

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JENNIFER DE LA ROSA,
Individually and as Personal
Representative of the Estate of
SOPHIA GRANT, deceased,

Petitioner,

vs.

Case No. 14-3730N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION, a/k/a NICA,

Respondent,

and

ST. JOSEPH'S HOSPITAL, INC., AND
AREEJ SALEM, M.D.,

Intervenors.

_____ /

SUMMARY FINAL ORDER ON NOTICE

This cause came on for consideration upon Intervenor Areej Salem, M.D.'s, Renewed Motion for Summary Final Order and Intervenor, St. Joseph's Hospital Inc.'s Motion for Summary Final Order filed on July 20 and 24, 2015, respectively.

STATEMENT OF THE CASE

On August 11, 2014, Petitioner, Jennifer de la Rosa, individually and as Personal Representative of the Estate of Sophia Grant (Sophia), deceased, filed a Petition Under Protest Pursuant to Florida Statute Section 766.301 et seq. (Petition),

with the Division of Administrative Hearings (DOAH) for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition named Areej Salem, M.D., as the physician who provided obstetric services at the birth of Sophia on May 20, 2012, at St. Joseph's Hospital in Lutz, Florida.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) and St. Joseph's Hospital with a copy of the Petition on August 18, 2014. DOAH served Areej Jamil Salem, M.D., with a copy of the Petition on August 12 and 18, 2014.

On September 11, 2014, St. Joseph's Hospital filed a Petition for Leave to Intervene, which was granted by Order dated September 15, 2014. On September 16, 2014, Dr. Areej Salem filed a Motion to Intervene, which was granted by Order dated September 26, 2014.

On June 1, 2015, NICA filed an Unopposed Motion for Partial Summary Final Order on the issue of birth-related neurological injury. On June 5, 2015, a Partial Summary Final Order on compensability was entered, finding that Sophia sustained a birth-related neurological injury, which is compensable under the Plan. Jurisdiction was retained on the issues of notice and award.

A Notice of Hearing by Video Teleconference was issued on June 15, 2015, scheduling the final hearing for August 25, 2015. On July 20, 2015, Intervenor, Dr. Salem, filed a Renewed Motion for Summary Final Order. On July 24, 2015, Intervenor, St. Joseph's Hospital, Inc., filed a Motion for Summary Final Order.^{1/} On August 10, 2015, Petitioner filed a Combined Objection and Response to the Intervenors' Motions for Summary Final Order. Meanwhile, the parties continued to file pleadings in preparation for the upcoming final hearing, including a Joint Pre-hearing Stipulation filed on August 12, 2015.

On August 11, 2015, Dr. Salem filed a Motion to Strike Affidavit of Berto Lopez, M.D. On August 11 and 12, 2015, respectively, St. Joseph's Hospital and NICA filed a Notice of Joinder to Dr. Salem's Motion to Strike. No response was filed to the Motion. The Motion to Strike was granted by Order dated August 20, 2015.

The final hearing was convened as scheduled on August 25, 2015. However, at the commencement of the hearing, the parties concurred that it was the parties' preference that the Motions for Summary Final Order be considered and ruled upon before any final hearing took place. Petitioner made an ore tenus Motion to supplement her Combined Objection and Response to Motion for Summary Final Order, which was denied. The hearing was adjourned for consideration of the Intervenors' Motions for Summary Final

Order. On August 28, 2015, Petitioner filed a Motion for Reconsideration of Petitioner's Ore Tenus Motion to Supplement Her Combined Objection to Motions for Summary Final Order. On September 1, 2015, Intervenor St. Joseph's Hospital filed a Response to Petitioner's Motion for Reconsideration and Intervenor Dr. Salem filed a Notice of Joinder to St. Joseph's Response. Upon consideration, Petitioner's Motion for Reconsideration is denied.

FINDINGS OF FACT

1. Sophia Grant was born alive on May 20, 2012, at St. Joseph's Hospital (St. Joseph's) located in Lutz, Florida. Sophia was a single gestation weighing 3,020 grams at birth. At all times material to this proceeding, St. Joseph's was, and is, a NICA participant.

2. Sophia was delivered by Areej Salem, M.D. At all times material to this proceeding, Dr. Salem was, and is, a NICA participating physician.

