

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DESIREE WILLIAMS AND ROBERT
WILLIAMS, individually and as
parents and next friends of
LYLYAUHNE WILLIAMS, a minor,

Petitioners,

vs.

Case No. 12-0848N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

PALMS WEST HOSPITAL LIMITED
PARTNERSHIP, d/b/a PALMS WEST
HOSPITAL, AND STEVEN PLISKOW,
M.D.,

Intervenors.

_____ /

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on
April 30, 2013, by video teleconference with sites in Tallahassee
and West Palm Beach, Florida, before Susan Belyeu Kirkland, an
Administrative Law Judge of the Division of Administrative
Hearings.

APPEARANCES

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For Respondent: David W. Black, Esquire
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For Intervenor Palms West Hospital, Limited Partnership,
d/b/a Palms West Hospital:

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STATEMENT OF THE ISSUES

The issues to be determined in this proceeding are whether Steven Pliskow, M.D. (Dr. Pliskow), provided notice as required by section 766.316, Florida Statutes, and whether Palms West Hospital, Limited Partnership, d/b/a Palms West Hospital (Palms West Hospital) provided notice as required by section 766.316.

PRELIMINARY STATEMENT

On March 5, 2012, Petitioners, Desiree Williams and Robert Williams, individually and as parents and next friends of Lylyauhnie Williams, a minor, filed a Petition for Determination of NICA Coverage with the Division of Administrative Hearings, seeking compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

On April 20, 2012, Petitioners' counsel, Allison C. McMillan, Esquire, filed a motion to withdraw, which was granted by Order dated May 8, 2012. On May 8, 2012, Paul Silva, Esquire, filed a Notice of Appearance on behalf of Petitioners. On July 6, 2012, Mr. Silva filed an Amended Petition for Determination as to Applicability of Florida Birth-Related Neurological Injury Compensation Plan, asserting that Petitioners did not believe that the claim was compensable under the Plan.

On July 12, 2012, Palms West Hospital filed a motion to intervene, which was granted by Order dated July 25, 2012. On July 25, 2012, Dr. Pliskow filed an amended petition to intervene, which was granted by Order dated August 7, 2012.

On September 6, 2012, Respondent, Florida Birth-Related Neurological Injury Compensation Association, filed a Notice of Compensability and Request for Evidentiary Hearing on Compensability.

On October 12, 2012, Mr. Silva filed a motion to withdraw, which was granted by Order dated October 22, 2012. On October 29, 2012, Petitioners' current counsel filed a Notice of Appearance.

On October 15, 2012, Respondent filed a Motion for Summary Final Order. The motion was denied by Order dated December 21, 2012.

On November 2, 2012, Petitioners filed Petitioners' Notice of Withdrawal of Acceptance of NICA Compensability and Objection to Entry of Summary Final Order on the Issue of Compensability. On November 2, 2012, Petitioners filed Petitioners' Motion to Amend Amended Petition for Determination as to Applicability of Florida Birth-Related Neurological Injury Compensation Plan to Add Additional Facts and Claims Based on the Record. The motion was granted by Order dated December 21, 2012. The amended petition asserted that the claim was not compensable and that notice had not been provided by Intervenors as required by section 766.316.

On March 18, 2013, Respondent filed a Renewed Motion for Summary Final Order, representing that Petitioners no longer disputed that the claim was compensable, but still asserted that the required notice had not been provided by either Dr. Pliskow or Palms West Hospital. On April 19, 2013, a Partial Summary Final Order was entered on the issue of compensability, finding

that the claim was compensable and retaining jurisdiction to determine the issue of notice.

At the final hearing, Joint Exhibits 1 through 17 were admitted in evidence. Petitioners testified in their own behalf and called Dr. Pliskow and Robin Torres as witnesses. Neither Respondent nor Intervenors called any witnesses.

The one-volume Transcript of the final hearing was filed on May 15, 2013. Petitioners filed their proposed final order on May 24, 2013, and Intervenors filed their proposed final orders on May 28, 2013. Respondent did not file a proposed final order. The parties' proposed final orders have been considered in the drafting of this Final Order.

