

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KEITH ALLGOOD AND KRYSTLE-LYN)
ARENS, AS PARENTS AND NATURAL)
GUARDIANS OF THEIR MINOR AND)
DEPENDENT SON, LOGAN ALLGOOD,)
)
Petitioners,)
)
vs.) Case No. 08-4814N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
LAKELAND REGIONAL MEDICAL)
CENTER, INC.; JEFFREY PURETZ,)
M.D.; PATRICIA K. RICHEY, MN,)
RN, ARNP/CNM; and LAKELAND OB-)
GYN, P.A., d/b/a CENTRAL)
FLORIDA WOMEN'S CARE,)
)
Intervenors.)
)
_____)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge, Ella Jane P. Davis, held a hearing in the above-styled case on March 26, 2010, by video teleconference with sites in Lakeland and Tallahassee.

APPEARANCES

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For Intervenors Jeffrey Poretz, M.D.; Patricia K. Richey,
MN, RN, ARNP/CNM; and Lakeland OB/GYN, P.A., d/b/a and Central
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STATEMENT OF THE ISSUES

1. Whether Petitioners' claim qualifies under the Florida
Birth-Related Neurological Injury Compensation Plan. See
§ 766.309(1)(a) and (b), Fla. Stat.¹

2. Whether notice was accorded the patient (mother) by the
healthcare providers, as contemplated by Section 766.316,
Florida Statutes, or whether the 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.²

PRELIMINARY STATEMENT

On September 26, 2008, Keith Allgood and Krystle-Lyn Arens, as parents and natural guardians of their minor and dependent son, Logan Allgood, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on October 1, 2008.

Thereafter, on October 21, 2008, Lakeland Regional Medical Center (LRMC) was granted Intervenor status. On November 3, 2008, Jeffrey Puretz, M.D.; Patricia K. Richey, M.N., R.N., A.R.N.P., C.N.M.; and Lakeland OB/GYN, P.A., d/b/a Central Florida Women's Care, also were granted Intervenor status.

NICA gave notice it had concluded the claim was compensable.

After sufficient time for discovery, and there being no dispute that the birth-related injury sustained by Logan met all criteria of Subsections 766.309(1)(a) and (1)(b), Florida Statutes, Administrative Law Judge (ALJ) Kendrick entered an

Order on April 1, 2009, which bifurcated the issues of compensability and notice from those related to an award; approved NICA's proposal to accept the claim as compensable; provided for a separate Notice of Hearing for a hearing to resolve whether the healthcare providers complied with the notice provisions of the Plan; and provided that thereafter a final order would be entered resolving that the claim is compensable and whether the healthcare providers complied with the notice provisions of the Plan. Also, on April 1, 2009, ALJ Kendrick issued the first Notice of Hearing by Video Teleconference, establishing that the sole remaining substantive issue (notice) would be determined by a subsequent hearing.

After considerably more discovery and numerous intervening motions resolved by orders,³ the case came to final hearing before the undersigned on March 26, 2010.

At final hearing, Petitioners had no exhibits admitted in evidence. Respondent NICA had 26 exhibits admitted in evidence, one of which (NICA Exhibit 13) was corrected by agreement and a post-hearing filing on March 29, 2010. Subsequent to memoranda by the parties, post-hearing Orders on April 21, 2010, and April 22, 2010, defined and admitted NICA Exhibit 20, as supplemented by Petitioners at hearing. Intervenor LRMC had no exhibits admitted in evidence. Intervenors Poretz, et al., had eight exhibits admitted in evidence. Exhibit I-9 was not

admitted. The parties' Joint Prehearing Stipulation was admitted as Joint Exhibit 1.⁴

Petitioner Krystle-Lyn Arens testified on behalf of Petitioners. Jeffrey Poretz, M.D., testified on behalf of Intervenor Poretz, Richey, and Lakeland OB/GYN, P.A., d/b/a Central Florida Women's Care.

A Transcript was filed on April 19, 2010. The parties had requested and stipulated to 20 days from the Order Admitting NICA Exhibit 20, entered April 22, 2010, in which to file their proposed final orders. All parties filed proposed final orders. No objection on the basis of timing has been raised, so all proposals have been considered.

