

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CICORRA CERVANTES, as Personal
Representative of the Estate of
CIMAYAH RAYVONNE ROSE THURSTON,
a deceased minor,

Petitioner,

vs.

Case No. 13-3287N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

GREGORY DELONG, M.D., KEY WEST
HMA PHYSICIAN MANAGEMENT, LLC,
AND KEY WEST HMA, LLC, d/b/a
LOWER KEYS MEDICAL CENTER,

Intervenors.

_____ /

FINAL ORDER ON NOTICE

Pursuant to notice, a final hearing on the issue of notice was held in this case on September 24, 2014, via video teleconference with sites in Key West and Tallahassee, Florida, before Barbara J. Staros, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether Gregory DeLong, M.D., and
Key West HMA Physician Management, LLC; and Key West HMA, LLC,
d/b/a Lower Keys Medical Center provided notice as required by
section 766.316, Florida Statutes.

PRELIMINARY STATEMENT

On August 26, 2013, Petitioner, Cicorra Cervantes, as Personal Representative of the Estate of Cimayah Rayvonne Rose Thurston (Cimayah), a deceased minor, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. (Petition) with DOAH. The Petition stated that it was filed pursuant to court order and was being filed under protest, and that the Petition only sought benefits as an alternative remedy in the event a determination is made that the claim is compensable under the plan and that proper notice was provided to Petitioner.

The Petition named Gregory DeLong, M.D., as the physician providing obstetric services at the birth of Cimayah, who was born at Lower Keys Medical Center (Lower Keys). DOAH served the Birth-Related Neurological Injury Compensation Association with a copy of the Petition on September 4, 2013. DOAH served copies of the Petition on Lower Regional Keys Medical Center and Dr. DeLong on September 3, 2013.

On November 7, 2013, Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), filed a Motion for Summary Final Order on the issue of compensability. On November 26, 2013, NICA filed an Amended Motion for Summary Final Order.

On November 27, 2013, Dr. DeLong and Key West HMA Physician Management, LLC, filed a Motion to Intervene, which was granted by Order dated December 6, 2013. On December 2, 2013, Key West HMA, LLC, d/b/a Lower Keys Medical Center filed a Motion to Intervene, which was granted by Order dated December 11, 2013. The Intervenors also moved to Join NICA's Amended Motion for Summary Final Order.

On December 12, 2013, a Partial Summary Final Order on Compensability was entered, finding that Cimayah sustained a birth-related neurological injury, which is compensable under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). Jurisdiction was retained on the issues of notice and award.

The final hearing, which was scheduled for July 17 and 18, 2014, was continued and rescheduled for September 24 and 25, 2014. The hearing took place on September 24, 2014, and concluded that day.

At the final hearing, Petitioner called the following witnesses: Eugenia Butler, Donette Cervantes, and Cicorra Cervantes. Petitioner's Exhibits 1A, 1B, 2A, and 2B were admitted into evidence.

Intervenors did not present any live witnesses. Intervenors presented the deposition testimony of Eugenia Butler, Ciccora Cervantes, Donette Cervantes, Atavia Lopez-Dor,

Dr. Gregory DeLong, Naomi Thomas, and the video deposition of Marcus Thurston. These depositions were admitted into evidence as Intervenors' Joint Exhibits numbered 6A through 6H. Additionally, Intervenors DeLong and Key West HMA Physician Management, LLC's Exhibits numbered 1, 2, and 4 were admitted into evidence. A ruling on Intervenors' Exhibit 3 was reserved. Upon consideration, Intervenors DeLong and Key West Physician Management, LLC's Exhibit 3 is admitted. The Exhibits numbered 1 through 5 of Intervenor Lower Keys were admitted in evidence. Intervenor Lower Keys' Exhibit 7 was proffered. Respondent did not present any witnesses or offer any exhibits.

The Transcript of the final hearing was filed on October 14, 2014. Petitioner and Intervenors timely filed Proposed Final Orders on October 24, 2014, which were duly considered in the preparation of this Final Order on Notice. Respondent did not file a proposed final order.

