STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

YAIMA OROZCO AND MAYKEL AMADOR, ON BEHALF OF AND AS PARENTS AND NATURAL GUARDIANS OF YAIKEL AMADOR, A MINOR,	)	
Petitioners,	)	
vs.	)	Case No. 08-4985N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
KENDALL REGIONAL MEDICAL CENTER, FRANCISCO G. TUDELA, M.D., and FRANCISCO G. TUDELA, M.D., P.A.,	)	
Intervenors.	)	

FINAL ORDER ON COMPENSABILITY AND NOTICE[1]

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 April 20, 2009, by video teleconference, with sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioners: Deborah J. Gander, Esquire
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For Respondent: David W. Black, Esquire
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For Intervenor Kendall Regional Medical Center:

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For Intervenors Francisco G. Tudela, M.D., and Francisco G. Tudela, M.D., P.A.:

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STATEMENT OF THE ISSUES

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

2. Whether the hospital and the participating physicians provided the patient notice, as contemplated by Section 766.316, Florida Statutes (2006), or whether notice was not required because the patient had an "emergency medical condition," as

defined by Section 395.002(8)(b), Florida Statutes (2006), or the giving of notice was not practicable.[2]

PRELIMINARY STATEMENT

On October 6, 2008, Yaima Orozco and Maykel Amador, on behalf of and as parents and natural guardians of Yaikel Amador (Yaikel), a minor, filed a petition with the Division of Administrative Hearings (DOAH) to resolve whether Yaikel qualified for coverage under the Plan, and to resolve whether the health care providers complied with the notice provisions of the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition on October 9, 2008, and on February 5, 2009, NICA responded to the petition and gave notice that it was of the view the claim was compensable and offered to provide benefits, as prescribed by the Plan. In the interim, Kendall Regional Medical Center (Hospital), Francisco G. Tudela, M.D., and Francisco G. Tudela, M.D., P.A., were granted leave to intervene.

Following a pre-hearing conference on February 17, 2009, a hearing was scheduled for April 20, 2009, to resolve, absent a stipulated resolution, whether the claim was compensable and whether the health care providers complied with the notice provisions of the Plan.

The parties' Joint Pre-Hearing Stipulation was filed April 13, 2009. At hearing, Petitioners called Yaima Orozco as a witness, and Petitioners' Exhibits 1-4, Respondent's Exhibit 1, Hospital's Exhibits 1-6, and Dr. Tudela's Exhibit 1 were received into evidence. Post-hearing, Petitioners' Exhibits 5-8 were received into evidence.

The transcript of the hearing was filed May 6, 2009, and the parties were initially accorded 10 days from that date to file proposed orders. However, at the request of the Hospital, the date for filing was extended to June 1, 2009. The parties elected to file such proposals, and they have been duly-considered.

FINDINGS OF FACT

Stipulated facts related to compensability

1. Petitioners, Yaima Orozco and Maykel Amador, are the parents and natural guardians of Yaikel Amador, a minor. Yaikel was born a live infant on May 20, 2007, at Kendall Regional Medical Center, a licensed Florida hospital located in Dade County, Florida, and his birth weight exceeded 2,500 grams. Yaikel died December 4, 2008.

2. Obstetrical services were delivered at Yaikel's birth by Francisco G. Tudela, 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. Yaikel sustained a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes.

Coverage under the Plan

4. 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 . . . of a live infant weighing at least 2,500 grams for a single gestation . . . at birth caused by oxygen deprivation . . . occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. § 766.302(2), Fla. Stat. See also §§ 766.309 and 766.31, Fla. Stat.

5. At NICA's request, Donald Willis, M.D., an obstetrician/gynecologist, reviewed the medical records related to Yaikel's birth and subsequent development, and concluded that Yaikel suffered a "birth-related neurological injury." Dr. Willis summarized the basis for his conclusion, as follows:

> The mother, Yaima Orozco, was a 24 year old . . . with a known complete placenta previa and a prior Cesarean section delivery. Complete placenta previa was well documented by ultrasound during the pregnancy. Ultrasound also identified cleft lip and palate.

Repeat Cesarean section delivery was scheduled for the placenta previa. However, a few days before the scheduled delivery, labor began with heavy vaginal bleeding. Hospital records indicate that labor started on the day of delivery (May 20, 2007) at 4:30 in the morning. Delivery occurred [at 7:28 a.m.] about [three] hours after the onset of labor. Cervical exam was not done on admission due to the known placenta previa.

