STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAIME BARNES AND JONATHAN TALLEY, individually and as natural parents of SOPHIA TALLEY, minor,

Petitioners,

vs. Case No. 13-3313N

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,

Respondent,

and

LAKELAND REGIONAL MEDICAL CENTER AND JEFFREY PURETZ, M.D.,

Intervenors.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on December 17, 2014, in Orlando, Florida, before Barbara J. Staros, an Administrative Law Judge of the Division of Administrative hearings.

APPEARANCES

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For Jeffrey Puretz, M.D.:

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STATEMENT OF THE ISSUE

The issue in this case is whether Jeffrey Puretz, M.D., was a participating physician at the time of the birth of Sophia Talley for purposes of the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On August 5, 2013, Jaime Barnes and Jonathan Talley, individually and as natural parents of Sophia Talley (Sophia), a minor, filed a Petition under Protest Pursuant to Florida Statute Section 766.301 et seq., (Petition) with the Division of Administrative Hearings (DOAH). The Petition alleged that the parents are not claimants. The case was assigned to Administrative Law Judge Susan B. Kirkland.

The Petition named Jeffrey L. Puretz, M.D., as the physician providing obstetric services at the birth of Sophia, and that Sophia was born at Lakeland Regional Medical Center which is located in Lakeland, Florida, on June 14, 2011.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) on September 4, 2013, and served Jeffrey Puretz, M.D., on September 5, 2013, with a copy of the Petition. On September 9, 2013, DOAH received a certified return receipt from the United States Postal Service showing that Lakeland Regional Medical Center had been served with a copy of the Petition.

On December 4, 2013, Lakeland Regional Medical Center filed a Petition for Leave to Intervene, which was granted by Order dated December 17, 2013. On June 26, 2014, Jeffrey Puretz, M.D., filed a Motion to Intervene, which was granted by Order dated July 9, 2014.

On May 5, 2014, NICA filed a response to the Petition, giving notice that based upon the opinions of Drs. Donald Willis and Raymond Fernandez, the alleged injury met the definition of a "birth-related neurological injury" as defined in section 766.3021(2), Florida Statutes, and that the injuries suffered by Sophia are compensable. NICA requested that a hearing be scheduled to resolve the issue of compensability.

On May 27, 2014, Petitioners filed a Motion for Leave to Amend Petition, which was granted by Order dated May 30, 2014. The Amended Petition added Corrine Audette, CNM, and Sheri Small, CNM, and alleged that both midwives attended to the mother upon her presentation to Lakeland Regional Medical Center for the delivery of Sophia. DOAH served Ms. Audette with a copy of the Amended Petition on June 2, 2014. DOAH served Ms. Small with a copy of the Amended Petition on June 4, 2014. As of the date of this Final Order, no petitions to intervene have been filed by either Ms. Audette or Ms. Small.

A final hearing was scheduled for August 27, 2014. On July 18, 2014, Petitioners filed a Motion for Summary Final Order. On July 30, 2014, an Order was entered granting Intervenor Lakeland Regional Medical Center's Motion for Extension of Time to Respond to Petitioners' Motion for Summary Final Order and continuing the hearing scheduled for August 27, 2014, pending resolution of Petitioners' Motion for Summary Final Order.

A Notice of Case Reassignment was entered on August 21, 2014, reassigning the case to the undersigned due to Judge Kirkland's impending retirement. On September 5, 2014, an Order Denying Petitioners' Motion for Summary Final Order was entered. The final hearing was rescheduled for December 17, 2014, and was heard as scheduled. The parties filed a Joint Pre-hearing Statement on December 9, 2014, in which they agreed to certain facts as set

forth in section E of the Pre-hearing Stipulation. These facts have been incorporated into this Final Order.