FINDINGS OF FACT

1. Cicorra Cervantes first presented to Key West HMA Physician Management, LLC, an OB/GYN practice located in Key West, Florida, on September 23, 2008, for her first prenatal visit. Her treating physician was Gregory DeLong, M.D., a board-certified obstetrician who was a participating physician in the Plan, as defined by section 766.302(7). Dr. DeLong currently

works in his office in Key West one week a month, and is in Daytona Beach the other three weeks.

2. Ms. Cervantes was given several forms to fill out by the receptionist. She filled out, signed, and dated a medical questionnaire, an admission form called "Welcome to Our Practice," a No Show and No Call form, a prescription renewal form, a financial policy form, a Privacy Notice Acknowledgement form, and a Notice of Changes Agreement. These forms were all dated September 22, 2008.

3. Following completion of the forms provided by the receptionist, Ms. Cervantes was then seen by Dr. DeLong's medical assistant, Kay Van de Gejuchte. Ms. Cervantes recalled that Ms. Van de Gejuchte took her vital signs and checked the fetal heartbeat. The routine practice for each new obstetrical patient of Dr. DeLong's was for the patient to meet with Ms. Van de Gejuchte for their OB intake interview prior to being seen by Dr. DeLong. She would take the new patient's blood pressure, get a urine sample, and draw blood for testing. She would talk to the new patient about what to expect from each visit. She would also go over the contents of what she referred to as the OB packet with the new patient. The patient would then come back to the office within a week to meet with Dr. DeLong. Typically Ms. Van de Gejuchte would spend approximately 45 minutes with a new patient during the initial visit.

4. Ms. Van de Gejuchte's routine was to put together an OB packet the day before a new patient's initial visit. Each OB packet contained an Obstetrical Ultrasound policy, an obstetrical history, a NICA Peace of Mind brochure and a NICA acknowledgment form called a Receipt of Notice to Obstetric Patients. She would also include in the packet pamphlets from various vendors about things such as breast-feeding and Lamaze classes, which she color-coded.^{1/}

5. According to Ms. Van de Gejuchte, she always went over the NICA brochure in detail. She would open the brochure and explain the Exclusive Remedy, Criteria Coverage and Compensation sections, and explain that the NICA Plan was like an insurance policy outside the doctor's malpractice policy and that the doctor had to pay to belong to the Plan. She would explain to the patient that Dr. DeLong was a participating physician in the Plan. She would also show the new patient NICA's phone number and tell them that if they had any questions, they could contact NICA directly. The patient would then sign the form and Ms. Van de Gejuchte would then sign and date the form.

6. Ms. Van de Gejuchte had a detailed conversation with the new OB patients about the NICA Plan due to her personal experience of her granddaughter being born with cerebral palsy, which she shared with her patients.

7. No new patients were scheduled for an initial visit unless Ms. Van de Gejuchte was in the office.

8. While copies of seven other forms signed by Ms. Cervantes were located from her file, the NICA acknowledgement form was not located by Dr. DeLong's office. It was the policy of Dr. DeLong to provide the brochure to an obstetric patient and to have the patient sign a form acknowledging that she received the brochure. Ms. Van de Gejuchte does not know why the NICA acknowledgment form was not located in Ms. Cervantes' chart. Ms. Van de Gejuchte has not worked in Dr. DeLong's office since approximately 2010. While she does not specifically remember discussing the NICA brochure with Ms. Cervantes, this was her normal routine, and she is confident that she did this with every new OB patient, including Ms. Cervantes.

9. Ms. Cervantes recalls going to Dr. DeLong's office as a new patient and filling out paperwork. She recalls receiving paperwork from Dr. DeLong's office which she kept in a filing cabinet. She recalls meeting with Ms. Van de Gejuchte, who she referred to as Ms. Kay, but does not remember going over any paperwork with Ms. Kay. While she acknowledges that it is possible that Ms. Van de Gejuchte could have given her the NICA brochure, she does not recall anyone discussing NICA with her at that time.