3. Sophia's mother, Jennifer de la Rosa, presented to Labor of Love Birth Center (Labor of Love) the evening of May 19, 2012, for the delivery of her daughter. According to the records of Labor of Love, she had pushed through some of the night and much of the morning. Berenice Rowell, a certified midwife and owner of Labor of Love, was called in for assessment and support the following afternoon. Ms. Rowell arrived at Labor of Love around

1:00 p.m., and performed a vaginal examination of Ms. de la Rosa shortly after her arrival. During that examination, Ms. Rowell confirmed that Petitioner's water had broken and her membranes had ruptured. Labor of Love decided to transfer Petitioner to a hospital. Accordingly, Ms. Rowell offered to have an ambulance perform the transfer, but that offer was refused, and Petitioner rode in a car with her family to St. Joseph's. Ms. Rowell followed Petitioner to St. Joseph's and accompanied her to the labor and delivery department.

4. Petitioner presented to the labor and delivery department of St. Joseph's at approximately 4:00 p.m., in the afternoon on May 20, 2012.

5. Teresa Hampton is a licensed obstetrical registered nurse, who is employed by St. Joseph's. Nurse Hampton was working at St. Joseph's labor and delivery department at the time Ms. de la Rosa transferred from Labor of Love on the afternoon of May 20, 2012. Upon admission, Ms. Hampton provided Ms. de la Rosa with the informational brochure furnished by NICA and explained the rights and limitations under the NICA compensation plan to her.

6. Ms. Hampton also provided a form furnished by St. Joseph's entitled "Notice to Obstetric Patient-Receipt of NICA Information" (the acknowledgment form), which reads as follows:

RECEIPT OF NICA INFORMATION

I have been furnished the brochure furnished by the Florida Birth-Related Neurological Compensation Association (NICA), pursuant to Section 766.316, Florida Statutes, by St. Joseph's Hospitals, 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 further acknowledge that I have received a copy of the brochure prepared by NICA.

Ms. Hampton printed Ms. de la Rosa's name on the line immediately above the line for "Patient/Guardian's signature" and observed Ms. de la Rosa sign the form. The date appearing below her signature is May 20, 2012. In her affidavit, Ms. Hampton attests that Petitioner appeared alert and capable of receiving her explanation of the Plan and that there was no indication that Petitioner did not understand this explanation.

7. In her Responses to St. Joseph's First Request for Admissions, Petitioner admits to signing the acknowledgment, but despite her signature on the acknowledgement form, denies receiving the NICA brochure.

8. Helen Ross, M.D.,^{2/} is an obstetrician/gynecologist employed by OB Hospitalist Group. She was providing obstetrical services at St. Joseph's at the time Petitioner arrived at labor

and delivery. That is, OB Hospitalist Group was providing obstetric care to patients who did not have an obstetrician or who presented to the hospital under emergency conditions. Dr. Ross obtained Petitioner's medical history from Labor of Love's records that accompanied the patient, from the midwife, Ms. Rowell, and from the patient's family. The prenatal records were not in St. Joseph's system. After obtaining a history and after performing a medical exam of Petitioner, Dr. Ross determined that Petitioner had prolonged ruptured membranes, was in danger of infection, and that she was experiencing persistent labor contractions. It was clear to Dr. Ross that Petitioner's membranes had ruptured prior to her arrival at St. Joseph's and that she had been in persistent contractions for a prolonged period of time.

9. Dr. Ross's 24-hour shift was ending, and she had a face-to-face turnover with Dr. Salem sometime between 7:00 p.m., and 8:00 p.m., on the evening of May 20, 2012. Dr. Salem was also providing obstetrical services through OB Hospitalist Group and took over obstetrical duties from Dr. Ross that evening.

10. Dr. Salem first met with Ms. de la Rosa at 7:49 p.m., on May 20, 2012. When she first saw Ms. de la Rosa and evaluated her fetal monitoring strips, she determined that the baby needed to be emergently delivered, and she strongly recommended an immediate Caesarean section to Petitioner. Dr. Salem further

determined that Petitioner's membranes were ruptured and that there was evidence of persistent uterine contractions.

11. Although Petitioner initially did not consent to have a Caesarean section, she ultimately did. Dr. Salem performed a Caesarean section procedure on Petitioner, and delivered Sophia.

12. As has been determined in the Partial Summary Final Order issued on June 5, 2015, Sophia sustained a birth-related neurological injury.

13. Dr. Salem did not provide NICA notice to Ms. de la Rosa.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat. (2015).