FINDINGS OF FACT

1. Desiree Williams first presented to Dr. Pliskow on November 28, 2011, for a prenatal visit. She was 34 weeks' gestation. When she arrived at Dr. Pliskow's office, Mrs. Williams was given some forms to fill out by the receptionist. She filled out, signed, and dated a Patient Registration Form and a Policies and Consent form and returned them to the receptionist. The forms were initialed by the receptionist.

2. After she returned the forms to the receptionist, Mrs. Williams returned to the waiting room, while her chart was being prepared by Dr. Pliskow's medical assistant,

Marlena Lovely. Ms. Lovely took Mrs. Williams to the triage area. Mrs. Williams remembers Ms. Lovely because Ms. Lovely was wearing unusual pink tye-dyed shoes.

3. While in the triage area, Ms. Lovely gave Mrs. Williams a copy of the brochure published by the Florida Birth-Related Neurological Injury Compensation Association (NICA brochure). She also gave Mrs. Williams the Patient Information Verification form, the Prenatal Risk Screening form, and the Prenatal Genetic Screening form for Mrs. Williams to fill out. Mrs. Williams filled out the forms.

4. The Prenatal Information Verification form contains the following statement:

The first OB visit is an important time to insure that you start you prenatal care informed and confident that you are making the right decision regarding your pregnancy. As we progress together through the pregnancy, we will discuss many aspects of the prenatal care and delivery. Please confirm that you have received the following information and that all your questions have been answered.

After this statement, there is a list of items and beside each item is a blank for the date and a blank for the patient's initials. The first item listed is the NICA brochure.

Mrs. Williams placed the date, "11/28/2011," on the blank for the date and placed her initials on the blank designated for the patient's initials.

5. After filling out the forms in triage, Mrs. Williams was taken to Dr. Pliskow's office, where Dr. Pliskow discussed the pertinent items on the Prenatal Information Verification form with Mrs. Williams. Dr. Pliskow recalls seeing the NICA brochure in Mrs. Williams' lap while he was discussing the items on the form with Mrs. Williams. Dr. Pliskow initialed the Prenatal Information Verification form after he discussed the items with Mrs. Williams. After his discussion with Mrs. Williams, she was taken to the examination room, where Dr. Pliskow examined her.

6. Mrs. Williams denies having received the NICA brochure during her visit to Dr. Pliskow's office on November 28, 2011. However, based on the normal routine and practice in Dr. Pliskow's office, it is more likely than not that Mrs. Williams did receive a copy of the NICA brochure from Dr. Pliskow's office on November 28, 2011.

7. The routine practice in Dr. Pliskow's office for a first time obstetric patient was to have the receptionist give the patient the Patient Registration form and the Policies and Consent Form to fill out while the patient was in the waiting room. After the patient returned the forms to the receptionist, the receptionist would initial the forms and give them to Dr. Pliskow's medical assistant to compile a chart. The medical assistant would then take the patient to the triage area where the patient would be given the Prenatal Risk Screening form, the

Prenatal Genetic Screening form, and a Prenatal Information Verification form to complete. The medical assistant would give the patient the NICA brochure while the patient was in triage. After triage, the patient would be taken to see Dr. Pliskow in his office, where Dr. Pliskow would discuss the items listed in the Prenatal Information Verification form with her. He would also discuss the NICA brochure and advise the patient that he was a participating physician. After this discussion, the patient would be taken to the examination room to be examined by Dr. Pliskow.

8. Mrs. Williams presented to Palms West Hospital on December 19, 2011, and pre-registered for her delivery. On December 29, 2011, Mrs. Williams presented again to Palms West Hospital for a biophysical profile.

9. Palms West Hospital did not provide Mrs. Williams with notice as to the limited no-fault alternative for birth-related neurological injuries under the Plan on December 19, 2011, or December 29, 2011.

10. Palms West Hospital was not prohibited or constrained from providing notice to Mrs. Williams of the Plan on either December 19, 2011, or December 29, 2011.