Fetal heart rate monitor on admission was abnormal with decreased variability and late decelerations. Uterine contractions were every 2 to 3 minutes. By the time the monitor was taken off for delivery, fetal bradycardia had developed with a heart rate of 80 bpm.

Emergency Cesarean section was done for placenta previa in labor with active bleeding. Birth weight was 8 lbs 12 ozs (3,990 grams). The baby was depressed at birth with Apgar scores of 0/0/3/7. The newborn was limp with no respiratory effort or heart beat. CPR was performed for ten minutes before a heart rate was established. The initial blood gas after birth was severely acidotic with a pH of 6.54 and a BE-37.7.

The mother lost an estimated 4,500 ml of blood at delivery and was given multiple blood transfusions. Hysterectomy was required. Maternal complications after delivery included DIC, hypovolemic shock, renal failure and adult respiratory distress requiring intubation. The mother survived a stormy post operative course.

The baby had a complicated hospital course consistent with hypoxic brain injury. Discharge from the hospital was at 6 weeks of age. Head ultrasound on the day of birth showed slight echogenicity in the

> periventricular regions. Head ultrasound on DOL 9 showed brain edema with focal infarcts, consistent with hypoxic injury. CT on DOL 23 had extensive changes consistent with severe ischemic hypoxic encephalopathy.
>
> Pediatric Neurology office visit at 3 months of age lists diagnoses of spastic quadriparesis, global developmental delay and seizures. The child died on December 4, 2008 of complications related to brain injury and chronic lung disease.
>
> In summary: This pregnancy was complicated with a known placenta previa. Labor began with substantial bleeding and fetal distress. The baby was born severely depressed with no heart rate until ten minutes of life. Head ultrasound and CT scans after birth were consistent with hypoxic brain injury. This child suffered severe brain damage due to lack of oxygen during labor, delivery and the immediate post delivery period.

(Respondent's Exhibit 1).

6. Here, the parties have stipulated, and the proof is otherwise compelling, that Yaikel suffered a "birth-related neurological injury." Consequently, since obstetrical services were delivered by a "participating physician" at birth, the claim is compensable. §§ 766.309(1) and 766.31(1), Fla. Stat.

The notice issue

7. While the claim qualifies for coverage under the Plan, Petitioners would prefer to pursue their civil remedies, and avoid a claim of Plan exclusivity (immunity), as set forth in Section 766.303(2), Florida Statutes. Therefore, Petitioners

have averred and requested a finding that the hospital (Kendall Regional Medical Center) and the obstetrician who provided Ms. Orozco's prenatal care (Armando de la Torre, M.D.) failed to comply with the notice provisions of the Plan. See Galen of Florida, Inc. v. Braniff, 698 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."). As for the delivering obstetrician (Dr. Tudela), the parties have stipulated he was not required to give notice because, at the time Ms. Orozco presented to the hospital on May 20, 2007, she had an "emergency medical condition," as defined in Section 395.002(9)(b), Florida Statutes (2006), and Dr. Tudela had no prior opportunity to provide notice. (Joint Pre-Hearing Stipulation; Dr. Tudela Exhibit 1). Consequently, it is necessary to resolve whether Kendall Regional Medical Center and Dr. de la Torre complied with the notice provisions of the Plan. § 766.309(1)(d), Fla. Stat. (2006)("[I]f raised by the claimant or other party, [the administrative law judge shall make] the factual determinations regarding [whether] the notice requirements in s. 766.316 are satisfied.").[3]

The notice provisions of the Plan

8. At all times material hereto, Section 766.316, Florida Statutes (2006), prescribed the notice requirements of the Plan, as follows:

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

9. Section 395.002(9)(b), Florida Statutes (2006), 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.

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

The NICA brochure

11. 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 the participating physicians and hospitals so that they could furnish a copy of it to their obstetrical patients. (Intervenor Exhibit 1 to Hospital Exhibit 2 (the deposition of Mayra Gonzalez)).

