

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

COURTNEY LINDSEY, individually
and as parent of KAMARI JACKSON,
a minor,

Petitioner,

vs.

Case No. 15-2499N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

PUTNAM COMMUNITY MEDICAL CENTER,
LLC, d/b/a PUTNAM COMMUNITY
MEDICAL CENTER; AND MOHAMED M.
AKHIYAT, M.D.,

Intervenors.

_____ /

SUMMARY FINAL ORDER ON NOTICE

This cause came on for consideration upon Respondent's Motion for Summary Final Order and Intervenor, Putnam Community Medical Center's, LLC, Motion for Partial Summary Final Order filed on January 28 and February 22, 2016, respectively.

STATEMENT OF THE CASE

On April 29, 2015, Petitioner, Courtney Lindsey, individually and as parent of Kamari Jackson (Kamari), filed a Petition for Determination of Compensability 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 Mohamed M. Akhiyat, M.D., as the physician who provided obstetric services at the birth of Kamari on August 28, 2014, at Putnam Community Medical Center in Palatka, Florida.

On January 28, 2016, NICA filed a Motion for Summary Final Order, or in the Alternative, Motion for Partial Summary Final Order. On March 4, 2016, a Partial Summary Final Order on the issue of compensability was entered, finding that Kamari sustained a birth-related neurological injury, which is compensable under the Plan. Jurisdiction was retained on the issues of notice and award.

On February 22, 2016, Putnam Community Medical Center filed a Motion for Partial Summary Final Order on the issue of notice. On March 11, 2016, Intervenor Mohammed Akhiyat, M.D., filed a Joinder in Putnam Community Center's Motion for Partial Summary Final Order.

The time for Petitioner to file a response was extended and on June 27, 2016, Petitioner filed her Response to Respondent's and Intervenors' Motions for Partial Summary Final Order, which included the deposition testimony of Mohamed Akhiyat, M.D.; Bessie Sweat, R.N.; Jamie Ramirez, R.N.; Liesa Sykes;

Cherry Leonard; and Petitioner, Courtney Lindsey. Respondent and Intervenor filed Motions for Leave to Reply to Petitioner's Response, which were granted. NICA filed its Reply to Petitioner's Response on August 3, 2016, and Intervenor filed their Replies to Petitioner's Response on August 4 and 5, 2016. Intervenor Dr. Akhiyat also filed a Notice of Joinder in NICA's and Putnam Community Medical Center's Reply to Petitioner's Response.

FINDINGS OF FACT

1. Kamari Jackson was born on August 28, 2014, at Putnam Community Medical Center (PCMC) in Palatka, Florida. Kamari weighed in excess of 2,500 grams at birth.

2. Kamari was delivered by Mohamed M. Akhiyat, M.D., who was a NICA participating physician at the time of her birth.

3. Ms. Lindsey went to Dr. Akhiyat's office on January 8, 2014, to initiate obstetrical care. Ms. Lindsey first signed a NICA acknowledgment form on that date in his office. Her signature was witnessed by Leisa Sykes, who worked in Dr. Akhiyat's office as a medical assistant in 2014. Petitioner does not dispute that she signed the NICA acknowledgment form on January 8, 2014. According to Ms. Sykes, it was the routine practice in Dr. Akhiyat's office to give the obstetric patient the NICA brochure before asking the patient to sign the acknowledgment form. This routine practice was confirmed by

Dr. Akhiyat in his deposition testimony. The routine practice described by Dr. Akhiyat was that the NICA brochure was given to the patient on their first office visit during pregnancy, and then the patient would sign the acknowledgment form during that first visit. During the first obstetric visit to his office, the patient would complete all necessary paperwork, including receiving the NICA brochure followed by signing the NICA acknowledgment form. The new obstetrical patient does not have a prenatal visit with a physician on the first visit. Moreover, Dr. Akhiyat specifically recalls discussing the information in the NICA brochure with Ms. Lindsey, and asking her if she understood everything in the brochure, and whether she had any questions, which she did not. Petitioner testified in her deposition that she does not recall one way or the other as to whether she may have gotten a NICA brochure during her initial prenatal visit.