At the final hearing, Petitioners, Respondent, and Intervenor Dr. Puretz did not present any live witnesses. Intervenor Lakeland Regional Medical Center presented the live testimony of Carol Fox. Joint Exhibits 1-11, 13-17, 18 (without the attached Exhibit A), and 19-24 were admitted into evidence. Included in these exhibits are the deposition testimonies of seven witnesses: Jeffrey Puretz, M.D.; Carol Fox; Jaime Barnes; Jonathan Talley; Donald Willis, M.D.; Raymond Fernandez, M.D.; and Maria Murphy. Lakeland Regional Medical Center's proposed exhibits numbered 25 and 26 were rejected. A ruling on Respondent's Motion to Withdraw its answers to Petitioners' Request for Admissions was reserved. Upon consideration, Respondent's Motion is granted.[1/]

A one-volume Transcript of the hearing was filed on January 6, 2015. On January 20, 2015, an Order was entered extending the time in which the parties must submit proposed final orders. The parties timely filed their proposed final orders, which have been carefully considered in the drafting of this Final Order.

FINDINGS OF FACT

Stipulated Facts

1. Petitioners Jaime Barnes and Jonathan Talley are the parents/natural guardians of Sophia Talley.

2. The delivery of Sophia was performed by Intervenor, Jeffrey Puretz, M.D.

3. Sophia was born at Lakeland Regional Medical Center (LRMC), a licensed hospital in Lakeland, Florida, on June 14, 2011.

4. Sophia's birth weight was 2,970 grams.

5. Sophia was a single gestation.

6. Sophia did not suffer from a genetic or congenital abnormality at birth.

7. Sophia's APGAR scores at birth were 4/8/9.

8. Sophia was delivered by Cesarean section.

9. Sophia is substantially and permanently mentally and physically impaired as a result of an hypoxic injury to her brain which occurred during labor, delivery and in the immediate post-delivery period.

10. Sophia's medical condition and treatment are documented in the birth records of Lakeland Regional Medical Center.

11. The Petition in this cause was filed within five years from the date of birth of Sophia.

12. Jeffrey Puretz, M.D., provided NICA notice to Jaime Barnes.

13. Jeffrey Puretz, M.D., paid the NICA fee covering the period during which the birth of Sophia took place.

14. NICA issued a certificate of participation regarding Jeffrey Puretz, M.D., for the period of time which included the date of birth of Sophia.

15. At the time of Sophia's birth, Jeffrey Puretz, M.D., was providing services pursuant to a contract with Central Florida Healthcare, Inc. (CFH).

Facts based upon evidence of record

16. At the time he delivered Sophia Talley, Dr. Puretz was employed by Women's Care of Florida Lakeland OB/GYN. However, Dr. Puretz also provided obstetrical services pursuant to an independent contractor agreement with CFH.

17. Ms. Barnes received her prenatal care from CFH. Dr. Puretz provided services to Ms. Barnes as a result of Ms. Barnes' status as a patient of CFH, a federally-funded community healthcare provider.

18. The independent contractor agreement between Dr. Puretz and CFH states that Dr. Puretz has been "deemed" an employee of the federal government pursuant to the Federally Supported Health Centers Assistance Act and reads in pertinent part as follows:

> The practice represents and warrants to the Contractor that it has been "deemed" and that during the term of this Agreement it shall remain "deemed" as an employee of the Federal Government pursuant to the Federally Supported Health Centers Assistance Act of 1995 (Pub. L. 104-73). As such, all of the Practice's employees and certain independent contractors, as well as the Practice itself, are afforded

> protection under the Federal Tort Claims Act (FTCA) for claims relating to personal injury, including death, resulting from the performance of medical procedures required under this Agreement. The Contractor, by virtue of his/her independent contractor status in the field of obstetrics and gynecology, will be afforded protection under the FTCA for duties performed under this Agreement.

19. The NICA Notice provided to Ms. Barnes by CFH includes the name of Dr. Puretz as one of the physicians who could be providing obstetrical care to Ms. Barnes.