10. Part of the routine practice of Dr. DeLong's office was to inform the new patient about NICA. Ms. Van de Gejuchte's testimony that her routine practice was to give each new OB patient a NICA brochure is persuasive. Her personal circumstances regarding her granddaughter being born with cerebral palsy strengthens Ms. Van de Gejuchte's testimony that this was part of her routine practice, as she was personally aware of the NICA program. Moreover, no new OB patients were seen on days that Ms. Van de Gejuchte was not at the office. Ms. Cervantes recalls seeing "Ms. Kay" at her initial visit, but does not recall Ms. Kay giving her paperwork, nor does she recall whether she had any paperwork with her when leaving Dr. DeLong's on that first visit.

11. Ms. Van de Gejuchte's recollection of her role in a patient receiving notice of the NICA Plan comports with Dr. DeLong's testimony. Dr. DeLong emphasized to his staff the importance of a patient receiving the NICA brochure, as well as the other initial information, at their initial visit and the importance of the patient signing the acknowledgment form. According to Dr. DeLong, the practice of giving the brochure to a new patient and obtaining the patient's signature was part of Ms. Van de Gejuchte's normal routine.

12. Dr. DeLong saw Ms. Cervantes for the first time on September 30, 2008, and reviewed the information which Ms. Van de

Gejuchte recorded in Ms. Cervantes' chart. Ms. Cervantes was approximately 18 weeks along in her pregnancy when she first was seen by Dr. DeLong. His normal routine for a new OB patient would include asking the patient if they had any questions about any of the consent forms they had signed. It was not in the normal course of his practice for him to discuss NICA with patients unless they indicated that they had questions about it. According to Dr. DeLong, this is the customary practice of physicians in his field. Dr. DeLong typically spent approximately 30 minutes with each new OB patient.

13. The greater weight of the evidence established that more likely than not, Dr. DeLong's office provided Ms. Cervantes with a copy of the NICA brochure when she made her first visit to his office in September 2008, when the beginning of her provider-obstetrical patient relationship began with Dr. DeLong.

14. Ms. Cervantes presented to Lower Keys Medical Center on five occasions in 2008.

15. Her first visit to Lower Keys was to the Emergency Room in July 2008 because of a kidney infection. At that time, she did not know that she was pregnant. Her second visit to the Emergency Room at Lower Keys was in August 2008 for nausea and vomiting. She knew she was pregnant at that time but did not have a doctor as yet. Ms. Cervantes described the July and

August visits to the hospital as not being related to her pregnancy.

16. Ms. Cervantes presented to Lower Keys Medical Center laboratory on September 23, 2008, to have blood drawn for laboratory work. Ms. Cervantes used the Lower Keys Medical Center laboratory for her bloodwork because she had used the facility as an outpatient laboratory in the past: "That was the only place I knew to go was the hospital."

17. The medical records indicate that on September 30, 2008, she went to the outpatient medical area of the hospital to drop off a laboratory specimen.

18. On October 3, 2008, Ms. Cervantes presented to the outpatient radiology center for an ultrasound. According to Ms. Cervantes, she was sent there for the ultrasound because she was "too big" for the machine in Dr. DeLong's office. This comports with testimony from Ms. Van de Gejuchte that because of Ms. Cervantes' extra weight, they could not get an accurate measurement on the baby using the equipment at the doctor's office and so she was sent to the hospital for the ultrasound so that the test would be more definitive. Dr. DeLong's ultrasound policy states that he only performs two limited ultrasounds during a pregnancy, the first of which would be performed at the first visit. It is concluded that the ultrasound performed at Lower Keys Medical Center on October 1, 2008, would normally have

been performed at Dr. DeLong's office, but was performed at the hospital as an outpatient radiology provider to get a more definitive test result. Thus, Ms. Cervantes' professional relationship as an obstetrical patient with Lower Keys Medical Center did not begin with her visits to the hospital in July or August 2008 which were not related to her pregnancy; in September when she dropped off a specimen at the laboratory; nor in October when she had an ultrasound.

