

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SIMONE HOUVARDAS AND PAUL)
HOUVARDAS, INDIVIDUALLY AND AS)
PARENTS AND NATURAL GUARDIANS)
OF GEORGE HOUVARDAS, A MINOR,)
)
Petitioners,)
)
vs.) Case No. 06-4141N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
KATHARINE WEINSTOCK, M.D. and)
ROSEWATER, LERNER, RUDOLPH AND)
ASSOCIATES, M.D., P.A., d/b/a)
TAMPA BAY WOMEN'S HEALTHCARE)
ALLIANCE, LLP, a/k/a TAMPA BAY)
WOMEN'S CARE,)
)
Intervenors.)
)
_____)

FINAL ORDER ON COMPENSABILITY AND NOTICE¹

Pursuant to notice, the Division of Administrative Hearings (DOAH), by Administrative Law Judge William J. Kendrick, held a hearing in the above-styled case on October 11, 2007, in St. Petersburg, Florida.

APPEARANCES

For Petitioners: Wil H. Florin, Esquire
Robin M. Orosz, Esquire
Florin Roebig, P.A.
777 Alderman Road
Palm Harbor, Florida 34683

For Respondent: Robert J. Grace, Jr., Esquire
Stiles, Taylor & Grace, P.A.
Post Office Box 460
Tampa, Florida 33606

For Intervenors: Diane I. Zuckerman, Esquire
Michael Minkin, Esquire
Stephens Lynn Klein
101 East Kennedy Boulevard
Tampa, Florida 33629

STATEMENT OF THE ISSUES

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

2. Whether Katharine Weinstock, M.D., the participating physician who provided obstetrical services at George's birth, gave the patient notice, as required by Section 766.316, Florida Statutes.

PRELIMINARY STATEMENT

At the hearing held October 11, 2007, to resolve the issues of compensability and notice, Intervenors called Katharine Weinstock, M.D., as a witness, and Petitioners' Exhibits 1-16 and Intervenors' Exhibits 1-3² were received into

evidence. No further exhibits were offered, and no other witnesses were called.

The transcript of the hearing was filed October 17, 2007, and the parties were initially accorded 10 days from that date to file proposed orders. However, at the parties' request the time for filing proposed orders was extended to November 6, 2007. The parties elected to file such proposals, and they have been duly-considered.

FINDINGS OF FACT

Findings related to compensability

1. Simone Houvardas and Paul Houvardas are the natural parents of George Houvardas, a minor. George was born a live infant on September 29, 2003, at Morton Plant/Mease Hospital, a licensed hospital located in Clearwater, Florida, and his birth weight exceeded 2,500 grams.

2. Obstetrical services were provided during George's birth by Katharine Weinstock, 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 parties have stipulated, and the proof is otherwise compelling, that George suffered an injury to the brain caused by oxygen deprivation during the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital, which rendered him permanently and substantially mentally and physically impaired. Consequently, the record demonstrated that George 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 like an opportunity to pursue their civil remedies, and avoid a claim of Plan immunity. Therefore, Petitioners have averred and requested a finding that Dr. Weinstock 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 Dr. Weinstock 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).

The notice provisions of the Plan

6. In pertinent part, Section 766.316, Florida Statutes, prescribes the notice requirements of the Plan, as follows:

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. 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

The NICA brochure

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), and distributed the brochure to the participating physicians and hospitals so they could furnish a copy of it to their obstetrical patients. (Exhibit 1 to Intervenor's Exhibit 1). The NICA brochure included the following statement:

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.

Findings related to the participating physician and notice

8. Mrs. Houvardas received her prenatal care at Rosewater, Lerner, Rudolph & Associates, M.D., P.A. (hereinafter "RLR"), a division of Tampa Bay Women's Care, a group practice that was, at the time of her initial visit, composed of five physicians

that practiced obstetrics and gynecology: Doctors Stanley Rosewater, Saul Lerner, Richard Rudolph, GiGi McCance, and Katherine Weinstock.³ Notably, all of the physicians were participating physicians in the Plan.

9. On January 30, 2003, Mrs. Houvardas presented to RLR for her initial prenatal visit. At the time, consistent with established practice for new prenatal patients, Mrs. Houvardas was given a copy of the NICA brochure, together with a Notice to Obstetric Patient form. The Notice to Obstetric Patient form provided:

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

I have been furnished information by Tampa Bay Women's Care that was prepared by the Florida Birth-Related Neurological Injury Compensation Association, and have been advised that Dr. Rosewater, Dr. Rudolph, Dr. Lerner and Dr. McCance are participating physicians in that program. I understand that under this program certain limited compensation is available in the event certain neurological injury may occur during labor, delivery or resuscitation. For specifics on the program, I understand I can contact the Florida Birth-Related Neurological Injury Compensation Association (NICA) at P.O. Box 14567, Tallahassee, FL 32317-4567, 1-800-398-2129. I further acknowledge that I have received a copy of the brochure prepared by NICA.