20. In addition to having a "Certificate of Participation" from NICA, Dr. Puretz appears on NICA's list of participating physicians, which listed Dr. Puretz as a participating physician for the time period in which Sophia was born.

21. Carol Fox is Associate Vice President of Medical and Academic affairs at LRMC. Her responsibilities include oversight of the medical staff office, which does the credentialing, privileging, and enrollment of medical staff members of the hospital. According to Ms. Fox, a physician must provide evidence of licensure and malpractice insurance to apply for medical staff privileges. The office is also responsible for confirming that physicians with privileges are participants in NICA.

22. Dr. Puretz is an active staff member providing obstetrical services at LRMC. A copy of Dr. Puretz's memorandum

of insurance for medical professional liability insurance is kept on file at LRMC, listing his private practice, Women's Care Florida, LLC, as the named insured. According to Ms. Fox, LRMC does not consider or rely upon a physician's employment status when considering the granting of privileges.

23. The Agreement between Dr. Puretz and CFH specifically contemplates that the services provided by Dr. Puretz include both hospital and outpatient services. It is Dr. Puretz's understanding that he was acting as a federal employee under the contract with CFH when he was providing obstetrical services for the birth of Sophia.

CONCLUSIONS OF LAW

24. 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).

25. The Plan was established by the Legislature "to provide compensation on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation." § 766.301, Fla. Stat.

26. Section 766.302 defines "birth-related neurological injury," and "participating physician" as follows:

> (2) "Birth-related neurological injury" means 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.
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> * * *
>
> (7) "Participating physician" means a physician 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 the birth-related neurological injury compensation plan for the year in which the injury occurred. Such term shall not apply to any physician who practices medicine as an officer, employee, or agent of the Federal Government. (emphasis added).

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

28. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the Administrative Law Judge to whom the claim has been assigned. § 766.305(7), Fla. Stat. The Administrative Law Judge has exclusive jurisdiction to determine whether a claim filed under the Plan is compensable. § 766.304, Fla. Stat.

29. In discharging this responsibility, the Administrative Law Judge must make the following determinations based upon all available evidence:

> (a) Whether the injury claimed is a birth-related neurological injury. If the claimant has demonstrated, to the satisfaction of the administrative law judge, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.302(2).
>
> (b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital.
>
> (c) How much compensation, if any, is awardable pursuant to s. 766.31.

> (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 exclusive jurisdiction to make these factual determinations. (emphasis added).

§ 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 birth." § 766.31(1), Fla. Stat.

30. In the instant case, Petitioners are not seeking NICA benefits and stated in the Petition that they are not claimants. Intervenors, the healthcare providers, seek a determination that the claim is compensable under the NICA plan. As the proponents of the issue of compensability, the burden of proof is upon Intervenors. Fla. Health Sciences Ctr, Inc. v. Div. of Admin. Hearings, 974 So. 2d 1096, 1099 (Fla. 2d DCA 2007). See also Balino v. Dep't of Health & Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.").

31. In this case, the parties have stipulated that Sophia suffered a "birth-related neurological injury" as that term is defined by section 766.302(2), and that notice was given satisfying section 766.309(1)(d). At issue is whether Dr. Puretz

was a participating physician when he provided obstetric services at Sophia's birth in a hospital licensed in Florida as that term is defined in section 766.302(7).