FINDINGS OF FACT

1. Krystle-Lyn Arens is the natural mother of Logan Allgood.
2. Keith Allgood is the natural father of Logan Allgood.
3. Logan Allgood was born a live infant on September 2, 2005.
4. Logan Allgood was born at LRMC.
5. There is no dispute that LRMC paid the money and filed its required paperwork in accordance with the NICA Plan so that it constitutes a licensed Florida hospital that is "covered" by the NICA Plan.
6. Logan Allgood's birth weight was 3,963 kilograms.⁵

7. Jeffrey Poretz, M.D., delivered obstetrical services in the course of labor, delivery, and resuscitation in the immediate post-delivery period in a hospital. Moreover, there is no longer a dispute among the parties that at all times material, Dr. Poretz and Patricia Richey, ARNP/CNM, were "participating physicians" in the NICA Plan, as defined by Sections 766.302(7) and 766.314(4)(c), Florida Statutes.

8. At all times material, Jeffrey Poretz, M.D., was employed with Lakeland OB/GYN, P.A., d/b/a Central Florida Women's Care.

9. Dr. Poretz provided Ms. Arens a NICA acknowledgment form bearing the Lakeland OB/GYN P.A. letterhead, more than a week after Logan Allgood was born, and Ms. Arens signed it. No party contends that this document or a contemporaneous provision of information about NICA is sufficient pre-delivery notice by which Ms. Arens could make an informed choice of physician or hospital prior to Logan's birth.

10. The exhibits herein show that Logan Allgood suffered a hypoxic ischemic event which occurred in the course of labor and delivery. Each party has stipulated or does not contest that Logan Allgood suffered a "birth-related neurological injury," as defined in Section 766.302(2), Florida Statutes, or that the Order entered herein on April 1, 2009, determined that Logan had suffered a "birth-related neurological injury."⁶

11. Lakeland OB/GYN, P.A., does business in its own name, housing its medical physicians specializing in obstetrics, at 1733 Lakeland Hills Boulevard, and does business as Central Florida Women's Care in a separate building located four blocks further south at 1525 Lakeland Hills Boulevard, where it houses its certified nurse midwives. Physicians supervise the midwives on a rotating basis.

12. On January 17, 2005, Ms. Arens, who was then age 15 and who had just learned she was pregnant, went with her mother and her child's father to Central Florida Women's Care. This was her first and only contact with either Central Florida Women's Care or Lakeland OB/GYN, P.A., prior to her arrival at the hospital, LRMC, for a full-term delivery on August 30, 2005. She had no appointment, and was told that in order to be seen by a midwife or physician, the provider required that she be interviewed and fill out and sign specific forms.

13. On January 17, 2005, at Central Florida Women's Care, while her mother and Mr. Allgood waited elsewhere in the building, Ms. Arens was interviewed by a licensed practical nurse, Betty Kelly, LPN.

14. Ms. Arens experienced no "hands on" examination by anyone on that date, but she did fill out or provide information for many patient forms, including a genetic screening and infection screening. In Central Florida Women's Care's file,

there is an initial physical examination sheet, which is essentially an oral medical history and status provided by Ms. Arens and written down by her or Nurse Kelly. It is not the result of a "hands on" examination, but it may have involved Ms. Arens being weighed. There are notes about plans to bottle-feed her baby; her current medications; her asthma; and her relatives' health issues. There are signed rejections by Ms. Arens of HIV and CF testing. The HIV and CF forms name Central Florida Women's Care as "a Division of Lakeland OB-GYN, P.A." Ms. Kelly gave her a prescription for prenatal vitamins.

15. Ms. Arens also executed an acknowledgment of receiving a NICA brochure explaining her rights under NICA.

16. The NICA acknowledgment form that Ms. Arens signed, dated, and placed her social security number on at Central Florida Women's Care on January 17, 2005, bore the Central Florida Women's Care letterhead and read:

NOTICE TO OBSTETRIC PATIENT RE: NICA
PARTICIPATION

I have been furnished information by Central Florida Women's Care, prepared by the Florida Birth Related Neurological Injury Compensation Association, and have been advised that Drs. Alvarez, Poretz, Damian, Caravello, & Nixon and the midwives associated with their practice: Jill Hendry, Patricia Richey, Joan Bardo, Pam Barany and Sheri Small participate in that program, wherein certain limited compensation is available in the event certain neurological injury may occur during

labor delivery or resuscitation. For specifics on the program, I understand I can contact the Florida Birth Related Neurological Injury Compensation Association (NICA), 1435 Piedmont Drive East, Suite 101, Tallahassee, Florida 32312 telephone number 1 (800) 398-2120.

I further acknowledge that I have received a copy of the brochure prepared by NICA. (Emphasis added).

This form also shows Betty Kelly's signature as witnessing Ms. Arens' signature. Both women acknowledged their signatures. Ms. Arens also acknowledged writing in the date and her social security number, but she could not remember if she received a NICA pamphlet that day or not.