DATED this ____ day of _____, 200__.

Signature

(Name of Patient) Please Print

Social Security No. _____

Attest:

Signature of employee

Date: _____

The notice was printed on RLR stationery, with the names of four of the physicians associated with the practice (Doctors Rosewater, Lerner, Rudolph, and McCance) listed along the upper left side of the stationery. Dr. Weinstock was not named on the letter head or identified in the notice as a participating physician.⁴

10. Mrs. Houvardas signed the form, acknowledging notice of Doctors Rosewater's, Rudolph's, Lerner's, and McCance's participation in the Plan, and receipt of the NICA brochure. Brandy Clark, an employee of RLR who conducted the initial interview, witnessed Mrs. Houvardas' signature.

11. Here, there is no dispute that Mrs. Houvardas signed the Notice to Obstetric Patient form or that she received a copy of the NICA brochure during her initial visit. (Petitioners' Amended Pre-Hearing Stipulation, filed October 5, 2007, Stipulated Facts (c) and (d); Respondent's and Intervenors'

Amended Pre-Hearing Stipulation, filed October 4, 2007, Stipulated Facts (c) and (d)). But, since Dr. Weinstock was not identified as a participating physician, the Notice to Obstetric Patient form was inadequate to satisfy Dr. Weinstock's obligation to provide pre-delivery notice of her participation in the Plan, as mandated by Galen, supra. See also Jackson v. Florida Birth-Related Neurological Injury Compensation Association, 932 So. 2d 1125, 1129 (Fla. 5th DCA 2006) ("[S]ince the [Notice to Obstetric Patient] form had a blank space where the names of the physicians should have been filled in, the notice was inadequate to give rise to the statutory rebuttable presumption that PAF [the obstetrical practice] provided proper notice as outlined in the statute . . . [or that] 'any obstetrician associated with PAF was a participating physician in the Plan.'").

12. While the Notice to Obstetric Patient form was inadequate to provide notice of Dr. Weinstock's participation, Intervenor's have, during the course of this proceeding, advanced two bases which they contend support the conclusion that proper notice was provided. First, Intervenor's contended that Mrs. Houvardas was told, during her initial visit, that all of the physicians participated with NICA, and therefore proper notice of Dr. Weinstock's participation was provided.⁵ See Jackson v. Florida Birth-Related Neurological Injury Compensation Association, 932 So. 2d at 1129 ("[V]erbal notice that all of PAF's physicians were participants in the NICA plan" was adequate notice.). Consequently, it must be resolved whether the proof demonstrates, more likely than not, that Mrs. Houvardas was so

informed and, if so, whether given the language of the notice (which named only Doctors Rosewater, Rudolph, Lerner, and McCance), such a statement was adequate to provide notice of Dr. Weinstock's participation. Tabb v. Florida Birth-Related Neurological Injury Compensation Association, 880 So. 2d 1253, 1260 (Fla. 1st DCA 2004) ("[A]s the proponent of the issue, the burden rested on the health care providers to demonstrate, more likely than not, that the notice provisions of the Plan were satisfied.").

13. To support their contention, Intervenors offered the testimony of Melissa Rudolph, the practice administrator for RLR and the wife of Dr. Rudolph. (Intervenors' Exhibit 1). According to Mrs. Rudolph, the nurses who conduct the initial prenatal evaluation are trained, as a part of their routine, to

. . . give . . . [the patient] the NICA notification, . . . show them the notification and let them know if they have any questions whatsoever there is an 800 number on the back of the pamphlet.

They can always ask the physician if they have any questions, and they are notified that all of the physicians are participating with NICA.

They ask them to sign the notification that they've been informed that we are participating with NICA, and then they are moved onto the back where they then meet with the physician. (Intervenors' Exhibit 1, pages 7 and 8).

Notably, Intervenors did not call Brandy Clark, the nurse responsible for Mrs. Houvardas' initial prenatal visit, or account for her unavailability, and did not call any nurse or other staff to substantiate that such a routine was in place on

September 30, 2003.

