

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LUIS ARTURO JIMENEZ and
PRISCILLA FRANCO, individually
and on behalf of DALLAS JIMENEZ,
a minor,

Petitioners,

vs.

Case No. 16-3531N

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

Respondent,

and

SOUTH MIAMI HOSPITAL, INC.,

Intervenor.

_____ /

SUMMARY FINAL ORDER ON NOTICE

A final hearing was held in this case before Todd P. Resavage, an Administrative Law Judge (ALJ) of the Division of Administrative hearings (DOAH), on April 17, 2018, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioners: Carlos Diez-Arguelles, Esquire
Brooke Charlan, Esquire
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For Respondent: David W. Black, Esquire
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Plantation, Florida 33324

For Intervenor: Scott Edward Solomon, Esquire
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STATEMENT OF THE ISSUE

Whether notice was accorded the patient, as contemplated by section 766.316, Florida Statutes, or whether the failure to give notice was excused because the patient had an emergency medical condition, as defined in section 395.002(8), or the giving of notice was not practicable.

STATEMENT OF THE CASE

On June 22, 2016, Petitioners, Luis Arturo Jimenez and Priscilla Franco, as parents of Dallas Jimenez (Dallas), a minor, filed an Amended Petition Under Protest Pursuant to Florida Statute Section 766.301 et seq. (Petition) with DOAH for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition named Sabriya Ishaof, M.D., as the physician who provided obstetric services at the birth of Dallas on April 8, 2014, at South Miami Hospital, d/b/a Baptist Health South Florida (South Miami), in Miami, Florida.

On August 3, 2016, South Miami filed a Petition for Leave to Intervene, which was granted by Order dated August 11, 2016. On June 22, 2017, the undersigned conducted a telephonic status conference with the parties. During said conference, Petitioners' counsel represented that Petitioners were not contesting that Petitioners' claim was compensable under the Plan. Thereafter, on June 28, 2017, Respondent filed a Renewed Motion for Summary Final Order (Respondent's Motion), addressing the issue of compensability.

On July 20, 2017, a Partial Summary Final Order was entered, finding that Dallas had sustained a birth-related neurological injury and finding Petitioners' claim to be compensable. Jurisdiction was retained on the issues of whether the notice requirements of section 766.316 were satisfied and to determine an award pursuant to section 766.31.

On November 1, 2017, the undersigned issued an Order Requiring Response, directing the parties to provide a written status report as to the remaining issues and whether a final hearing was required. In response, on November 8, 2017, Petitioners represented that Intervenor failed to provide adequate notice pursuant to section 766.316, and requested a final hearing.

The final hearing was scheduled for April 17, 2017. On April 11, 2018, the parties filed a Joint Pretrial Stipulation

wherein the parties stipulated that Petitioner, Priscilla Franco, delivered her son, Dallas, at South Miami on April 8, 2014. The final hearing proceeded as noticed. The final hearing Transcript was filed on May 7, 2018. The identity of the witnesses and exhibits and the rulings regarding each are as set forth in the Transcript.

Based upon the parties' stipulation at the conclusion of the hearing, the parties' proposed orders were to be submitted 30 days after the Transcript was filed. Ultimately, after granting two extensions, the proposed orders were to be filed on or before June 22, 2018. The parties timely submitted the proposed orders, which have been considered in issuing this Summary Final Order.

FINDINGS OF FACT

1. On April 8, 2014, at approximately 7:33 a.m., Petitioner, Priscilla Franco, presented to Fisherman's Community Hospital (Fisherman's) in Marathon, Florida. At the time, she was 33 weeks and 6 days pregnant. Her primary complaint at Fisherman's was abdominal pain. It was noted that her lower abdominal pain was sharp and had begun at 4:00 a.m. At 7:40 a.m., her pain was noted to be a 5 out of 10 on a 10-point pain scale.

2. At 7:51 a.m., Ms. Franco was diagnosed at Fisherman's with "active labor, premature."^{1/} As Fisherman's does not have obstetrical services available, a transfer was initiated. At

approximately 8:45 a.m., Sabrya Ishoof, M.D., accepted the transfer of Ms. Franco to South Miami.

3. Dr. Ishoof is a self-employed obstetrician/gynecologist. At all times relevant to this proceeding, she held staff privileges at South Miami. On April 8, 2014, she was called in to treat Ms. Franco as the on-call emergency obstetrician. Prior to this date, Dr. Ishoof and Petitioner did not have a physician-patient relationship for obstetrical services. Similarly, Ms. Franco did not have such a relationship with South Miami.

4. At approximately 9:54 a.m., Ms. Franco was transported via helicopter provided by Lifenet from Fisherman's to South Miami, where she arrived at approximately 11:15 a.m. Upon arrival, Ms. Franco was taken to the antepartum unit, where she was initially assessed and examined by Carmen Davis, R.N., and Melissa Luna, R.N. The initial assessments included, inter alia, placing an external fetal monitor on Ms. Franco and performing a vaginal examination. The vaginal examination revealed that Ms. Franco's cervix was 3 cm dilated and had thinned to 60 percent effacement.