Findings related to Ms. Orozco's prenatal care and notice

12. Ms. Orozco received her prenatal care from Armando de la Torre, an obstetrician/gynecologist, who maintained an

office for the practice of his profession at 7200 Northwest 7th Street, Suite 150, Miami, Florida. At the time, Dr. de la Torre was a sole practitioner, a participating physician in the Florida Birth-Related Neurological Injury Compensation Plan, and held staff privileges at, but was not an employee of, Kendall Regional Medical Center.

13. Pertinent to the notice issue, the proof demonstrated that when Ms. Orozco presented to Dr. de la Torre's office on February 21, 2007, for her initial visit, the office had a routine pursuant to which all new obstetric patients were to be given a copy of the NICA brochure by the medical assistant who interviewed them, in this case Mayra Gonzalez, together with a NICA acknowledgment form (RECIBO DE AVISO DE PACIENTE DE OBSTETRICIA), which the patient was asked to complete (by printing her name, social security number, and date) and sign, acknowledging receipt of the NICA brochure and notice of Dr. de la Torre's participation in the Plan. (Hospital Exhibit 2 (the deposition of Mayra Gonzalez), together with Intervenor Exhibits 1 and 2 to that deposition). An Aids & HIV Informed Consent Form (HIV consent form) was also given to the patient to sign. (Petitioners' Exhibit D to Hospital Exhibit 2).

14. According to Ms. Gonzalez, after she gave the patient the NICA brochure and the NICA acknowledgment form to complete and sign, she documented the lab record, under "32-36 WEEK

LABS," next to the "NST" (nonstress test) line, with the notation "NICA" followed by the date. (Petitioners' Exhibit 3; Petitioners' Exhibit A to Hospital Exhibit 2). Here, Ms. Gonzalez testified she documented the lab record with the entry "NICA 2/21/07," in her own handwriting, and would not have done so had she not given Ms. Orozco a copy of the NICA brochure.

15. Apart from the foregoing activities, Ms. Gonzalez also completed the first page of the Prenatal Record, except for limited information at the top of the form (related to the date, insurance, patient's name, social security number, age, date of birth, address, and phone number), and then referred the patient to Dr. de la Torre for her initial consultation. (Petitioners' Exhibit 4; a copy of the Prenatal Record is also included among the office records attached to Hospital Exhibit 2). According to Ms. Gonzalez, she paper clipped the NICA acknowledgment form and the HIV consent form together and placed them in the patient chart, to be later hole-punched and secured in the chart by a clerk.

16. In contrast to the proof offered regarding Dr. de la Torre's office routine, Ms. Orozco testified that no one discussed the Plan with her, she did not receive a NICA brochure, she was not asked to sign a receipt for the brochure, and she was not advised of Dr. de la Torre's participation in

the Plan. As for the HIV consent form, Ms. Orozco did not recall filling out such a form, but acknowledged the test was done with her consent. (Transcript, pp. 36 and 37).

17. Notably, Ms. Orozco's chart does not include, as it should if the office routine was followed, a copy of the NICA acknowledgment form or the HIV consent form. Nevertheless, the Hospital and NICA contend there is no reason to conclude the office routine was not followed because the HIV analysis was performed and Ms. Gonzalez noted on the lab record that she had provided the NICA brochure to Ms. Orozco (by making the entry that read "NICA 2/21/07"). However, there was no showing that written consent, as opposed to oral consent, was required before an HIV analysis would be performed. See also §§ 381.004(3)(a) and 384.31, Fla. Stat. As for the probative value of the "NICA 2/21/07" entry on the lab record, Petitioners were of the view that such entry did not compare favorably with the acknowledged exemplars of Ms. Gonzalez's writing of the date "2/21/07" that appear on the Prenatal Record she completed, that such entry was likely entered by another person after Ms. Gonzalez's interview, and that such entry is not a reliable indication that the office practice was followed on Ms. Orozco's initial visit or that she was provided a NICA brochure.

18. With regard to the absent NICA acknowledgment form and HIV consent form, there are two possible explanations. First,

that such forms were never presented to Ms. Orozco. If that were the case, then the office practice was not followed, and it would be inappropriate to conclude, based on such practice, that Ms. Orozco was given a NICA brochure. A second possible explanation, given the office practice, is that for some inexplicable reason the forms were lost or misplaced. In that case, it would be appropriate to consider the office practice when resolving whether Ms. Orozco was given a NICA brochure.