19. Ms. Cervantes contends that she preregistered at Lower Keys Medical Center in late January or possibly early February, 2009. Ms. Cervantes was very close to her mother, Donette Cervantes, and Cimayah's paternal grandmother, Eugenia Butler. Both grandmothers encouraged Ms. Cervantes to preregister at the hospital prior to when it would be time to have the baby.^{2/}

20. There is conflicting testimony regarding whether or not Ms. Cervantes preregistered at Lower Keys Medical Center prior to her admission on February 11, 2009, preceding the birth of Cimayah. Ms. Cervantes' deposition testimony regarding preregistration is not entirely consistent with her testimony at hearing; is significantly different from Mr. Thurston's deposition testimony regarding preregistration; and neither's recitation of what happened at the alleged preregistration

comports with the routine and practice of the hospital in preregistering patients.

21. Both Ms. Cervantes and Mr. Thurston testified that they went together to Lower Keys Medical Center to preregister. Ms. Cervantes testified that they went to the hospital in late January 2009, or possibly early February 2009, to preregister; that she drove them there in her mother's car; that they entered the hospital through the Emergency Room to the outpatient area. She then testified that she signed in on a clipboard, was called up by a gentleman from the hospital, that she told him she was there to preregister and that she handed him her ID. She testified that the gentleman told her that he needed a form from Dr. DeLong's Office, that the gentleman called her doctor's office, and that the form was faxed over. She then testified that the gentleman gave them a bunch of papers, that Mr. Thurston did not have interaction with the gentleman, and that they went to the outpatient waiting area to fill out the paperwork, and then handed the completed paperwork back to the gentleman.

22. Mr. Thurston's testimony about the couple's trip to the hospital to preregister differed in many respects from Ms. Cervantes' testimony regarding the issue of preregistration. Mr. Thurston testified that he drove the couple to the hospital in their car (a Ford Taurus), that he dropped her off at the

hospital's main entrance, and that he did not accompany her inside.

23. At her deposition, Ms. Cervantes testified that she did not see anyone type anything into a computer when she went to preregister at the hospital. At hearing, she testified that the gentleman she spoke to when she went to the hospital to preregister typed her personal information into the computer when she first gave him her ID.

24. Ms. Cervantes' testimony of the events that took place while at the hospital for preregistration also do not comport with testimony of Atavia Lopez-Dor, who works for Lower Keys Medical Center preregistering patients. According to Ms. Lopez-Dor, the hospital's normal routine and practice when a patient preregisters is to enter the patient's demographic information into the computer contemporaneously with the patient presenting them their information (e.g., an ID). Additionally, the admissions person would have the patient sign several forms, including the Tobacco Free Campus form. While the other forms would be updated (re-signed) on the date of admission to reflect a signature on the admission date rather than the preregistration date, the Tobacco Free Campus Form would always reflect a signature and date of preregistration if that patient had indeed preregistered. The Tobacco Free Campus Form in evidence from Ms. Cervantes' chart reflects a date of February 11, 2009, the

date she was admitted for observation and eventual delivery, not an earlier date.

25. As part of the preregistration process, the admissions clerk would create a unique billing account number for "delivery admission" in the Discharge Accounts Receivable System (DAR), and create a note in the DAR system under that billing account number to reflect verification of insurance on the date of preregistration. The unique billing account number would carry forward to the date of delivery and all notes related to the delivery, including preregistration notes, would show in the one unique account. When a patient preregisters, they are given that account number. When that patient then comes back in active labor for admission, everything is under the same account number. The person preregistering the patient is required to create a note reflecting the preregistration.

26. A review of Ms. Cervantes' billing account associated with the delivery of Cimayah reflect that the first note was entered on February 11, 2009, verifying Ms. Cervantes' Medicaid insurance. The billing records do reflect an entry for February 4, 2009, under an account number (4979251) that is different from the account number (4980322) for her admission to the hospital on February 11, 2014, for observation and eventual delivery. The record does not contain an explanation of the February 4, 2009, entry.