4. The acknowledgment form signed by Ms. Lindsey on January 8, 2014, is entitled 'NOTICE TO OBSTETRIC PATIENT see Section 766.316, Florida Statutes,' and reads as follows:

I have been furnished information by Putnam OBGYN prepared by the Florida Birth-Related Neurological Injury Compensation Association (NICA), and have been advised that Dr. Akhiyat is a participating physician in that program, wherein certain limited compensation is available in the event certain neurological injury may occur during labor, delivery or resuscitation. For

specifics of the program, I understand I can contact the Florida Birth-Related Neurological Injury Compensation Association, P.O. Box 14567, Tallahassee, Florida, 32317-4567, 1-800-398-2129. I further acknowledge that I have received a copy of the brochure prepared by NICA.

5. Ms. Lindsey went to PCMC on August 22, 2014, because she was having contractions. Jamime Rameriz is a registered nurse employed at PCMC who performed an obstetric triage on Ms. Lindsey when she went to PCMC on August 22, 2014. Part of her job responsibilities in August 2014 was to meet prenatal patients to provide the NICA brochure to them. It was routine practice to provide the NICA brochure to the patient when they arrived and then to witness the patient's signature on the NICA acknowledgment form. After giving her the NICA form, Nurse Rameriz witnessed Ms. Lindsey's signature on a NICA acknowledgment form furnished by PCMC on August 22, 2014. Petitioner acknowledges that she signed the NICA acknowledgment form on August 22, 2014. Nurse Ramirez did not fill in Dr. Akhiyat's name in the blank space on the form due to an oversight. However, she was well aware that Dr. Akhiyat was Ms. Lindsey's obstetrician.

6. Ms. Lindsey went back to PCMC the following day. She signed another NICA acknowledgment form on August 23, 2014. This form was witnessed by Bessie Sweat, who is a registered nurse and was charge nurse in the department of obstetrics at PCMC. Part

of her job responsibilities in 2014 was to provide NICA brochures to obstetrical patients when they come in for triage or when in labor. Her normal practice is to hand the NICA brochure to every patient who comes in. She then explains both the brochure and the acknowledgment form to them, and then witnesses their signature. Nurse Sweat recalls discussing the NICA brochure with Ms. Lindsey and witnessing her signature on August 23 and 28, 2014. Petitioner acknowledges that she signed the NICA acknowledgment form provided to her on August 23, 2014.

7. Ms. Lindsey returned again to PCMC on August 28, 2014, because her water/membranes had broken. Nurse Sweat recalls asking Petitioner how long her membranes had been broken and that Petitioner answered that they had been ruptured for a couple of days. Nurse Sweat again provided Ms. Lindsey with a NICA brochure and witnessed her signature on the NICA acknowledgment form on August 28, 2014. Petitioner does not dispute that she signed the NICA acknowledgment form on August 28, 2016.

8. The NICA acknowledgment form signed by Ms. Lindsey is entitled, "Notice to Obstetric Patients (Section 766.316, Florida Statutes)," which reads as follows:

NOTICE OF NICA

I have been furnished information by Putnam Community Medical Center prepared by the Florida Birth-Related Neurological Compensation Association (NICA), and have been advised that _____ is a participating

physician in that program, wherein certain limited compensation is available in the event certain neurological injury may occur during labor, delivery or resuscitation. 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, 1-800-398-2129. I further acknowledge that I have received a copy of the brochure prepared by NICA.

9. The space for the physician's name to be written is blank on the acknowledgment form dated August 22, 2014, due to Nurse Ramirez's oversight. "Dr. Akhiyat" was written in the blank on the acknowledgment forms dated August 23 and 28, 2016, and witnessed by Nurse Sweat.

10. Mohamed Akhiyat, M.D., is an obstetrician/gynecologist employed by Putnam Obstetrics and Gynecology. He was the physician who provided obstetric services for Kamari's birth. Dr. Akhiyat wrote a medical report at PCMC on August 28, 2014, which stated in pertinent part as follows:

Patient was seen in the office on the day of admission where she complained of some leakage of amniotic fluid two days prior to examination.