19. As an explanation for the missing documents, Dr. de la Torre and Ms. Gonzalez opined that they may have been lost, and pointed to the entry of "NICA 2/21/07" on the lab record as proof Ms. Gonzalez followed the office routine and that Ms. Orozco was likely given a copy of the NICA brochure. (Petitioners' Exhibit 1, pp. 33-35, 36, and 37; Hospital Exhibit 2, pp. 27-29). However, the entry of "NICA 2/21/07," which Ms. Gonzalez testified she made is troublesome. Notably, with specific regard to the numeral "2," and to a lesser extent with regard to the other numerals, the entry does not facially resemble the entries Ms. Gonzalez made on the Prenatal Record. Moreover, there being no evidence of a catastrophic event (i.e., wind or fire damage to the office) to account for the missing documents; the importance of the NICA acknowledgment form, and its retention with the medical records; the wealth of identifying information on the documents that makes it easy to

assure they are properly filed; and the fact that patient records are kept in a secure area,[4] compel the conclusion that it is more likely the forms were never presented to Ms. Orozco, then lost. Accordingly, on this record, it must be resolved that the proof failed to support the conclusion that, more likely than not, the office practice was followed or that Ms. Orozco was given a NICA brochure.

Findings related to the hospital and notice

20. On April 6, 2007, at the suggestion of Dr. de la Torre, Ms. Orozco presented to Kendall Regional Medical Center and pre-registered for Yaikel's delivery by cesarean section. At the time, Ms. Orozco was interviewed by a registration clerk, and signed a "Condiciones de admisión" (Conditions of admission) form. (Petitioners' Exhibit 8; Hospital Exhibit 6). However, Ms. Orozco was not given a NICA brochure or otherwise advised of the NICA program, although it was practicable to have done so.

21. At 4:30 a.m., May 20, 2007, a few days before the scheduled delivery, labor began with heavy vaginal bleeding, and on the advice of Dr. Tudela, the physician on-call to cover Dr. de la Torre's patients,[5] Ms. Orozco went to Kendall Regional Medical Center, where she was received at or about 6:02 a.m. At the time, Ms. Orozco had an "emergency medical condition," as defined by Section 395.002(9)(b), Florida Statutes (2006.)[6] (Joint Pre-Hearing Stipulation; Dr. Tudela Exhibit 1).

Dr. Tudela, like Dr. de la Torre, held staff privileges at, but was not an employee, of Kendall Regional Medical Center.

22. Given Ms. Orozco's condition, a stat cesarean section delivery was called, and at 6:25 a.m., Ms. Orozco was asked to sign, and signed, a number of forms, including a Photography and Videotaping Guidelines in the Maternity Unit form, Consent for Operation form, Consent for Anesthesia form, and Consent for Transfusion form. (Petitioners' Exhibit 8, Orozco Bate Stamp Numbers 00165-00168). At 6:30 a.m., Ms. Orozco was asked to sign, and signed, a Notice to Obstetric Patient form, acknowledging that the hospital had provided her a copy of the NICA brochure. (Petitioners' Exhibit 8, Orozco Bate Stamp Number 00169; Hospital Exhibit 5).

23. Ms. Orozco admits she signed the Notice to Obstetric Patient form, but credibly testified she did not read it because she was ill, and disputes that she was given a NICA brochure. Petitioners also contend the brochure, if given, was not provided a reasonable time prior to delivery to allow for the exercise of an informed choice of providers. As to this contention, Petitioners note that the hospital had an opportunity to provide meaningful notice during Ms. Orozco's pre-registration on April 6, 2007, but failed to do so, and that if a brochure was given to her after she presented in an emergency medical condition, it was not efficacious notice.

Petitioners' contention is well-founded. 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."); Weeks v. Florida Birth-Related Neurological Injury Compensation Association, 977 So. 2d 616, 618 (Fla. 5th DCA 2008)("[NICA] notice must be given a reasonable time after the commencement of the [provider-obstetrical] patient relationship and . . . the failure to do so is not excused by the subsequent emergency."); Northwest Medical Center, Inc. v. Ortiz, 920 So. 781, 786 (Fla. 4th DCA 2006). ("Because 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,' . . . notice [given after a patient was admitted in an emergency medical condition] was ineffective . . . ."); 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."). Consequently, it must be resolved that having failed to take advantage of a reasonable opportunity to provide pre-delivery notice, the hospital failed to comply with the notice provisions of the Plan.