27. Moreover, according to Ms. Lopez-Dor, no paperwork would be required by the hospital from the physician's office for a patient to preregister for an anticipated vaginal delivery, which was the case for Ms. Cervantes until circumstances arose requiring an unplanned, emergency C-section.

28. Looking at the totality of the evidence, including the significant inconsistencies between Ms. Cervantes' testimony regarding the issue of preregistration and Mr. Thurston's testimony regarding the same, the routine and practice of the hospital in preregistering of patients, and the billing records, the greater weight of the evidence does not support Ms. Cervantes' contention that she preregistered.

29. On February 11, 2009, Ms. Cervantes was sent from Dr. DeLong's office to Lower Keys Medical Center for observation because of high blood pressure and concern that she might be developing pre-eclampsia. Ms. Cervantes arrived at the hospital at 4:48 p.m., and was admitted to labor and delivery around 5:00 p.m.

30. Naomi Thomas is a Registered Nurse who was on duty at Lower Keys Medical Center when Ms. Cervantes was admitted on February 11, 2009. Her typical routine when a patient presented to labor and delivery was to give the patient a gown and put the patient on the fetal monitor. The nurse also educates the patient to the unit and goes over papers and forms with the

patient. She was the nurse who furnished the NICA brochure to Ms. Cervantes, along with a Receipt of Notice to Obstetric Patient.

31. According to Ms. Thomas, she would explain to the patient that should the baby have neurological injuries related to birth, that they have some compensation available. According to Ms. Thomas, it was normal practice that when a patient presents to labor and delivery on more than one occasion, e.g., for observation or false labor and then sent home, that she presents the NICA brochure and the acknowledgement form each time the patient presents.

32. Ms. Cervantes signed the form acknowledging that she had been provided information prepared by NICA. The form stated:

RECEIPT OF NOTICE TO OBSTETRIC PATIENT

I have been furnished information prepared by the Florida Birth-Related Neurological Injury Compensation Association (NICA), pursuant to Section 766.316, Florida Statutes, by Lower Keys Medical Center, wherein certain limited compensation is available in the event certain types of qualifying neurological injuries may occur during labor, delivery or resuscitation in a hospital. For specifics on the program, I understand I can contact the Florida Birth-Related Neurological Injury Compensation Association, Post Office Box 14567, Tallahassee, Florida 32317-4567, (800)-398-2129.

I specifically acknowledge that I have received a copy of the Brochure prepared by NICA.

Ms. Thomas signed the acknowledgment form executed by Ms. Cervantes, indicating that Ms. Thomas witnessed Ms. Cervantes signing the acknowledgment form.

33. The parties stipulated that Ms. Cervantes was provided information by Lower Keys Medical Center in the form of a brochure prepared by the Florida Birth Related Neurological Association, and that Ms. Cervantes signed the Receipt of Notice to Obstetric patient on February 11, 2009.

34. Ms. Cervantes' professional relationship with Lower Keys Medical Center relating to her pregnancy began with her admission to the hospital on February 11, 2009.

35. Because there is no dispute that notice of the NICA plan was given to Ms. Cervantes on February 11, 2009, by Lower Keys Medical Center, it is not necessary to address the issue of medical emergency as an excuse for not providing notice.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat. (2014).

37. 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.

38. 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.

39. Petitioner contends that Dr. DeLong did not provide notice and that the notice that Lower Keys Medical Center gave to Petitioner was not sufficient notice pursuant to section 766.316.

Respondent did not take a position on the notice issue.

Intervenors, Dr. DeLong and Lower Keys Medical Center, contend that sufficient notice was provided pursuant to section 766.216. As the proponents of the proposition that appropriate notice was given or that notice was not required, 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).

