specialists of the Palm Beaches called Mary Brown as a witness, and Respondent's Motion to Take Official Recognition, filed May 30, 2007, was granted. (Transcript, page 20; Order, dated April 4, 2007.)

By their Joint Pre-Hearing Stipulation, filed March 20, 2007, the parties stipulated to the following facts:

1. That the Petitioners, Janell Coble and David Coble, are the parents and natural guardian of Jory Coble.

2. The physician providing obstetric services at birth was Steven J. Fern, M.D., an employee of OB/GYN Specialists of the Palm Beaches.

3. That Steven J. Fern, M.D. was a participating physician in NICA in 2004.

4. The physician[s] providing obstetrical services prior to Janell Coble going into labor were Steven Fern, M.D., and Julie Pass, M.D., both employees of OB/GYN Specialists of the Palm Beaches.

5. That Julie Pass, M.D. was a participating physician in NICA in 2004.

6. Pursuant to §766.309(1)(B), Fla. Stat., obstetrical services delivered by a participating physician in the course of labor, delivery or resuscitation in the immediate postdelivery period in a hospital.

7. That Jory Coble was born at Wellington Regional Medical Center on February 18, 2004.

> 8. That obstetrical services were delivered by NICA participating physician, Steven J. Fern, M.D., in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital.
>
> 9. That the injury claimed is a birth-related neurological injury as defined by the NICA plan.
>
> 10. The circumstances surrounding Janell Coble's presentation to Wellington Regional Medical Center and the labor and delivery of Jory Coble at Wellington Regional Medical Center on February 18, 2004 constituted an emergency medical condition as defined by Fla. Stat. §395.002(9)(b) and notice was not required to be given to Janell Coble at that time.
>
> 11. Wellington Regional Medical Center has made all payments for all assessments as required by Fla. Stat. §766.314 and, as such, Wellington Regional is entitled to any and all protections of the NICA law in the event the Court rules that Jory Coble's injuries are to be paid in accordance with the NICA plan.

By their Supplemental Stipulation, filed April 5, 2007, the parties stipulated to the following additional facts:

> 1. In January 2004, Janell Coble was provided pre-registration forms by Wellington Regional Medical Center for her labor and delivery of Jory Coble. Notice of the NICA plan was not provided to Janell Coble at that time.
>
> 2. At that time, Wellington Regional's procedure for providing notice of NICA to obstetrical patients was to do so closer to or at the time of admission. Due to the circumstances of Janell Coble's presentation to Wellington Regional Medical Center on

February 18, 2004, notice of the NICA plan was not provided.

The transcript of the hearing was filed April 18, 2007, and the parties were accorded 10 days from that date to file proposed orders. Respondent elected to file such a proposal and it has been duly-considered.

FINDINGS OF FACT

Findings related to compensability

1. Janell Coble and David Coble are the parents and natural guardians of Jory Coble, a minor. Jory was born a live infant on February 18, 2004, at Wellington Regional Medical Center, a hospital located in Wellington, Florida, and his birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Jory's birth was Steven J. Fern, M.D., an employee of OB/GYN Specialists of the Palm Beaches, 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 a 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 parties have stipulated, and the proof is otherwise compelling and uncontroverted, that Jory suffered an injury to the brain caused by oxygen deprivation during labor, delivery, or resuscitation in the immediate postdelivery period in the hospital, which rendered him permanently and substantially mentally and physically impaired. (Respondent's Exhibits 1-3.) Consequently, the record demonstrates that Jory 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 apparently prefer to pursue their civil remedies against the hospital, and avoid a claim of Plan immunity. Therefore, Petitioners have averred and requested a finding that the hospital 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 hospital complied with the notice provisions of the Plan. Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 948

So. 2d 705, 717 (Fla. 2007)([W]hen the issue of whether notice was adequately provided pursuant to section 766.316 is raised in a NICA claim, we conclude that the ALJ has jurisdiction to determine whether the health care provider complied with the requirements of section 766.316.") Accord, 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."); 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).

The notice provisions of the Plan

6. 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.

7. 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. (Exhibits 1 and 2 to Hospital Exhibit 1.)

Findings related to the hospital and notice

8. Here, it is undisputed the hospital never gave Mrs. Coble notice. It is also undisputed that "[t]he circumstances surrounding Janell Coble's presentation to Wellington Regional Medical Center and the labor and delivery of Jory Coble at Wellington Regional Medical Center on February 18, 2004, constituted an emergency medical condition as defined by Fla. Stat. § 395.002(9)(b) and notice was not required to be given to Janell Coble at that time." Finally, it is undisputed that on or about January 8, 2004, Mrs. Coble pre-registered at Wellington Regional Medical Center for the delivery of her child, and that she was not provided notice at that time.[1] According to the parties' Supplemental Stipulation, "[a]t the time, Wellington Regional's procedure for providing notice of NICA to obstetrical patients was to do so closer to or at the time of admission. [However,] [d]ue to the circumstances of Janell Coble's presentation to Wellington Regional Medical Center on February 18, 2004, notice of the NICA plan was not provided."[2]

CONCLUSIONS OF LAW

Jurisdiction

9. 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

10 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.

11. "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.

12. In this case, it has been established that the physician who provided obstetrical services at Jory's birth was a "participating physician," and that Jory suffered a "birth-related neurological injury." Consequently, Jory 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.