CONCLUSIONS OF LAW

Jurisdiction

24. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. § 766.301, et seq., Fla. Stat.

Compensability

25 In resolving whether a claim is covered by the Plan, the administrative law judge must make the following determination based upon the available evidence:

> (a) Whether the injury claimed is a birth-related neurological injury. If the claimant has demonstrated, to the satisfaction of the administrative law judge, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.303(2).

> (b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital.

§ 766.309(1), Fla. Stat. An award may be sustained only if the administrative law judge concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth." § 766.31(1), Fla. Stat.

26. "Birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes, to mean:

> . . . injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

27. In this case, it has been established that the physician who provided obstetrical services at Yaikel's birth was a "participating physician," and that Yaikel suffered a

"birth-related neurological injury." Consequently, Yaikel 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

28. While the claim qualifies for coverage, Petitioners have sought the opportunity to avoid a claim of Plan immunity in a civil action, by requesting a finding that the notice provisions of the Plan were not satisfied by Kendall Regional Medical Center and Dr. de la Torre. As the proponent of the immunity claim, the burden rested on the health care providers to demonstrate, more likely than not, that the notice provisions of the Plan were satisfied. Tabb v. Florida Birth-Related Neurological Injury Compensation Association, 880 So. 2d 1253, 1260 (Fla. 1st DCA 2004)("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.").

29. 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.

30. 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.

31. In Board of Regents v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997), approved, University Medical Center, Inc. v. Athey, 699 So. 2d 1350 (Fla. 1997), the Court, consistent with its decision in Braniff v. Galen of Florida, Inc., 669 So. 2d 1051 (Fla. 1st DCA 1995), again resolved that notice was a condition precedent to invoking the Plan as a patient's exclusive remedy. Also of interest to the notice issue, the court in Athey (under circumstances where it was alleged neither the participating physicians nor the hospital gave the pre-delivery notice required by the Plan) spoke to the independent obligation of the physician and the hospital to accord the patient notice, as mandated by Section 766.316, Florida Statutes, as follows:

> Under the plan, a "participating physician" is one who is "licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full time or part time and who had paid or was exempted from payment at the time of the injury the assessment required for participation" in NICA. Section 766.302(7), Fla. Stat. (1989). Thus, if a hospital has a "participating physician" on staff, to avail itself of NICA exclusivity the hospital is required to give pre-delivery notice to its

> obstetrical patients. In addition, except for residents, assistant residents and interns who are exempted from the notice requirement, a participating physician is required to give notice to the obstetrical patients to whom the physician provides services. Under section 766.316, therefore, notice on behalf of the hospital will not by itself satisfy the notice requirement imposed on the participating physician(s) involved in the delivery. [Conversely, it reasonably follows, notice on behalf of the participating physician will not by itself satisfy the notice requirement imposed on the hospital.]

Id. at 49.

32. The court in Athey further resolved that "[h]aving failed to take advantage of a reasonable opportunity to provide pre-delivery notice, a health care provider will not be heard to complain that notice, if given, would have been ineffective." Id. at 51. In so concluding, the court reasoned:

> . . . Recognizing that the notice under section 766.316 "is intended to permit an informed choice between alternatives before delivery," Braniff, 669 So. 2d 1053, appellants reason that the patients here had no real choice in delivery alternatives because, as the undisputed facts reflect, there were no other hospitals or birthing centers in the county where these Medicaid patients could have gone for the birth of their children. Further, appellants contend since these patients were in active labor when they presented to UMC, it would have been medically unsafe and inappropriate to have transferred them to another health care institution for delivery. Thus, appellants argue, these patients were denied an "informed choice," not because of any failure to provide the NICA notice, but because they were precluded from seeking care at a health care facility other than UMC as a result of both their status as Medicaid patients and their medical conditions. Since no "informed choice" was possible for these patients at

the time they presented to UMC under the instant circumstances, appellants argue they had no opportunity to provide an efficacious notice under section 766.316.

We find this argument to be without merit.

* * *

We believe the use of a bright-line rule here will be most in keeping with the legislative intent of the notice requirement in section 766.316. We hold that health care providers who have a reasonable opportunity to give notice and fail to give predelivery 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 the notice was provided. See Levine v. Dade County School Board, 442 So. 2d 210, 213 (Fla. 1983)("Consideration of the efficacy of or need for the notice requirement is a matter wholly within the legislative domain."). Having failed to take advantage of a reasonable opportunity to provide pre-delivery notice, a health care provider will

> not be heard to complain that notice, if given, would have been ineffective.