5. At approximately 11:37, Nurse Luna documented that Ms. Franco was having uterine contractions, lasting 30 to 60 seconds. The contractions resulted in cramping abdominal pain. The pain was described as a 5-6 on the 10-point pain scale.

At 11:38 a.m., this assessment was communicated to Dr. Ishoof. Two minutes later, Dr. Ishoof issued her Admission Order, wherein she admitted Ms. Franco to the antepartum unit and ordered magnesium, antibiotics, insulin, as well as an ultrasound. The decision to admit Ms. Franco was based upon the following: Ms. Franco's prior history of a preterm Cesarean delivery, cervical dilation, and uterine contractions--being in active labor.

6. At 12:06 p.m., Nurse Luna documented that Ms. Franco was having uterine contractions lasting 50 to 60 seconds.

At 12:13 p.m., Nurse Davis contacted Dr. Ishoof regarding the external fetal monitoring interpretation, the contraction pattern, pain assessment, and interventions performed.

7. Nurse Davis, at approximately 12:14 p.m., proceeded with admission paperwork with Ms. Franco. A packet of information was provided to Ms. Franco, which, inter alia, included a NICA brochure, entitled "A Peace of Mind for an Unexpected Problem," and a form acknowledging receipt of the brochure, entitled "Notice to Obstetric Patient." The notice language, which is contained on a document bearing the label for South Miami, provides as follows:

NOTICE TO OBSTETRIC PATIENT

I have been furnished information by the hospital prepared by the Florida Birth Related Neurological Injury Compensation

Association, and have been advised that my doctor may be 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 (NICA), P.O. Box 14567, Tallahassee, Florida 32317-4567, (800) 398-2129. I further acknowledge that I have received a copy of the brochure prepared by NICA.

8. Nurse Davis credibly testified that, while she does not have a specific recollection of Ms. Franco, her routine practice was to provide the NICA brochure and notice acknowledging receipt to her patients upon admission. Specifically, Nurse Davis testified that she would provide the documents and request the patient to sign the same. Nurse Davis would then sign the document acknowledging the patient's signature and receipt. In this matter, Ms. Franco's signature appears under the above-referenced notice. The document further bears the signature of Nurse Davis as a witness to Ms. Franco's signature.

9. While Ms. Franco testified that she did not receive the NICA brochure, Ms. Franco's testimony on this fact is not credited. The better evidence establishes that Ms. Franco was provided the NICA brochure as described by Nurse Davis and acknowledged by Ms. Franco's signature.

10. At 12:34 p.m., Dr. Ishoof ordered Ms. Franco to be prepared for a Cesarean section delivery. Dallas was delivered

at 1:51 p.m. It is undisputed that Dr. Ishoof was the physician providing obstetric services at Dallas's birth. The evidence established that Dr. Ishoof was a Plan-participating physician at that time. The evidence further established that South Miami was a Plan-participating hospital at the time of Dallas's birth.

CONCLUSIONS OF LAW

11. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat.

12. The issue to be determined at this juncture is whether notice was provided pursuant to section 766.316, which provides:

Notice to obstetrical patients of participation in the plan.—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.

13. 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. That there is evidence of the onset and persistence of uterine contractions or rupture of the membranes.

14. Ms. Franco signed an acknowledgement form stating that she received a NICA brochure. The form was signed within approximately one hour upon first arriving at South Miami. Her signature raises a rebuttable presumption that the notice requirements of section 766.316 have been met by Intervenor.

15. Intervenor contends that Petitioners were provided with proper notice pursuant to section 766.316 and, in any event, notice was not required to be given due to Ms. Franco's emergency medical condition as defined in section 395.002(8) (b), upon arrival at South Miami on April 8, 2014, the day Dallas was born. As the proponents of the proposition that appropriate notice was given or excused, the burden on this issue of notice is upon

Intervenor. Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 880 So. 2d 1253, 1257 (Fla. 1st DCA 2004).

16. Intervenor has met its burden on the issue of notice. The evidence clearly establishes that, when Ms. Franco presented to South Miami, on April 8, 2014, she had an emergency medical condition as defined in section 395.002(8)(b)3. Specifically, the undisputed evidence establishes that Ms. Franco was experiencing persistent uterine contractions upon her arrival and subsequent admission to the hospital. Accordingly, neither Dr. Ishoof nor South Miami Hospital was required to provide NICA notice pursuant to section 766.316.

CONCLUSION

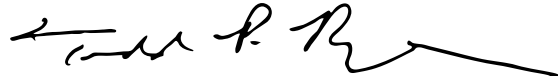
Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Intervenor and Sabriya Ishoof, M.D., were not obligated to provide notice pursuant to section 766.316, because Petitioner, Priscilla Franco, presented to South Miami 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 ALJ, 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 ALJ, 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 18th day of July, 2018, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of July, 2018.

ENDNOTE

^{1/} In her deposition, Sabriya Ishaof, M.D., defined active labor as a "cervical change with painful uterine contractions." Prematurity was defined by Dr. Ishaof as "any baby before 37 weeks."

COPIES FURNISHED:
(via certified mail)

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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