17. According to Ms. Arens, although she was a minor, her mother let her sign all her own papers throughout her pregnancy.

18. On January 17, 2005, Lakeland OB/GYN, P.A., d/b/a Central Florida Women's Care did not bill until a patient was seen by a nurse midwife or medical physician. Ms. Arens left Central Florida Women's Care without seeing one of those professionals. A few days later, she decided not to return because she had decided she wanted physicians, not midwives, overseeing her prenatal care and delivery. (NICA Exhibit 13, page 9). She did not fail to make a another appointment with Central Florida Women's Care because of an informed choice to select a non-participating physician or because of an informed choice to avoid NICA's limitations.

19. Ms. Arens obtained pre-natal care from late January 2005, until May or June 2005, from Exodus Women's Center, a practice unaffiliated with Lakeland OB/GYN, P.A., d/b/a Central Florida Women's Care. Whether or not members of Exodus were NICA participants does not appear in this record. Ms. Arens testified she left Exodus because she wanted a perinatologist. However, the next and last physician Ms. Arens consulted for prenatal care, Dr. Hamagiri Ravi, testified that she was not a perinatologist, and Ms. Arens' mother testified that she, the mother, had selected Dr. Ravi, because Dr. Ravi accepted Medicaid patients, such as Ms. Arens, and would see Ms. Arens quickly. There is no evidence Ms. Arens left Exodus to avoid NICA's limitations.

20. Approximately three months before Logan's birth, Ms. Arens presented to Dr. Ravi to provide her prenatal care. Dr. Ravi is a non-participating physician. Dr. Ravi does not deliver babies. She also does not have privileges at any hospital or provide NICA brochures or counseling. On the first visit, Dr. Ravi has each of her patients sign a document acknowledging that Dr. Ravi will not be her delivering physician. Ms. Arens signed such a form, which read:

To whom it may concern

This is to inform you that I am very happy to be taking care of all of your prenatal needs at this office. However, I will not

be your delivering physician. At the time of delivery you will go to the hospital of your choice to be delivered by the doctor on call. A copy of your records will be provided to you to preregister at the hospital of your choice. For your C-section needs, alternate measures will be arranged with a different physician.

By signing below, you agree with the above conditions of prenatal care.

21. Ms. Arens did not pre-register with any hospital for delivery of her child, who was due on August 30, 2005.

22. On August 30, 2005, her due date, Ms. Arens and her mother went to Dr. Ravi's office. Dr. Ravi documented Ms. Arens' blood pressure as elevated to 140/80. Ms. Arens also was suffering from edema, and tests determined there was protein in her urine elevated to +3. Dr. Ravi contacted the obstetrician on-call at LRMC's emergency room and told him Ms. Arens was coming in. She told Ms. Arens to go straight to the LRMC emergency room for evaluation in a hospital setting and for possible induction of labor. Ms. Arens was stable when she left Dr. Ravi's office, but she expected that her child would be delivered when she got to the hospital.

23. Ms. Arens presented to LRMC's emergency room at approximately 5:00 p.m., on August 30, 2005. She was seen in the emergency room by the physician who had relieved the physician to whom Dr. Ravi had spoken by telephone.

24. When Ms. Arens presented to LRMC's emergency room on August 30, 2005, she had proteinuria and elevated blood pressure. Vaginal examination revealed slight dilation, slight minimal effacement, and no vaginal bleeding. Her water had not yet broken and her membranes were not ruptured. Ms. Arens was not yet in labor.

25. However, Ms. Arens' blood pressure was measured in LRMC's emergency room as 153/76. Lab work was begun. (Emergency Room records). At approximately 6:30 p.m., on August 30, 2005, Ms. Arens was moved to LRMC's labor and delivery floor for continued evaluation, including urine tests.

26. On the labor and delivery floor, she was immediately seen by LRMC's Patient Access Representative, Kim Lepak.

27. Ms. Lepak's normal routine was to provide each new patient with a packet of information specific to that patient's situation. Part of Ms. Lepak's responsibilities included providing each new obstetric patient with a packet that includes a Privacy Act explanation, a Patient's Rights form, and the NICA brochure. Ms. Lepak was also responsible for obtaining the patient's signature on forms that included assignment of benefits, releases, acceptance of financial responsibility, permission for treatment, and a form acknowledging that the patient had received the explanatory NICA brochure.