15. The only remaining issue to be determined 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.
(emphasis added).

16. Section 395.002(8) (b), Florida Statutes, defines "emergency medical condition" as follows:

(8) "Emergency medical condition" means:

* * *

(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. There is evidence of the onset and persistence of uterine contractions or rupture of the membranes.

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. Ms. de la Rosa signed an acknowledgement form stating that she received a NICA brochure from St. Joseph's. Her signature on this form raises a rebuttable presumption that the notice requirements of section 766.316 have been met by the hospital. In her response to a Request for Admissions, Petitioner denies that she received the NICA brochure from St. Joseph's pursuant to section 766.316. Intervenor, St. Joseph's, contends that notice was provided pursuant to section 766.316, and that, in any event, notice was not required to be given due to Petitioner's emergency medical condition upon arrival.

19. Intervenor Dr. Salem, contends that she was not required to give notice because Petitioner had an emergency medical condition as defined in section 395.002(8)(b), when she first encountered the patient. 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 Intervenor. Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass'n., 880 So. 2d 1253, 1257 (Fla. 1st DCA 2004).

20. Intervenor has met this burden. The evidence establishes that when Petitioner presented to St. Joseph's and when Dr. Salem first encountered Petitioner the evening of May 20, 2012, Petitioner's membranes had broken and she was experiencing persistent uterine contractions. The testimony of

Ms. Rowell, the certified midwife from Labor of Love; Dr. Ross, who initially examined Petitioner upon admission; and Dr. Salem, who took over Petitioner's obstetrical care when Dr. Ross's shift was over, are consistent in this regard.

21. Thus, it is concluded that when Petitioner presented to St. Joseph's labor and delivery department and when she first encountered Dr. Salem, she had an emergency medical condition as defined in section 395.002(8)(b). As such, neither St. Joseph's nor Dr. Salem was required to provide NICA notice pursuant to section 766.316.

22. 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 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.

23. The provider-patient relationship between Ms. de la Rosa and St. Joseph's began when she presented to the labor and delivery department on May 20, 2012. The physician-patient relationship between Ms. de la Rosa and Dr. Salem also began on May 20, 2012. At the time these provider-patient relationships commenced, Ms. de la Rosa was in an emergency medical condition, as defined in section 395.002(8)(b). Therefore, the providers were excused from giving such notice.

CONCLUSION

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

ORDERED:

1. St. Joseph's Hospital provided NICA notice in compliance with section 766.316, although they were not obligated to do so because Petitioner presented to the hospital in an emergency medical condition as defined in section 395.002(8)(b).

2. Dr. Areej Salem was not required to give NICA notice to Petitioner because Petitioner was in an emergency medical condition, as defined in section 395.002(8)(b), when Dr. Salem first encountered Petitioner.

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 Petitioner; 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 the file of DOAH will be closed.

DONE AND ORDERED this 30th day of September, 2015, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of September, 2015.

ENDNOTES

^{1/} Dr. Salem initially filed a Motion for Summary Final Order on May 26, 2015, and St. Joseph's Hospital initially filed a Motion

for Partial Final Summary Order on May 28, 2015. These Motions were denied without prejudice by Order dated June 8, 2015.

^{2/} Now known as Helen Ross Shields, M.D.

COPIES FURNISHED:
(via certified mail)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(eServed)
(Certified Mail No. 7014 2120 0000 0358 6173)

Michael R. D'Lugo, Esquire
Wicker, Smith, O'Hara, McCoy, Ford, P.A.
Post Office Box 2753
Orlando, Florida 32802
(eServed)
(Certified Mail No. 7014 2120 0000 0358 6180)

Jeffrey P. Brock, Esquire
Smith Stout Bigman and Brock PA
444 Seabreeze Boulevard, Suite 900
Daytona Beach, Florida 32118
(eServed)
(Certified Mail No. 7014 2120 0000 0358 6197)

James A. Martin, Jr., Esquire
Macfarlane Ferguson & McMullen
625 Court Street, Suite 200
Clearwater, Florida 33756
(eServed)
(Certified Mail No. 7014 2120 0000 0358 6203)

Maria D. Tejedor, Esquire
Diez-Arguelles & Tejedor
505 North Mills Avenue
Orlando, Florida 32803
(eServed)
(Certified Mail No. 7014 2120 0000 0358 3126)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7014 2120 0000 0358 8704)

Elizabeth Dudek, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)
(Certified Mail No. 7014 2120 0000 0358 8711)

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).