11. On January 3, 2012, Mrs. Williams presented to Palms West Hospital after a spontaneous rupture of membranes. When she arrived at the hospital, she was given some forms to complete and

sign. One of the forms that she was given and which she signed and dated was the Acknowledgement of Patient's Receipt of the Florida Birth-Related Neurological Injury Compensation Plan Brochure. The form stated:

1. I ACKNOWLEDGE THAT I HAVE RECEIVED THE OFFICIAL INFORMATION BROCHURE OF THE Florida Birth-Related Neurological Injury Compensation Plan.

2. I acknowledge that any questions I may have had with regard to the operation of this plan and the potential benefits available to me have been answered to my satisfaction.

3. I hereby consent to the rendering of all necessary medical services including having received the official information NICA brochure which describes my rights and limitations under that plan.

4. I acknowledge and understand that I may contact the Florida Birth-Related Neurological Compensation Association about the details of the plan.

12. Mrs. Williams' signature on the acknowledgement form was witnessed by Robin Torres, a registered nurse in the labor and delivery unit at Palms West Hospital. Part of Ms. Torres' duties and routine practice at Palms West Hospital is to give incoming obstetrical patients a copy of the NICA brochure prior to her signing her name to the acknowledgement form as a witness. Ms. Torres also routinely manually inputs data into the hospital computer showing that the NICA brochure was given to the patient. The records of Palms West Hospital show that on January 3, 2012,

Ms. Torres entered data into the hospital computer system indicating that Mrs. Williams was provided a copy of the NICA brochure on that date.

13. Mrs. Williams denies being given a copy of the NICA brochure when she presented to Palms West Hospital on January 3, 2012, but concedes that she did not read the forms that were provided to her on that date. The greater weight of the evidence demonstrates that Mrs. Williams was given a copy of the NICA brochure by the staff of Palms West Hospital on January 3, 2012.

14. At the time that Mrs. Williams presented to Palms West Hospital on January 3, 2012, she could not be transferred to another hospital because her membranes had broken and she was in labor.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat. (2012).

16. The only issue that was to be determined in the final hearing is whether notice was provided pursuant to section 766.316, which provides:

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(8)(b) or when notice is not practicable.

17. Section 766.309(1)(d) provides:

(1) The administrative law judge shall make the following determination based upon all available evidence:

* * *

(d) Whether if raised by the claimant or other party, the factual determinations regarding the notice requirements in s. 766.316 are satisfied. The administrative law judge has the exclusive jurisdiction to make these factual determinations.

18. Petitioners contend that Dr. Pliskow did not provide notice and that any notice that may have been provided by the hospital was insufficient. Respondent did not take a position on the notice issue. Intervenors contend that the appropriate statutory notice was given. As the proponent of the proposition that appropriate notice was given, the burden on the issue of notice is upon the Intervenors. Tabb v. Fla. Birth-Related

Neurological Injury Comp. Ass'n., 880 So. 2d 1253, 1257 (Fla. 1st DCA 2004).

19. The greater weight of the evidence established that Dr. Pliskow provided Mrs. Williams a copy of the NICA brochure when she made her first visit to his office on November 28, 2011. Thus, Dr. Pliskow satisfied the notice requirement in section 766.316.

20. Petitioners and Palms West Hospital stipulated that the hospital did not provide Mrs. Williams with a copy of the NICA brochure when she pre-registered at the hospital on December 19, 2011, and when she went to the hospital on December 29, 2011, for testing. The greater weight of the evidence did establish that Palms West Hospital did provide Mrs. Williams with a copy of the NICA brochure when she presented to the hospital on January 3, 2012.

21. In Weeks v. Florida Birth-Related Neurological Injury Compensation Association, 977 So. 2d 616, 618-619 (Fla. 5th DCA 2008), the court stated:

[T]he formation of the provider-obstetrical patient relationship is what triggers the obligation to furnish the notice. The determination of when this relationship commences is a question of fact. Once the relationship commences, because [section 766.316] is silent on the time period within which notice must be furnished, under well-established principles of statutory construction, the law implies that notice must be given within a reasonable time.

Burnsed v. Seaboard Coastline R. Co., 290 So. 2d 13, 19 (Fla. 1974); Concerned Citizens of Putnam County v. St. Johns River Water Mgmt. Dist., 622 So. 2d 520, 523 (Fla. 5th DCA 1993). The determination depends on the circumstances, but a central consideration should be whether the patient received the notice in sufficient time to make a meaningful choice of whether to select another provider prior to delivery, which is the primary purpose of the notice requirement.