14. Contrasted with the proof offered by Intervenors, Petitioners offered the testimony of Dawanna Bunting, R.N., the clinical coordinator at RLR, and the person responsible for training all new nurses, including Brandy Clark.⁶ (Petitioners' Exhibit 14). Under the procedure described by Nurse Bunting, patients were not routinely advised that all the physicians in the group were participants in the Plan. Rather, Nurse Bunting described the routine, as follows:

Q. Okay. What specifically did you train Ms. Clark to do with regard to NICA information?

A. Well, we offer them the NICA pamphlet, the brochure, and then we give them the notice to sign, stating that they are aware that they have received this pamphlet. And that there is a 1-800 number on the back of that pamphlet, and if they have any questions, they should call, and they're signing that they're receiving the brochure.

Q. Okay. Anything other than that?

A. No, not unless they ask.

(Petitioners' Exhibit 14, pages 10 and 11). According to Nurse Bunting, 99.9 percent of the patients do not ask questions, but simply sign the notice form and hand it back. (Petitioners' Exhibit 14, page 26).

15. As between, Mrs. Rudolph and Nurse Bunting, the testimony of Nurse Bunting was, overall, the most candid and compelling. Therefore, it must be resolved that the proof failed to establish, with the requisite degree of certainty, that at the

time of Mrs. Houvardas' initial prenatal visit RLR had an established routine whereby obstetrical patients were informed that all the physicians associated with the practice were participating physicians in the Plan. Moreover, were such a routine established, it would not have been adequate to inform Mrs. Houvardas of Dr. Weinstock's participation. In so concluding, it is noted that given the format of the notice (which named only Doctors Rosewater, Rudolph, Lerner, and McCance) a reasonable person, similarly situated, would unlikely place any significance on such a general comment regarding participation, beyond the physicians identified in the notice.⁷

16. Finally, Intervenor's contend that the Notice to Obstetric Patient form is optional, and that delivery of the NICA brochure to the patient by the participating physician or an employee of the practice is the sole requirement for compliance with Section 766.316, Florida Statutes. Intervenor's reason, as follows:

2. §766.316, *Florida Statutes*, refers to two separate and distinct types of forms. The first is a Notice Form furnished by the Florida Birth-Related Neurological Injury Compensation Association. The Notice Form is otherwise known as [the] NICA Brochure.

* * *

4. This Notice Form (NICA Brochure) was provided to SIMONE HOUVARDAS on January 30, 2003.

5. The second form referred to in §766.316 is an Acknowledgment Form.

6. The Acknowledgment Form is optional and if used by the participating physician serves to raise a rebuttable presumption that the Notice Form (NICA Brochure) was delivered to the patient. In the instant case, the rebuttable presumption is not an issue since Petitioners have stipulated that the Notice Form (NICA Brochure) was delivered to SIMONE HOUVARDAS.

* * *

8. Delivery of the Notice Form (NICA Brochure) by the participating physician or an employee of the practice to the obstetrical patient is the sole requirement for compliance under §766.316, *Florida Statutes*.

9. The Notice Form (NICA Brochure) contains the following language:

"If your healthcare provider has provided you with a copy of this informational form, your health care provider is [p]lacing you on notice that one or more physician(s) at your health care provider participates in the NICA plan["].

10. Accordingly, delivery of the Notice Form (NICA Brochure) with the language encompassed therein, serves as notice that one or more of the health care providers in the practice participates in the NICA and of the patient's rights and limitations under the plan.

11. Therefore, delivery of the Notice Form (NICA Brochure) to SIMONE HOUVARDAS on January 30, 2003, by a nurse employee of RLR, in the office [of] RLR, was sufficient compliance with §766.316, *Florida Statutes*, and therefore, KATHARINE WEINSTOCK, M.D. and RLR are entitled to immunity under §766.316, *Florida Statutes*.

17. Intervenors are correct that use of the Notice to Obstetric Patient form is optional, but are incorrect to conclude that its utility is limited to raising a rebuttable presumption that the NICA brochure was given to the patient. Rather, if properly used, the Notice to Obstetric Patient form is persuasive evidence that the named physicians gave notice of their participation in the Plan. Apparently, that was Intervenors' intention in this case, but because RLR used the wrong form it failed to give notice on Dr Weinstock's behalf.