Notice

13. 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 hospital. As the proponent of the immunity claim, the burden rested on the hospital 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)("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.'"). 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.").

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

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

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

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

15. The Plan does not define "practicable." However, "practicable" is a commonly understood word that, as defined by Webster's dictionary, means "capable 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.").

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

> . . . the only logical reading of the statute is that before an obstetrical patient's remedy is limited by the NICA plan, the patient must be given pre-delivery notice of the health care provider's participation in the plan. Section 766.316 requires that obstetrical patients be given notice "as to the limited no-fault alternative for birth-related neurological injuries." That notice must "include a clear and concise explanation of a patient's rights and limitations under the plan." § 766.316. This language makes clear that the purpose of the notice is to give an obstetrical patient an opportunity to make an informed choice between using a health care provider participating in the NICA plan or using a provider who is not a participant and thereby preserving her civil remedies. Turner v. Hubrich, 656 So. 2d 970, 971 (Fla. 5th DCA 1995). In order to effectuate this purpose a NICA participant must give a patient notice of the "no-fault alternative for birth-related neurological injuries" a

> reasonable time prior to delivery, when practicable.

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

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

Id. at 311. Consequently, the Court concluded:

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

Id. at 309.

17. Here, it must be resolved that the hospital failed to comply with the notice provision of the Plan. In so concluding, it is noted that while the Legislature clearly expressed its intention in Section 766.316, Florida Statutes, that notice was not required when a patient presented with an "emergency medical condition," the Legislature did not absolve the health care provider from the obligation to give notice when the opportunity

was previously available. Northwest Medical Center, Inc. v. Ortiz, 920 So. 2d 781, 785 (Fla. 4th DCA 2006)(certifying conflict)("We do not read the statutory provision exempting notice in an emergency situation as covering those cases where the hospital has pre-admitted a patient for the very medical condition for which she is subsequently admitted in an emergency condition."); University of Miami v. Ruiz, 916 So. 2d 865, 870 (Fla. 3d DCA 2005)("Although we concur that the provision of notice is excused when the patient presents in an emergency medical condition, we find that, if a reasonable opportunity existed to provide notice prior to the onset of the emergency medical condition, the participating health care providers' failure to do so will not be excused and the participating health care providers will lose their NICA Plan exclusivity."); 933 So. 2d 523 (Fla. 2006), review granted; 948 So. 2d 723 (Fla. 2007), review dismissed. But see Orlando Regional Healthcare System, Inc. v. Alexander, 909 So. 2d 582, 586 (Fla. 5th DCA 2005)("We hold that the statute contains two distinct exemptions, each of which independently provides an exception to the pre-delivery notice requirement. As such, ORHS [the hospital] was excused from providing notice to Alexander [the patient] when she arrived at the ORHS under emergency conditions, and her previous visits to the hospital during her pregnancy did not negate this clear statutory exemption.").

Consequently, while the hospital was not required to give notice when Mrs. Coble presented on February 18, 2004, because she had an emergency medical condition, it nevertheless failed to comply with the notice provisions of the Plan because, although it had a reasonable opportunity to do so, it failed to give Mrs. Coble notice when she pre-registered.

The constitutional challenges to the Plan

18. Here, Petitioners have raised a number of constitutional challenges to the Plan. However, an administrative law judge does not have jurisdiction to consider or determine constitutional issues. Florida Hospital v. Agency for Health Care Administration, 823 So. 2d 844, 849 (Fla. 1st DCA 2002). Nevertheless, since Petitioners may challenge the constitutionally of the Plan on appeal, they have the right, as they have been accorded here, to build their record for appeal. Anderson Columbia and Commercial Risk Management, Inc. v. Brown, 902 So. 2d 838, 841 (Fla. 1st DCA 2005).

CONCLUSION

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

ORDERED that the claim for compensation filed by Janell Coble and David Coble, on behalf of and as parents and natural guardians of Jory Coble (Jory), a minor, and Janell Coble and David Coble, individually, be and the same is hereby approved.

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

It is FURTHER ORDERED that the parties are accorded 45 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, and a final order issued.

DONE AND ORDERED this 4th day of May, 2007, in Tallahassee, Leon County, Florida.

S

WILLIAM J. KENDRICK
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of May, 2007.

ENDNOTES

1/ The pre-registration forms provided Mrs. Coble included a "Center for Family Beginnings Important Information" sheet, a "Center for Family Beginnings Education Schedule," a list of "Pediatricians on staff at Wellington Regional Medical Center," and an information sheet titled "Tour Reminders." Mrs. Coble was also given, and signed a "Condition of Admission to Wellington Medical Center" form, which noted her patient number as 100291129 and her medical record (medrec) number as 334519, and a "Patient Authorization to Treat" form, with similar patient number and medical record number, that correspond with those numbers in her medical record related to Jory's birth. (Petitioners' Exhibit 1; Respondent's Exhibit 1.) Finally, it is also likely, given the practice customarily followed at pre-registrations, that Mrs. Coble completed "The Centre for Family Beginnings Admission Pre-Registration Form," which included pertinent patient information, including Mrs. Coble's insurance company and policy number. (Respondent's Exhibit 1, Wellington Regional Medical Center, Labor and Delivery Record for Janell Coble, page 000000044.)

2/ Apart from the parties' Supplemental Stipulation, Wellington Regional Medical Center's procedure for providing notice was not otherwise explained.

COPIES FURNISHED:

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