28. LRMC's NICA acknowledgement form was signed by both Ms. Arens and Ms. Lepak, and dated August 30, 2005. It reads:

RECEIPT ACKNOWLEDGMENT OF FLORIDA BIRTH
RELATED NEUROLOGICAL INJURY COMPENSATION
INFORMATION (See Section 766.316, Florida
Statutes)

I have been furnished information by Lakeland Regional Medical Center prepared by the Florida Birth Related Neurological Injury Compensation Association, and have been advised that my doctor and all nurse midwives associated with my doctor's practice participate in the Florida Birth Related Neurological Injury Compensation program, wherein, certain limited compensation is available in the event certain neurological injury may occur during labor, delivery, or resuscitation. For specifics on the program, I understand I can contact the Florida Birth Related Neurological Injury Compensation Association (NICA), 1435 East Piedmont Drive, Suite 101, Tallahassee, Florida, 32312, (904) 488-8191. I further acknowledge that I have received a copy of the brochure prepared by NICA. (Emphasis added)

29. Ms. Lepak testified that the form also bore an LRMC stamp that had been applied in the emergency room, showing Ms. Arens was assigned by LRMC to CNM Joan Bardo on the labor and delivery floor.

30. LRMC required all physicians and CNMs practicing at LRMC to be NICA "participating physicians," and CNMs were assigned by the hospital on 24-hour shifts in 2005. On their shifts, physicians were on-call, usually in the hospital.

31. Dr. Puretz testified that under these conditions he and his practice rely on the hospital to notify patients of the NICA provisions.

32. Ms. Arens and Ms. Lepak did not specifically recall whether Ms. Arens received the NICA brochure, but both identified their signatures on the acknowledgment form. Ms. Lepak testified that, based on her routine procedure, she would have presented the pamphlet to Ms. Arens, watched Ms. Arens sign the acknowledgment, and finally Ms. Lepak would have signed as a witness to Ms. Arens' signature and added her own witness information after Ms. Arens had signed.

33. On the labor and delivery floor, during August 31, 2005, Ms. Arens' blood pressure readings ran mostly in the 130's/80's, and her urine was monitored.

34. Joan Bardo, CNM, was practicing with Lakeland OB/GYN, P.A., d/b/a Central Florida Women's Care. (See Finding of Fact 16). Nurse Bardo was Ms. Arens' "attending physician" upon Ms. Arens' admission to LRMC's labor and delivery floor sometime around 6:30 p.m., August 30, 2005. Ms. Arens did not begin labor on Nurse Bardo's shift, which ended at 8:00 a.m., August 31, 2005, when she was relieved by Sheri Small, CNM.

35. Sheri Small, CNM, relieved Nurse Bardo. Nurse Small was also practicing with Lakeland OB/GYN P.A. d/b/a Central Florida Women's Care. (See Finding of Fact 16). According to

Ms. Small's notes on August 31, 2005, Ms. Arens was administered cervidil to induce labor and on September 1, 2005, was administered pitocin to induce labor.

36. Patricia Richey, CNM, also practiced with Lakeland OB/GYN, d/b/a Central Florida Women's Care in 2005. (See Finding of Fact 16). When she came on the floor at 7:00 a.m., on September 1, 2005, she relieved Nurse Small. Nurse Richey was assigned by LRMC to render care to Ms. Arens.

37. At 10:30 a.m., September 1, 2005, Ms. Arens' contractions were noted by Nurse Richey to be frequent but difficult to monitor.

38. During the last part of Nurse Richey's 12-hour shift, Dr. Puretz, also of Lakeland OB/GYN (see Finding of Fact 16), was her supervising physician. He came on-call in the hospital, beginning between 6:30 and 7:00 p.m., on September 1, 2005.

39. At 2:08 a.m., on September 2, 2005, Ms. Arens was completely dilated and pushing began with contractions every two minutes.

40. At 4:35 a.m., September 2, 2005, Nurse Richey called Dr. Puretz to assist with delivery. Fetal heart tones had increased to 170-180 beats per minute.

41. At 4:45 a.m., September 2, 2005, Nurse Richey notified Dr. Puretz of Ms. Arens' progress and requested evaluation for possible vacuum extraction.

42. Care of Ms. Arens was transferred to Dr. Poretz at approximately 5:00 a.m., September 2, 2005. At that time, he documented that Ms. Arens had a 101-degree temperature and her unborn baby was experiencing mild fetal tachycardia. This was the first time Ms. Arens and Dr. Poretz had been in each other's presence.

43. Upon examination, Ms. Arens was fully dilated. There was an arrest of descent. The baby was wedged in her pelvis.

44. At 5:10 a.m., September 2, 2005, Dr. Poretz evaluated Ms. Arens, and elected to do a Caesarian section delivery, believing that vacuum extraction was not prudent.