18. Intervenors may also be correct that under certain circumstances (i.e., when the participating physician gives the patient the brochure) delivery of the brochure provides proper notice of a physician's participation in the Plan. However, those are not the facts of this case. Rather, here an employee of RLR gave the patient a NICA brochure, together with a Notice to Obstetric Patient form that identified Doctors Rosewater, Rudolph, Lerner, and McCance, but not Dr. Weinstock, as participating physicians in the Plan. Under these circumstances, delivery of the NICA brochure, giving due consideration to the wording of the provision relied upon by Intervenors, would not have placed Mrs. Houvardas on notice of Dr. Weinstock's participation in the Plan. Accordingly, it must be resolved that, although it was practicable to have done so, Mrs. Houvardas was not provided notice of Dr. Weinstock's participation in the Plan.⁸

CONCLUSIONS OF LAW

Jurisdiction

19. 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

20. 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.

21. "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.

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

23. 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.

Here, there is no claim that notice need not have been given because Mrs. Houvardas had an emergency medical condition or the giving of notice was not practicable.

24. Pertinent to this case, the Florida Supreme Court described the legislative intent and purpose of the notice requirement, as follows:⁹

. . . 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.

25. Also speaking to the issue, the Court in The Board of Regents of the State of Florida v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1996), established a "bright-line rule" requiring predelivery notice from each healthcare provider. There, the Court held 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 (Fla. 1st DCA 2002).

26. Here, for reasons appearing in the Findings of Fact, it has been resolved that the participating physician failed to comply with the notice provisions of the Plan.

CONCLUSION

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

ORDERED that the claim for compensation filed by Simone Houvardas and Paul Houvardas, individually and as parents and natural guardians of George Houvardas, a minor, be and the same is hereby approved.

It is FURTHER ORDERED that Katherine Weinstock, M.D., the participating physician, 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.

DONE AND ORDERED this 26th day of November, 2007, in
Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of November, 2007.

ENDNOTES

1/ See § 766.309(4), Fla. Stat. ("The administrative law judge may issue a final order on compensability and notice which is subject to appeal under s. 766.311, prior to issuance of an award pursuant to s. 766.31.") and Ch. 03-416, §§ 77 and 86, Laws of Fla. (The provisions of Section 766.309(4) apply to any medical incident for which a notice of intent to initiate litigation is mailed on or after September 15, 2003.) Here, the infant was born September 29, 2003. Consequently, any notice of intent to initiate litigation had to be mailed after September 15, 2003, and the provisions of Section 766.309(4) apply.

2/ The hearing transcript (at page 2) does not include Intervenors' Exhibit 3 among the list of exhibits. However, Intervenors' Exhibit 3 (a pay stub for Dr. Weinstock dated October 12, 2001) was marked and received into evidence. (Transcript, pages 29 and 30). By letter dated November 2, 2007, and filed November 2, 2007, Petitioners withdrew their objection to the deposition testimony of Melissa Rudolph (Intervenors' Exhibit 1).

3/ The parties stipulated that "[a]t all times material hereto SIMONE HOUVARDAS was an obstetrical patient of ROSEWATER,

LERNER, RUDOLPH AND ASSOCIATES, P.A., d/b/a TAMPA BAY WOMEN'S HEALTHCARE ALLIANCE, LLP, a/k/a TAMPA BAY WOMEN'S CARE." (Petitioners' Amended Pre-Hearing Stipulation, filed October 5, 2007, Stipulated Fact[](b); Respondent's and Intervenor's Amended Pre-Hearing Stipulation, filed October 4, 2007, Stipulated Fact[](b).) Rosewater, Lerner, Rudolph & Associates, M.D., P.A., is described on the practice's stationery and other forms as a division of Tampa Bay Women's Care.

4/ The most likely explanation for the omission of Dr. Weinstock's name from the letterhead, and failure to identify her as a participating physician, was that staff used an old Notice to Obstetric Patient form that predated Dr. Weinstock's association with the practice. (Petitioners' Exhibit 14, page 42). Use of the outdated form was not, however, an isolated incident. (See Petitioners' Exhibit 8, Notice to Obstetric Patient form dated September 16, 2003, signed by Christine Ageladelis).

Further evidence that an old form was likely used, is a notice form signed by another patient (Areti Kantaras) on October 15, 2002, well prior to Mrs. Houvardas' initial prenatal visit, that included Dr. Weinstock's name on the letterhead, along with those of Doctors Rosewater, Lerner, Rudolph, and McCance. On that notice form, the following format was used:

NOTICE TO OBSTETRIC PATIENT

I have been furnished information by Rosewater, Lerner, Rudolph & Associates, M.D., P.A., prepared by the Florida Birth-Related Neurological Injury Compensation Association, and have been advised that Rosewater, Lerner, Rudolph & Associates, M.D., P.A., are participating physicians in that program, where certain limited compensation is available in the event certain neurological injury may occur during labor, delivery or resuscitation. For specifics on the program, I understand I can contact the Florida Birth-Related Neurological Injury Compensation Association (NICA), 1435 Piedmont Drive East, Suite 101, Tallahassee, Florida 32312, 1-800-398-2129. I further acknowledge that I have received a copy of the brochure prepared by NICA. (Petitioners' Exhibit 9).