40. Despite the inability of Dr. DeLong's office to locate a copy of a signed NICA acknowledgment form, the greater weight of the evidence did establish that more likely than not, Dr. DeLong provided Ms. Cervantes a copy of the NICA brochure when she made her initial visit to his office in September 2008, when the provider-obstetrical patient relationship began between Ms. Cervantes and Dr. DeLong. The greater weight of the evidence establishes that Dr. DeLong provided the notice required by section 766.31 on September 23, 2008, and that the notice was sufficient. Ms. Van de Gejuchte followed the normal office routine and practice when registering obstetrical patients, which includes giving the NICA brochure to the patient and having the patient sign the acknowledgment form. "Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to

prove the conduct of the organization on a particular occasion was in conformity with routine practice." § 90.406, Fla. Stat. (2012); see also Tabb, 880 So. 2d at 1259.

41. Section 766.316 requires that "[e]ach hospital with a participating physician on its staff and each participating physician" shall provide notice.

42. The parties have stipulated that on February 11, 2009, Lower Keys Medical Center gave Ms. Cervantes a brochure prepared by NICA and that Ms. Cervantes signed the acknowledgment form. Her signature on the form raises a rebuttable presumption that the notice requirements of section 766.316 have been met. Petitioner contends that the notice provided by the hospital was insufficient. Intervenor Lower Keys Medical Center contends that sufficient notice was given.

43. 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.

44. The facts of this case established that the provider-obstetrical patient relationship commenced between Ms. Cervantes and Lower Keys Medical Center when Ms. Cervantes presented to the labor and delivery floor on February 11, 2009, with pre-eclampsia to be admitted for monitoring and the eventual delivery of her baby. This was the first time that the hospital was aware that Ms. Cervantes intended to deliver at Lower Keys Medical Center.

45. The court in Weeks held:

[T]he NICA notice must be given within a reasonable time after the provider-obstetrical 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.

Id. at 619-620.

46. Prior to February 11, 2009, Ms. Cervantes presented to Lower Keys Medical Center emergency room on two occasions, once in July 2008 and once in August 2008. She did not know she was pregnant in July 2008 and had not yet established as a patient of Dr. DeLong. Petitioner does not dispute that the July and August 2008 visits to Lower Keys were not related to her pregnancy.

47. Ms. Cervantes presented to the outpatient center of the hospital on three occasions: for blood work on September 23, 2008; to drop off a laboratory specimen on September 30, 2008, and for an outpatient ultrasound on October 2, 2008. At these visits, Petitioner did not present to the labor and delivery floor and there is no evidence that Lower Keys was made aware that she intended to deliver her baby there. Accordingly, the hospital was not obligated to provide the NICA notice to her at those times.

48. The greater weight of the evidence does not support a finding that Ms. Cervantes actually preregistered for the birth of her baby in January or early February 2009.

49. The greater weight of the evidence established that Lower Keys Medical Center gave proper notice at the time the provider-obstetrical patient relationship was formed on February 11, 2009. Thus, Lower Keys Medical Center satisfied the notice requirement of section 766.316.

CONCLUSION

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

ORDERED:

1. Lower Keys Medical Center provided notice for the hospital as required by section 766.316.

2. Dr. DeLong provided 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 Ms. Cervantes; 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 Petitioner files an election of remedies declining or rejecting NICA benefits, this case will be dismissed with prejudice and DOAH's file will be closed.

DONE AND ORDERED this 19th day of November, 2014, in
Tallahassee, Leon County, Florida.



BARBARA J. STAROS
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of November, 2014.

ENDNOTES

^{1/} Petitioner asserts that Ms. Van de Gejuchte's testimony was about her personal routine, not office routine, and point to a specific comment she made in her deposition at page 25. However, that comment was specifically referencing her practice of making "little stacks" of materials that were not hospital generated and color coding vendors' brochures according to subject matter (e.g., breastfeeding or Lamaze classes) to include in the OB packet. The totality of her testimony was about her routine as it related to established office practices.

^{2/} The grandmothers' testimony regarding Ms. Cervantes' alleged preregistration has limited value. Their testimony that Ms. Cervantes and the baby's father, Mr. Thurston, told them that they had preregistered is hearsay and is not sufficient in itself to support a finding of fact as contemplated by section 120.57(1)(c), Florida Statutes, as to whether or not Ms. Cervantes did indeed preregister.

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(Certified Mail No. 7014 2120 0003 1049 3515)

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).