45. At 5:35 a.m., September 2, 2005, Ms. Arens was moved, under Dr. Poretz' care, to an operating room, and at 6:15 a.m., Logan was delivered. (See Finding of Fact 10).

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause. §§ 766.301-316, Fla. Stat.

47. The Florida Birth-Related Neurological Injury Compensation Plan was established by the Legislature "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims" relating to births occurring on or after January 1, 1989. § 766.303, Fla. Stat.

48. The injured "infant, her or his personal representative, parents, dependents, and next of kin," may seek compensation under the Plan by filing a claim for compensation with the Division of Administrative Hearings. §§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat. NICA, which administers the Plan, has "45 days from the date of service of a complete claim . . . in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." § 766.305(4), Fla. Stat.

49. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the Administrative Law Judge to whom the claim has been assigned. § 766.305(7), Fla. Stat.

50. In discharging this responsibility,

§ 766.309(1) The administrative law judge shall make the following determinations based upon all 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. 766.302(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.

51. 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 birth. § 766.31(1), Fla. Stat.

52. Herein, it is undisputed that Logan Allgood suffered a "birth-related neurological injury" as defined in Section 766.302(2), Florida Statutes, and that all Intervenors are Plan participants. Moreover, the evidence shows that all Intervenors are Plan participants. ALJ Kendrick previously determined the claim to be compensable in his April 1, 2009, Order. Accordingly, the claim qualifies for coverage under the Plan.

53. The Administrative Law Judge also has jurisdiction to determine whether notice as required by Section 766.316, Florida Statutes, was given by the healthcare providers. See Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 880 So. 2d 1253, 1257 (Fla. 1st DCA 2004); Gugelmin v. Div. of Admin.

Hearings, 815 So. 2d 764 (Fla. 4th DCA 2002); Univ. of Miami v. M.A., 793 So. 2d 999 (Fla. 3d DCA 2001); O'Leary v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 757 So. 2d 624 (Fla. 5th DCA 2000); and Behan v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 664 So. 2d 1173 (Fla. 4th DCA 1995).

54. Herein, although the claim qualifies for coverage under the Plan, Petitioners seek to avoid a claim of Plan immunity in a civil action by requesting a finding that the notice provisions of the Plan were not met by the healthcare providers. As the proponents of the immunity claim, the burden rests on the healthcare providers to demonstrate that, more likely than not, the notice provisions of the Plan were satisfied. See Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass'n, supra. ("The ALJ . . . properly found that 'as the proponent of the issue, the burden rested on the healthcare provider to demonstrate, more likely than not, that the notice provisions of the Plan were satisfied.'").

55. At all times material, 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)^[7] or when notice is not practicable.

56. 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."). See also Galen of Fla., Inc. v. Braniff, 696 So. 2d 308 (Fla. 1997); Tarpon Springs Hospital Foundation, Inc. v. Anderson, 2010 Fla. App. LEXIS 5257; 35 Fla. L. Weekly D 903; Weeks v. Fla. Birth-Related Neurological, 977 So. 2d 616 (Fla. 5th DCA 2008).

57. Section 395.002(9)(b), Florida Statutes (2004; 2005), defined "emergency medical condition" to mean:

(b) With respect to a pregnant woman:

1. That there is inadequate time to effect safe transfer to another hospital prior to delivery;

2. That a transfer may pose a threat to the health and safety of the patient or fetus;
or

3. That there is evidence of the onset and persistence of uterine contractions or rupture of the membranes.

58. In Florida Birth-Related Neurological Injury Comp. v. Department [sic] of Admin. Hearings, 29 So. 3d 992 (Fla. 2010), the Florida Supreme Court clarified 20-plus years of case law, holding as follows:

Consequently, under our holding today, if either the participating physician or the hospital with participating physicians on its staff fails to give notice, then the claimant can either (1) accept NICA remedies and forgo any civil suit against any other person or entity involved in the labor or delivery, or (2) pursue a civil suit only against the person or entity who failed to give notice and forgo any remedies under NICA.

As to all Intervenors

59. Petitioners' suggestion that Ms. Arens' minority prohibited the effectiveness of her signature on either NICA acknowledgment is rejected. Aside from her own testimony that her mother always let her sign all her own papers, which is tantamount to a parental acknowledgment for a minor, the Petitioners' suggestion is rejected for three reasons. First,

Section 766.316, Florida Statutes, states that participating physicians and hospitals with participating physicians on staff "shall provide notice to the obstetrical patient," without age limitation. Second, Section 766.316, Florida Statutes, does not require consent of the patient, only notice from the providers. Third, with regard to all services related to her pregnancy, Section 743.065, Florida Statutes, provides the infant's mother's acknowledgment is as binding as if she had reached her majority. See LeCrenier v. Fla. Birth-Related Neurological Injury Comp. Ass'n, DOAH Case No. 00-1169 (Final Order: 3/15/01).