32. Maradiaga v. U.S., 679 F.3d 1286 (11th Cir. 2012), is a factually similar case to the instant proceeding. In Maradiaga, as in this case, the child was born at LRMC and delivered by a physician who was acting as an employee of CFH, a federally-supported health care center. The Petitioners in Maradiaga sued the United States in federal district court under the Federal Tort Claims Act (FTCA) arguing that the United States could be held liable for the negligence of a physician who was a federal employee. The United States moved to dismiss the underlying case due to the fact that the physician participated in the NICA Plan and, as a result, the United States was immune from suit under the Plan. The district court granted the motion to dismiss which was appealed. On appeal, the Eleventh Circuit Court of Appeals considered the exclusion of "officers, employees and agents of the Federal Government" from the statutory definition of a "participating physician" under section 766.302(7), in the context of an impermissible expansion of the waiver of sovereign immunity under the FTCA. Citing their reasoning in Scheib v. Fla. Sanitarium and Benevolent Ass'n, 759 F.2d 859, 864 (11th Cir. 1985), the Court in Maradiaga held:

> Stanton and Audette were both certified participants in the no-fault compensation plan when they treated Maradiaga and J.C.S.M. Because a like private physician would be immune from tort liability for birth-related neurological injuries attributable to his negligence, Fla. Stat. § 766.303(2), the United States is entitled to immunity from tort liability for birth-related neurological injuries attributable to the negligence of Stanton and Audette. The exclusion of "any physician who practices medicine as an officer, employee, or agent of the Federal Government" from the definition of "participating physician" in the Compensation Act, see id. § 766.302(7), cannot expand the waiver of sovereign immunity in the Federal Tort Claims Act because "state law cannot expand the Government's liability beyond that which could flow from an analogous private activity." Scheib, 759 F.2d at 864.

Maradiaga, 679 F.3d 1286, 1293.

33. Petitioners rely on the definition of "participating physician" in section 766.302(7), which specifically excludes physicians who practice medicine as an officer, employee, or agent of the Federal Government.[2/] Certainly there is a direct conflict between this sentence and the Eleventh Circuit's opinion in Maradiaga. Petitioners assert that state courts are not bound by federal courts' interpretations of state law, citing Liberty American Insurance, Co., v. Kennedy, 890 So. 2d 539 (Fla. 2nd DCA 2005)(the court opined that it was not bound by the Eleventh Circuit's decisions on questions of Florida law) and State v. Dwyer, 332 So. 2d 333 (Fla. 1976)(lower court which followed reasoning of federal circuit court on issue of constitutionality

of state statute should have followed the ruling of the Supreme Court of Florida finding statute constitutional).

34. Absent a state court's ruling to the contrary, the undersigned concludes that it is simply impossible to ignore the Eleventh Circuit's opinion in Maradiaga, a case in which the facts and circumstances are virtually identical to those of the instant case, and concerned the same legal issue. The baby in Maradiaga was born at LRMC by a physician (Dr. Stanton) "employed by Central Florida Health Care, Inc., a grantee under the Federally Supported Health Center Assistance Act." Maradiaga, 679 F.3d at 1290. The reasoning of the Maradiaga court applies here: Dr. Puretz, like the health care providers in Maradiaga, was a certified participant in NICA; Dr. Puretz, like the health care providers in Maradiaga, would be immune from tort liability if he were a similarly situated private physician. In Maradiaga, the appellants specifically argued that the relevant injury was not compensable under NICA because of the definition contained in section 766.302(7). It is concluded that, in applying the court's ruling in Maradiaga, Dr. Puretz has the benefit of the NICA immunity.

35. NICA affords the exclusive remedy for the infant, her parents, and the next of kin alleging a neurological birth-related injury. § 766.303(2), Fla. Stat. NICA provides that such birth-related injuries are compensable if the patient was on notice of

the physician and hospital's participation in NICA, and the obstetric services were provided by a participating physician. Applying the holding of Maradiaga, NICA affords Petitioners the exclusive potential remedy for any claims arising out of the care and treatment provided by Dr. Puretz.

36. Finally, Petitioners challenge the constitutionality of the NICA statutes. The Division of Administrative Hearings is without jurisdiction to resolve a constitutional attack upon a state statute. Fla. Marine Fisheries Comm. et al v. Pringle, 736 So. 2d 17 (Fla. 1st DCA 1999) citing Carrollwood State Bank v. Lewis, 362 So. 2d 110, 113-114 (Fla. 1st DCA 1978) and Dep't of Rev. v. Young American Builders, 330 So. 2d 864 (Fla. 1st DCA 1976).