Id. at 50. See also Weeks v. Florida Birth-Related Neurological Injury Compensation Association, supra; Northwest Medical Center, Inc. v. Ortiz, supra; University of Miami v. Ruiz, supra. But see, Bayfront Medical Center v. Florida Birth-Related Neurological Injury Compensation Association, 982 So. 2d 704 (Fla. 2d DCA 2008); All Childrens' Hospital, Inc. v. Department of Administrative Hearings, 989 So. 2d 2 (Fla. 2d DCA 2008).

33. The conclusions reached by the court in Athey regarding the independent obligation of the physician and the hospital to accord the patient notice "as to the limited no-fault alternative for birth-related neurological injuries" are consistent with basic principles of statutory construction. First, the statutory language in Section 766.316, clearly supports the court's conclusion:

> 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 . . . (emphasis added).

Had the Legislature intended for the patient to receive notice from only the physician or the hospital, the statute could easily have been worded to reflect that intention. The legislature's choice of clear, unambiguous language to the contrary evidences its intention that the participating physician and hospital are both obligated to provide notice. As

noted in Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984):

> Florida case law contains a plethora of rules and extrinsic aids to guide courts in their efforts to discern legislative intent from ambiguously worded statutes. However, when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning . . . . Courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power. (citations omitted).

Accord, Tropical Coach Line, Inc. v. Carter, 121 So. 2d 779, 782 (Fla. 1960)("If the language of the statute is clear and unequivocal, then the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think that the legislators intended or should have intended."). Finally, one must be mindful that "[c]onsideration of the efficacy of or need for the notice requirement is a matter within the legislative domain." Levine v. Dade County School Board, 442 So. 2d 210 (Fla. 1983).

34. Accordingly, it must be resolved that Kendall Regional Medical Center and Dr. de la Torre 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. Weeks v. Florida Birth-Related Neurological Injury Compensation Association, supra; Northwest Medical Center, Inc. v. Ortiz, supra; University of Miami v. Ruiz, supra.

CONCLUSION

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

ORDERED that the claim for compensation filed by Yaima Orozco and Maykel Amador, on behalf of and as parents and natural guardians of Yaikel Amador, a minor, be and the same is hereby approved.

It is FURTHER ORDERED that Dr. Tudela complied with the notice provisions of the Plan, but Kendall Regional Medical Center and Dr. de la Torre did not.

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 12th day of June, 2009, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of June, 2009.

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 May 20, 2007. 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/ Section 766.316, was amended, effective July 1, 2007, by Chapter 2007-230, Section 205, Laws of Florida, to substitute a reference to Section 395.002(8)(b) for the reference to Section 395.002(9)(b) because the definition of "emergency medical condition, was moved to that subsection. Otherwise, the wording of Section 766.316 was not changed.

3/ While the administrative law judge is required to resolve whether the notice requirements of Section 766.316, Florida Statutes, have been satisfied, he or she does not have jurisdiction to resolve whether any person or entity is entitled to invoke the immunity from tort liability provided for in Subsection 766.303(2), Florida Statutes. Depart v. Macri, 902 So. 2d 271 (Fla. 1st DCA 2005); Gugelmin v. Division of Administrative Hearings, 815 So. 2d 764 (Fla. 4th DCA 2002).

4/ According to the testimony of Dr. de la Torre's office manager (Janet Martinez), patient records are kept in a locked area. (Hospital Exhibit 1 (deposition of Janet Martinez), p. 5).

5/ Doctors de la Torre, Tudela, and Thomas Marimon had an arrangement whereby they cross-covered, likely on a rotating basis, each other's patients.

6/ As heretofore noted, the parties have stipulated that Dr. Tudela had not seen Ms. Orozco prior to the date of delivery, and was not required to give notice on May 20, 2007, because she had an emergency medical condition. The parties have also stipulated that Dr. de la Torre was not present during Ms. Orozco's labor and did not arrive in the operating room until after Yaikel's delivery. (Joint Pre-Hearing Stipulation; Dr. Tudela Exhibit 1).

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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.