The Hospital

60. On August 30, 2005, when Ms. Arens arrived at LRMC for the very first time, she had not pre-registered. She presented at LRMC's emergency room with elevated blood pressure, edema, and proteinuria, so that a threat to health and safety, if not precisely an emergency condition, already existed,⁸ and she expected to deliver her baby at LRMC during that visit, albeit she was not yet in labor.⁹

61. As soon as she was assessed in the emergency room, including verification of proteinuria and a considerably higher blood pressure than she had evidenced in Dr. Ravi's office, Ms. Arens was transferred to LRMC's labor and delivery floor, where she executed an acknowledgment form for receipt of the

NICA brochure. In the absence of any prior contact with LRMC, and under the circumstances of her admission through the emergency room and her physical condition when evaluated there, it would not have been practicable for the hospital to have given earlier notice than it did and a delay due to transfer elsewhere could have compromised hers or the baby's health.

62. The LRMC acknowledgment form specifically advised Ms. Arens that all the doctors and midwives at the hospital were NICA participants.

63. Although Ms. Arens has no current recollection of whether or not she was given a NICA brochure at that time, her signature on the hospital's acknowledgment form raises the statutory rebuttable presumption, not just that she received the NICA brochure, but that the notice requirements of Section 766.316, Florida Statutes, were met by LRMC. Ms. Arens' failure to remember getting or not getting the brochure does not rebut the presumption.

64. There was no statutory requirement that Ms. Lepak counsel Ms. Arens concerning NICA.

65. In Dianderas v. Fla. Birth-Related Neurological, 973 So. 2d 523, 527 (Fla. 5th DCA 2007), the court ruled that the NICA brochure alone satisfies the statutory requirement of a "clear and concise explanation of a patient's rights under the plan."

66. Finally, Ms. Lepak's testimony of her routine practice of presenting the NICA brochure to the patient before having the patient sign the acknowledgment form, by itself, creates a circumstantial inference that the notice was provided. See Tabb, 880 So. 2d at 1260.

Physician, Midwife, and Professional Association

67. Ms. Arens' visit to Central Florida Women's Care on January 17, 2005, was her first contact with Lakeland OB/GYN, P.A., d/b/a Central Florida Women's Care. It was the equivalent of a first contact, pre-registration in a hospital. See Tarpon Springs Hosp. Found., Inc. v. Anderson, supra.

68. At her visit to Central Florida Women's Care on January 17, 2005, Ms. Arens signed a form acknowledging receipt of the NICA brochure. The form specifically names Dr. Puretz and Nurse Richey, among all other healthcare providers practicing under the umbrella of Lakeland OB/GYN, d/b/a Central Florida Women's Care.

69. Ms. Arens' signature on this acknowledgment form creates a rebuttable presumption that she received the NICA brochure at that time. She has not rebutted that presumption.

70. Again, Ms. Arens did not remember receiving the NICA brochure or not receiving it. This does not rebut the presumption.

71. Again, Ms. Kelly was not statutorily required to counsel Ms. Arens concerning the Plan, and the NICA brochure is deemed sufficient. See Dianderas, supra.

72. The Court in Weeks v. Fla. Birth Related Neurological Injury Comp. Ass'n, supra, concluded:

In summary, we hold that the NICA notice must be given within a reasonable time after the provider-obstetrical patient relationship begins, unless the occasion of the commencement of the relationship involves a patient who presents in an "emergency medical condition," as defined by the statute, or unless the provision of notice is otherwise "not practicable." When the patient first becomes an "obstetrical patient" of the provider and what constitutes a "reasonable time" are issues of fact. As a result, conclusions might vary, even where similar situations are presented. For this reason, a prudent provider should furnish the notice at the first opportunity and err on the side of caution. (Emphasis added).

73. Dr. Poretz, et al., gave NICA notice to Ms. Arens at their very first contact, thus complying with the holdings in Weeks and Galen of Fla., Inc., supra. Petitioners read Weeks to say that until a doctor-patient relationship exists, notice of NICA participation is always invalid. That is not a reasonable interpretation of the latitude the courts have established. Each case must be assessed on its own facts, but addressing the argument, it is concluded that herein, the numerous forms, decisions, and choices Ms. Arens made at the January 17, 2005,

visit with Nurse Kelly, plus the prescription for prenatal vitamins, established a sufficient connection.