* * *

On examination in the office, her vital signs were normal, blood pressure was normal. She felt a little bit warm. On pelvic exam, cervix was dilated to 4 cm with a bloody show.

* * *

Patient was sent to the hospital for admission with a diagnosis of prolonged rupture of membranes at term.

* * *

Patient was also started on antibiotics. . . . Due to the prolonged nature of membranes, which in my opinion has ruptured at least two or three days prior to admission.

11. Petitioner acknowledged in her deposition testimony that her membranes had ruptured prior to her admission to the hospital on August 28, 2014, the day Kamari was born. Dr. Akhiyat's report confirms Petitioner's testimony in this regard.

12. As has been determined in the Partial Summary Final Order issued on March 4, 2016, Kamari sustained a birth-related neurological injury.

13. Petitioner asserts that while timely given, the NICA notices were legally insufficient as she lacked the capacity due to a mental handicap, to consent to waiver of a jury trial. Additionally, she testified in her deposition that she kept all of her documents from her prenatal care in a bag in her closet and that there is only one NICA pamphlet in that bag. Despite her signatures indicating otherwise, Petitioner testified that she does not recall that she was given a NICA pamphlet at her hospital visits on August 22 and 23, 2014. NICA and the Intervenor assert that section 766.316 requires that the

participating hospital and physician provide notice of NICA participation to the patient, and that the statute does not require consent, or establishing the competency of the patient. Moreover, Respondent and Intervenors contend that notice of NICA participation is irrelevant due to Ms. Lindsey's medical emergency condition upon her admission to PCMC on August 28, 2014.

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. Lindsey signed four acknowledgment forms stating that she received a NICA brochure. One form was signed at Dr. Akhiyat's office at the beginning of her obstetrical care in

January 2014, and three were signed at PCMC in August 2014. Her signatures on these forms raise a rebuttable presumption that the notice requirements of section 766.316 have been met by Dr. Akhiyat and by PCMC.

19. Intervenors contend that they provided Petitioner with proper notice pursuant to section 766.316 and, in any event, notice was not required to be given due to Petitioner's emergency medical condition as defined in section 395.002(8)(b), upon arrival at the hospital on August 24, 2014, the day Kamari was born. As the proponents of the proposition that appropriate notice was given or that notice was not required, the burden on this 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).

20. Intervenors have met this burden. The greater weight of the evidence establishes that when Petitioner presented to Dr. Akhiyat's office for her initial prenatal visit in January 2014, she received a NICA brochure and signed an acknowledgment form stating that she received the NICA brochure from Dr. Akhiyat's office. This was established by Leisa Sykes, a medical assistant at Putman OBGYN where Petitioner was a patient, whose routine practice was to give the NICA brochure to the patient followed by obtaining the patient's signature on the

acknowledgment firm. This routine practice was confirmed by Dr. Akhiyat.

21. The greater weight of the evidence establishes that PCMC gave the NICA brochure to Petitioner followed by obtaining her signature of the NICA acknowledgment forms on August 22 and 23, 2014. The inadvertent omission by Nurse Sweat of Dr. Akhiyat's name on the August 22, 2014, form is of no legal consequence. Jackson v. NICA, 932 So. 2d 1125, 1129 (Fla. 5th DCA 2006) (There is no requirement that the names of participating physicians be set forth in a written notice.).

22. Petitioner's testimony that she kept all of her prenatal forms and documents in a bag in her closet and that there is only one NICA brochure in the bag, is insufficient to rebut the presumption raised by her signature on the acknowledgment forms signed by Petitioner on January 8, 2014, and on August 22 and 23, 2016, that the notice requirements of the statute had been met.