5/ Notably, while Intervenors offered proof on the issue (through the deposition testimony of Melissa Rudolph, discussed infra), their proposed "Order of Administrative Law Judge," filed November 1, 2007, does not address the issue.

6/ Petitioners also offered the deposition testimony of Christine Ageladelis and Areti Kantaras (obstetric patients at RLR) with exhibits (that included their affidavits), to address the routine followed at a patient's first prenatal visit. (Petitioners' Exhibits 15 and 16). Upon review of these depositions, it is apparent that the witnesses have little or no recall concerning the discussion at the initial visit regarding the Plan, or whether they were or were not told that all the physicians participated. Consequently, their testimony, and certainly their affidavits, offer no persuasive evidence on the issue.

Petitioners also offered the testimony of Mrs. Houvardas, who also evidenced little recall regarding her first prenatal visit. As for Mrs. Houvardas' affidavit, it was never offered into evidence. Had it been, it, like the other affidavits, would not have been credible or persuasive proof on the issue.

7/ In reaching such conclusion, Intervenors proffer in their proposed order that "Intervenors have established that Simone Houvardas neither read or relied on the Acknowledgment Form to her detriment with respect to any of the physicians of RLR who participated in NICA," has not been overlooked. (Intervenors' proposed Order of Administrative Law Judge, filed November 1, 2007, Conclusions of Law, paragraph 7). However, such conclusion is not supported by the testimony, which demonstrates only that Mrs. Houvardas did not recall if she read the Notice to Obstetric Patient form. (Petitioners' Exhibit 1, pages 17-20, 23, and 24).

8/ Mrs. Houvardas presented to RLR for prenatal care 16 times between January 30, 2003, and September 22, 2003, and saw each physician associated with the practice, including Dr. Weinstock, who saw Mrs. Houvardas on March 26, 2003, and May 22, 2003. At no time was she given notice of Dr. Weinstock's participation in the Plan.

9/ When the Florida Supreme Court was called upon to address the legislative intent and purpose of the notice requirement, Section 766.316, Florida Statutes (1993), prescribed the notice requirement, 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 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 plan.

Responding to the Court's Opinion in Galen of Florida, Inc. v. Braniff, 698 So. 2d 308 (Fla. 1997), the legislature amended Section 766.316, Florida Statutes, effective July 1, 1998, to read, as follows:

766.316 Notice to obstetrical patients of participation in the plan.--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 ~~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. 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(8)(b) [now 395.002(9)(b)] or when notice is not practicable.

Ch. 98-113, § 4, Laws of Fla. Notably, the wording of the statute, upon which the Court based its opinion in Galen, has been preserved.

COPIES FURNISHED:

(Via Certified Mail)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(Certified Mail No. 7005 0390 0002 0423 9293)

Wil H. Florin, Esquire
Robin M. Orosz, Esquire
Florin Roebig, P.A.
777 Alderman Road
Palm Harbor, Florida 34683
(Certified Mail No. 7002 0860 0000 9191 6694)

Diane I. Zuckerman, Esquire
Michael Minkin, Esquire
Stephens Lynn Klein
101 East Kennedy Boulevard
Tampa, Florida 33629
(Certified Mail No. 7005 1820 0002 9840 8431)

Robert J. Grace, Jr., Esquire
Stiles, Taylor & Grace, P.A.
Post Office Box 460
Tampa, Florida 33606
(Certified Mail No. 7005 1820 0002 9840 8448)

Tana D. Storey, Esquire
Brewton Plante, P.A.
225 South Adams Street, Suite 250
Tallahassee, Florida 32301
(Certified Mail No. 7005 1820 0002 9840 8455)

Morton Plant Mease Healthcare
Morton Plant Hospital Women's Center
300 Pinellas Street
Clearwater, Florida 33756
(Certified Mail No. 7005 1820 0002 9840 8462)

Katharine Weinstock, M.D.
Rosewater, Lerner, Rudolph
and Associates, M.D., P.A.
d/b/a Tampa Bay Women's Healthcare Alliance, LLP
508 Jeffords Street, Suite C
Clearwater, Florida 33756
(Certified Mail No. 7005 1820 0002 9840 8479)

Charlene Willoughby, Director
Consumer Services Unit - Enforcement
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7005 1820 0002 9840 8486)

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.