74. Admittedly, the situation herein is unusual, but the fact remains that Dr. Poretz, et al., could not have given notice any earlier than the first time someone in their professional association had contact with the patient or potential patient.

75. The courts have consistently held that the purpose of the NICA notice requirement is to enable patients to make an informed choice to accept or reject the limitations of the Act. See Fla. Birth-Related Neurological Injury Comp. Ass'n v. Department [sic] of Admin. Hearings; Tarpon Springs Hosp. Foundation, Inc. v. Anderson; Weeks v. Fla. Birth-Related Neurological; and Galen of Florida, Inc. v. Braniff, supra.

76. Had the evidence shown that Ms. Arens rejected the physicians and midwives of Lakeland OB/GYN P.A., d/b/a Central Florida Women's Care on the basis of the NICA brochure, it would present a different situation. However, here, Ms. Arens was clear that she was just rejecting the idea of prenatal care by midwives, and she changed providers twice during the course of her pregnancy not based on a rejection of NICA's limitations.

77. Notwithstanding that Dr. Poretz, et al., gave notice months before the day of delivery, and notwithstanding that Petitioner's labor was not induced for more than 24 hours after

her admission to LRMC, it was not prudent to move Ms. Arens from LRMC, since Dr. Ravi had referred her for evaluation and possible induction of labor on her due date, and because she was evidencing symptoms which could lead to convulsions and coma. It also was not practicable for Dr. Puretz, to give repeat notice when, on September 2, 2005, he saw Ms. Arens for the first time and she was then in immediate need of a Caesarian section.

CONCLUSION

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

1. The claim for compensation filed by Keith Allgood and Krystle-Lyn Arens as parents and natural guardians of their minor and dependent son, Logan Allgood, is compensable and is approved.

2. Lakeland Regional Medical Center, Inc., Jeffrey Puretz, M.D., Patricia K. Richey, ARNP/CNM, and Lakeland OB/GYN, P.A., d/b/a Central Florida Women's Care complied with the notice requirements of the Plan.

3. NICA shall pay all future expenses as incurred.

4. 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 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 advise the administrative law judge, and a hearing will be scheduled to address these remaining issues.

DONE AND ORDERED this 11th day of June, 2010, in Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of June, 2010.

ENDNOTES

- 1/ "Compensability" of this claim was previously determined, but is subject to being incorporated in this Final Order, pursuant to Section 766.309(4), Florida Statutes.
- 2/ See April 1, 2009, Notice of Hearing by Video Teleconference and January 21, 2010, Order Granting Continuance and Re-Scheduling Hearing by Video Teleconference on March 26, 2010.
- 3/ One such Motion and the Order denying same bears discussion. On January 19, 2010, Petitioners filed a motion titled, "Petitioners' Motion for Determination that Civil Action is Not Foreclosed and Memorandum in Support of Argument that Civil Action Is Not Foreclosed Because Disclosure of Section 766.316

Notice to a Minor was Ineffective, or, Alternatively, Such Notice Violated Petitioners' Constitutional Rights." Respondent and Intervenor filed responses in the negative. Because the prayer for relief contained in that Motion was couched in a "double negative," the Order thereon, entered February 8, 2010, provided that ". . . the prayer for relief contained in Petitioners' Motion for Determination that a Civil Action is Not Foreclosed is denied."

That said, the undersigned is without jurisdiction to determine the constitutionality of a statute. The issue of whether or not notice to Ms. Arens was timely and sufficient was appropriate for the final evidentiary hearing. Likewise, the issue of Ms. Arens' minority is discussed in this Final Order as part of the notice issue. See Conclusion of Law 59.

4/ The exhibits in evidence are more fully described as:

NICA 1: Donald Willis, M.D. Report 11/4/2008; NICA 2: Raymond Fernandez, M.D. Report 12/3/2008; NICA 3: Lakeland OB/GYN, P.A., d/b/a Central Florida Women's Care Records of Krystle-Lyn Arens (Notice to Patient re: NICA Participation; Lab Reports; Prenatal Risk Screen; Misc. Hospital Forms: Obstetric Medical History; Doctor's Notes; Quest Diagnostic Lab Reports); NICA 4: Lakeland Regional Medical Center, Inc.'s Labor and Delivery Records of Krystle-Lyn Arens (Patient Summaries; Patient Assessment Sheets; Doctor's Notes; Notices of Privacy Practices; Emergency Department Requisition forms; Operative Report; Lab Reports; Medication Administration Records); NICA 5: Lakeland Regional Medical Center, Inc.'s Fetal Monitor Strips; NICA 6: Lakeland Regional Medical Center, Inc., Birth Records of Logan Allgood and Certificate of Birth (Patient Summaries; Doctor's Notes; Medication Administration Records; Birth Certificate Worksheet; Discharge Summary; Pediatric Physicians Order Sheets; Progress Notes; Florida Dept. of Health Lab Reports; Blood Gas Reports; NICA 7: Transcript of Puretze Deposition of 12/16/09 with Errata Sheet of 1/13/10; NICA 8: Transcript of Puretze Deposition of 9/23/09 with Exhibit; NICA 9: Transcript of Patricia Ritchie, ARNP Deposition taken 1/19/2010 with Exhibits; NICA 10: Transcript of Joan Bardo, ARNP, Deposition taken 11/2/09, with exhibits; NICA 11: Transcript of Kim Lepak, ARNP Deposition taken 1/19/2010 with exhibit and Errata Sheet signed 2/9/2010; NICA 12: Transcript of Betty Kelly Deposition taken 1/19/2010 with exhibits; NICA 13: Transcript of Krystle-Lyn Arens Deposition taken 4/13/09; NICA 14: Transcript of Ethel Arens Deposition taken 8/13/09 with exhibits; NICA 15: Transcript of Gracia Damian, M.D., taken 2/8/2010; NICA 16:

Transcript of Himagiri Ravi, M.D., Deposition taken 3/26/2009;
NICA 17: NICA documents given to Krystle-Lyn Arens (17A = 1/17/05 form; 17B = 8/30/05 form; 17C = 9/13/05 form; 17D = NICA Peace of Mind pamphlet); NICA 18: Patricia Kay Richey, ARNP's NICA Participant Certification No. 14119 and Supporting Payment Documentation; NICA 19: Jeffrey Puretz, M.D.'s NICA Participant Certification No. 14119 and Supporting Payment Documentation; NICA 20: All Responses to Presuit Discovery by all parties; NICA 21: All Interrogatories and Answers served by the parties; NICA 22: All Requests to Produce and Responses served by the parties; NICA 23: Mapquest showing that Lakeland OB/GYN and Central Florida Women's Care are Separate Buildings; NICA 24: Advance Registered Nurse Practitioners/Certified Nurse Midwife Collaborative Practice Agreement; NICA 25: Lakeland Regional Medical Center's Certified Nurse Midwife Protocol; NICA 26: Addendum Report by Dr. Fernandez dated 2/6/09; NICA 27: Birth Certificate for Logan Allgood. (TR 7-20) (NOTE: NICA 13 was completed by exhibits filed March 29, 2010 (see TR 19-20) and NICA's 20 was admitted pursuant to the Orders entered herein April 21 and 22, 2010.)

Intervenors, Puretz, et al.'s Exhibits I-1: Confirmation and Receipt of ARNP Protocols FBN 3/1/10; I-2: Registered Nurse Practitioner NCM Collaborative Practice Agreement for Patricia Richey received by FBN 9/27/04; I-3: Registered Nurse Practitioner CNM Collaborative Practice Agreement for Sheri Small received by FBN 9/27/04; I-4: Registered Nurse Practitioner CNM Collaborative Practice Agreement for Joan Bardo received by FBN 11/8/04; I-5: Lakeland OB/GYN, P.A., d/b/a Central Florida Women's Care Practice Guidelines; I-6: Gracia Maria Damian, M.D.'s NICA Participation Certification No. 13943 and supporting payment documents; I-7: Joan Bardo and ARNP NICA Participation Certification Number 14130 and supporting pay documentation; I-8: Sheri Small NICA Participation Certificate No. 14129 and supporting documentation. (TR 21-26).

Joint Exhibit 1: Joint Prehearing Stipulation, was admitted.

5/ This "fact" stipulated by the parties probably was intended to read "3,963 grams."

6/ Findings of Fact 1-10 are based on the Joint Prehearing Stipulation (Joint Exhibit 1), the oral stipulations of counsel at final hearing or acknowledgments of counsel in their proposed final orders.

7/ Chapter 2007-230, Laws of Florida re-numbered Section 395.002(9)(b) as Section 395.002(8)(b), and likewise corrected the reference thereto in s. 766.316.

8/ Dorland's Illustrated Medical Dictionary, 28th Edition, 1994 defines preeclampsia as "a complication of pregnancy characterized by hypertension, edema, and/or proteinuria; when convulsions and coma are associated, it is called eclampsia."

9/ "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 the term is used in Section 395.002(9)3., Florida Statutes, is commonly understood to mean "[i]nsistently repetitive or continuous." Id.

COPIES FURNISHED:

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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.