23. Even if PCMC had not provided Petitioner with notice on August 22 and 23, 2014, the undisputed evidence establishes that Petitioner's membranes had broken when Petitioner presented to PCMC on August 28, 2014. Dr. Akhiyat's medical report written after her admission reveals that upon admission to the hospital, Petitioner had prolonged rupture of her membranes. The testimony of Nurse Sweat, as well as Petitioner's testimony, is consistent

in this regard. That is, Nurse Sweat recalls discussing with Petitioner on August 28, 2014, how long her membranes had been ruptured.

24. Thus, it is concluded that when Petitioner presented to PCMC on August 28, 2014, she had an emergency medical condition as defined in section 395.002(8)(b). As such, PCMC was not required to provide NICA notice pursuant to section 766.316 on that date.

25. 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.

26. The physician-patient relationship for obstetrical services between Ms. Lindsey and Dr. Akhiyat began on January 8, 2014. Petitioner received the NICA brochure and signed the NICA

acknowledgment form on that day.

27. The provider-patient relationship between Ms. Lindsey and PCMC began August 22, 2014. Petitioner received a NICA brochure and signed a NICA acknowledgment form on that day.

28. When Petitioner presented to PCMC on August 28, 2014, she had an emergency medical condition as defined in section 395.002(8)(b). Therefore, while PCMC provided notice to Petitioner that day, they were excused from doing so.

29. Petitioner asserts that the NICA notices from Dr. Akhiyat and from PCMC are insufficient because Petitioner was incompetent to give consent due to a mental handicap or disability, and seeks an evidentiary hearing. However, the statutory language contained in section 766.316 does not reference consent and the undersigned declines to read that requirement into the statute. The statutory language is plain and unambiguous and does not require that a participating physician or hospital establish a patient's mental capacity or competency. See Dianderas v. NICA, 973 So. 2d 523 (Fla. 5th DCA 2007) (NICA brochure satisfies the legislative requirement of providing a clear and concise explanation of a patient's rights and limitations. The statutory terms do not require an explanation of a patient's potential civil remedies at common law or otherwise.).

30. Moreover, section 26.012, Florida Statutes, vests exclusive original jurisdiction to the circuit courts in proceedings regarding guardianship and the determination of incompetency. The undersigned is without jurisdiction to make any such determination and certainly does not have the authority to decide whether a person has the mental capacity to waive her right to a jury trial.

CONCLUSION

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

ORDERED:

1. Dr. Akhiyat provided notice in compliance with section 766.316.

2. Putnam Community Medical Center provided notice in compliance with section 766.316, although they were not obligated to do so on August 28, 2014, because Petitioner presented to the hospital in an emergency medical condition as defined in section 395.002 (8) (b).

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.

DONE AND ORDERED this 26th day of August, 2016, 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 26th day of August, 2016.

COPIES FURNISHED:
(via certified mail)

David P. Ferrainolo, Esquire
Hall Prangel & Schoonveld, LLC
Suite 301
4532 West Kennedy Boulevard
Tampa, Florida 33609
(eServed)
(Certified Mail No. 7015 0640 0001 2701 0848)

Jonathan T. Gilbert, Esquire
Colling, Gilbert, Wright & Carter, LLC
801 North Orange Avenue, Suite 830
Orlando, Florida 32801
(eServed)
(Certified Mail No. 7015 0640 0001 2701 0855)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308
(eServed)
(Certified Mail No. 7015 0640 0001 2701 0862)

Brooke M. Gaffney, Esquire
Smith Bigman Brock
444 Seabreeze Boulevard
Daytona Beach, Florida 32118
(eServed)
(Certified Mail No. 7015 0640 0001 2701 0879)

Tyler J. Oldenburg, Esquire
Marks Gray, P.A.
Post Office Box 447
Jacksonville, Florida 32201
(eServed)
(Certified Mail No. 7015 0640 0001 2701 0886)

Thomas E. Dukes, III, Esquire
McEwan, Martinez and Dukes, P.A.
Post Office Box 753
Orlando, Florida 32802
(eServed)
(Certified Mail No. 7015 0640 0001 2701 0893)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7015 0640 0001 2701 0909)

Elizabeth Dudek, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)
(Certified Mail No. 7015 0640 0001 2701 0916)

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).