22. The facts of this case established that a provider obstetrical patient relationship was established between Mrs. Williams and Palms West Hospital when Mrs. Williams pre-registered at the hospital on December 19, 2011. There was nothing that prevented the hospital from providing Mrs. Williams with the NICA brochure at that time, but the hospital chose not to do so.

23. Palms West Hospital had a second opportunity to provide Mrs. Williams with the required statutory notice on December 29, 2011, when Mrs. Williams presented to the hospital for testing. Again, there was nothing which prevented the hospital from providing the notice on December 29, 2011, but it chose not to do so.

24. In Northwest Medical Center, Inc. v. Ortiz, 920 So. 2d 781, 784 (Fla. 4th DCA 2006), the court, (citing Galen of Florida, Inc. v. Braniff, 920 So. 2d 781 (Fla. 1997)) discussed

the timing of the provision of notice required by section 766.316 and stated:

The supreme court [in Braniff] determined "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 not a participant and thereby preserving her civil remedies."

* * *

The court also determined that "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."

25. In Ortiz, the patient, Mrs. Ortiz, had preregistered at the hospital over three months prior to her delivery. The hospital did not give notice to the patient at the time of preregistration. When Mrs. Ortiz came to the hospital for delivery, she was having soft contractions. About five hours after she arrived at the hospital, she was given an NICA acknowledgment form to sign. A short time later a cesarean was performed on Mrs. Ortiz because she was in critical condition. The court held that the notice provided by the hospital was ineffective.

Northwest [the hospital] knew that Mrs. Ortiz intended to deliver her child there three months before her actual admission. At that

time she was given substantial information regarding her medical care at the hospital and she signed several consent forms. If the purpose of the notice requirement is to give the patient the choice to choose NICA protected delivery or not, hospitals should give notice at a time where such choice can still be made. By waiting until an emergency arises, the hospital is depriving the patient of this choice. Therefore, by failing to give notice of NICA participation a reasonable time prior to delivery, although able to do so, Northwest lost the protection of NICA and the Ortizes are entitled to pursue their civil remedies.

* * *

Northwest also argues that even if it could have given an earlier notice, it satisfied the statutory notice provision by informing Mrs. Ortiz about NICA on the day she was admitted to the hospital. The Ortizes maintain this notice was ineffective because it was not given to Mrs. Ortiz until a time when she would have been unable to act on the information. 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," see Braniff, 696 So. 2d at 309-310, the notice was ineffective in this case.

Ortiz, 920 So. 2d at 785-786.

26. The notice provided by Palms West Hospital on January 3, 2012, was ineffective because at the time the notice was provided Mrs. Williams could not have been transferred to another hospital. She did not have sufficient time to make an informed choice on whether to use a participating health care

provider. The hospital had two opportunities to provide notice to Mrs. Williams prior to her presenting for delivery, but did not avail itself of those opportunities. Thus, Palms West Hospital did not comply with the provisions of section 766.316 for providing notice.

CONCLUSION

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

ORDERED that Dr. Pliskow provided notice as required by section 766.316 and that Palms West Hospital did not provide notice as required by section 766.316.

It is further ORDERED that the parties are accorded 30 days from the date of this Order to resolve, subject to approval of the Administrative Law Judge, the amount and manner of payment of an award to Petitioners; the reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees and costs; 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.

It is further ORDERED that in the event Petitioners file an election of remedies declining or rejecting NICA benefits, this case will be dismissed and DOAH's file will be closed.

DONE AND ORDERED this 21st day of June, 2013, in
Tallahassee, Leon County, Florida.

Susan Belyeu Kirklund

SUSAN BELYEU KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 21st day of June, 2013.

COPIES FURNISHED:
(Via certified mail)

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NOTICE OF RIGHT TO JUDICIAL REVIEW

Review of a final order of an administrative law judge shall be by appeal to the District Court of Appeal pursuant to section 766.311(1), Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal. See § 766.311(1), Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992).