37. The obstetrical services provided during Sophia's birth were provided by a participating physician. Thus, Sophia is entitled to benefits under the Plan.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the petition filed by Jaime Barnes and Jonathan Talley, individually and as natural parents of Sophia Talley, is dismissed with prejudice.

It is further ORDERED that Dr. Jeffrey Puretz was a participating physician in the NICA program at the time he delivered Sophia Talley.

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 payments of an award to Ms. Barnes and Mr. Talley; 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.

DONE AND ORDERED this 13th day of March, 2015, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
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Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of March, 2015.

ENDNOTES

[1/] At hearing, NICA made an ore tenus motion to withdraw its response to some of Petitioners' requests for admission. Specifically, NICA sought to withdraw its admission that Dr. Puretz was not a participating physician for purposes of Sophia's delivery. NICA asserts that this request for admission is a question of law and not appropriate for a request for admissions. Further, NICA asserts that after further review of the case law, NICA believes the black letter law as to the statutory definition of a participating physician has been changed. Petitioners objected to NICA's ore tenus motion asserting it would be prejudicial.

As a threshold matter, the determination of whether Dr. Puretz was a NICA participating physician for purposes of Sophia's delivery is a mixed question of law and fact.

A review of the pleadings reveals that NICA's position on the issue of whether Dr. Puretz was a participating physician varied throughout the proceeding, and was not brought up only on the day of hearing, as asserted by Petitioners. NICA's initial position in its Response to Petition Under Protest filed May 5, 2014, was that the injuries were compensable under NICA, and that "Sophia Talley was delivered on June 14, 2011, at Lakeland Regional Medical Center, a Florida Hospital, by Jeffrey L. Puretz, a NICA participating physician." On July 1, 2014, NICA filed a Response to Petitioners' second Request for Admissions in which it responded to Admissions numbered 8 and 11 relevant to this issue, "Unknown; therefore, deny." In its Response to Petitioners' Request for Admissions filed on August 11, 2014, NICA admitted admissions 2, 3, and 6, admitting that Dr. Puretz was an employee of the federal government for purposes of Sophia's delivery, and that "obstetrical services were not delivered by a participating physician." In the parties' Joint Pre-Hearing Statement filed on December 9, 2014, NICA's position on this issue was stated as, "Dr. Puretz was a participating physician for purposes of the delivery of Sophia Talley." This remains NICA's position on this issue. (emphasis added).

Moreover, both Intervenors took the position that Dr. Puretz was a NICA participating physician for purposes of Sophia's birth. Thus, Petitioners knew that this issue was in controversy regardless of NICA's position. Therefore, the undersigned finds that NICA's ore tenus motion to withdraw its admission on the day of hearing was not prejudicial to Petitioners, and that permitting the withdrawal of NICA's answers to admissions on this

issue serves the presentation of the merits of the case. R. 1.370(b), Fla. R. Civ. P. Finally, an ore tenus motion is sufficient to satisfy Rule 1.370. See In re 1982 Ford Mustang v. City of Bartow Police Dep't, 725 So. 2d 382, 384 (Fla. 2d DCA 1998) citing Wilson v. Dep't of Admin., 538 So. 2d 139, 140-141 (Fla. 4th DCA 1989).

[2/] Petitioners rely in part on Joint Exhibit 15, which is an email from an attorney from the federal Department of Health and Human Services addressed to counsel for Petitioners concerning Dr. Puretz's employment status. While the parties stipulated to this exhibit and while section 120.569(1)(g) allows the admissibility of hearsay, it is not sufficient in itself to support a finding of fact as contemplated by section 120.57(1)(c). Moreover, it is not sufficient to establish a legal conclusion regarding Dr. Puretz's status as a federal employee.

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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).