

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DANIELLE FAIVUS and SCOTT
FAIVUS, as parents and natural
guardians of the person, RYDER
FAIVUS, on behalf of DANIELLE
FAIVUS and SCOTT FAIVUS
individually and on behalf of
RYDER FAIVUS, a minor, and
REBECCA G. DOANE, et al.,

Petitioners,

vs.

Case No. 16-3998N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

WELLINGTON REGIONAL MEDICAL
CENTER; MELISSA E. CARLSON,
M.D.; AND OB/GYN SPECIALISTS OF
THE PALM BEACHES, P.A.,

Intervenors.

_____ /

FINAL ORDER ON NOTICE

Pursuant to notice, a final hearing on the issue of notice was held in this case on April 5, 2017, via video teleconference with sites in West Palm Beach and Tallahassee, Florida, before Barbara J. Staros, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners: Nancy La Vista, Esquire
Clark Fountain La Vista Prather
Keen & Littky-Rubin
1919 North Flagler Drive, 2nd Floor
West Palm Beach, Florida 33407

For Respondent: David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest 6th Court
Plantation, Florida 33324

For Intervenor Wellington Regional Medical Center:

Jeffery L. Blostein, Esquire
The Law Office of Jay Cohen, P.A.
Suite 1500
100 Southeast Third Avenue
Fort Lauderdale, Florida 33394

For Intervenors Melissa Carlson, M.D., and OB/GYN
Specialists of the Palm Beaches, P.A.: No appearance

STATEMENT OF THE ISSUE

The issue in this case is whether Wellington Regional Medical Center provided the notice required by section 766.316, Florida Statutes.

PRELIMINARY STATEMENT

On July 8, 2016, Petitioners, Danielle Faivus and Scott Favius, as parents and natural guardians of Ryder Faivus (Ryder), a minor, and Rebecca G. Doane, filed a Petition Filed Under Protest for Determination as to the Applicability of Florida Birth-Related Neurological Injury Compensation Plan (Petition) with the Division of Administrative Hearings.

The Petition named Melissa E. Carlson, M.D., as the physician providing obstetric services at the birth of Ryder, who was born on July 22, 2014, at Wellington Regional Medical Center (Wellington Regional).

On January 24, 2017, Respondent filed a Motion for Summary Final Order, alleging that Ryder sustained a birth-related neurological injury as defined in section 766.302(2), Florida Statutes. On February 6, 2017, a Partial Summary Final Order was entered, finding that Ryder 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 parties filed a Joint Pre-hearing Stipulation on March 29, 2017, and an Amendment to Joint Pre-hearing Stipulation on April 4, 2017, wherein the parties stipulated that Intervenor OB/GYN Specialists of the Palm Beaches, P.A. (OB/GYN Specialists), provided timely NICA notice, and that Melissa Carlson, M.D., was a NICA participating physician in July 2014. The parties further stipulated, "[t]herefore, OB/GYN Specialists of the Palm Beaches and Melissa Carlson, M.D., are entitled to immunity under the NICA Plan."

At the final hearing, Petitioners presented the testimony of Danielle Faivus and Scott Faivus. Petitioners' Exhibits 1 through 3 were admitted into evidence. Petitioners' Motion to

Supplement their exhibit list was granted, thereby admitting Exhibit 4 into evidence.

Neither Respondent nor Intervenor presented any live witnesses. Intervenor's Exhibits 1 through 12, including the deposition testimony of Danielle Faivus, Scott Faivus, Jamie Gabbard, R.N., and Arlene Moria, were admitted into evidence.

The Transcript of the final hearing was filed on April 19, 2017. Intervenor requested a brief extension of time in which to submit proposed final orders, which was granted. Petitioners and Intervenor timely filed their Proposed Final Orders on May 8, 2017, which have been considered in the preparation of this Final Order on Notice. Respondent did not file a proposed final order.

FINDINGS OF FACT

Stipulated facts

1. At all times material, Scott and Danielle Faivus were and are husband and wife. Mrs. Favius was a patient of OB/GYN Specialists where she received prenatal care for the birth of her son, Ryder. Mrs. Faivus was given NICA notice during that care.

2. Mrs. Favius pre-registered online with Wellington Regional in April of 2014 for her delivery. She went to the hospital July 7, 2017, for a labor check. On July 22, 2014, Mrs. Favius presented to Wellington Regional for induction of labor. Mrs. Favius signed a Receipt of Notice to Obstetric

Patient on July 22, 2014, acknowledging receipt of the NICA Peace of Mind Brochure.

3. A Caesarean section was performed and Ryder Favius was delivered. It was subsequently determined he sustained a hypoxic ischemic encephalopathy. NICA determined that this is a birth-related injury as defined by chapter 766, Florida Statutes. Respondent filed a Motion for Summary Final Order. A Partial Summary Final Order was entered on February 6, 2017, which determined that Petitioners' claim to be compensable under the NICA Plan.

Facts based upon the evidence of record

4. The maternity Pre-registration page from Wellington Regional's website instructs the patient that there are three ways to preregister: online, by mail, and in person. On April 25, 2014, Ms. Faivus accessed the online pre-registration page to preregister for her delivery.

5. Just below the enumeration of the three methods of pre-registration, the online maternity pre-registration page in evidence contains a red exclamation point and "FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION (NICA)" written in capital letters immediately beside the exclamation point. The pre-registration page continues with the following:

In order to fully process your Pre-registration, please download the NICA

pamphlet and form. **The form must be signed and returned to:**

Wellington Regional Medical Center
Attn: Admitting Officer
10101 Forest Hill Boulevard
Wellington, FL 33414.

- NICA Pamphlet
- NICA Consent Form

6. The maternity pre-registration page in evidence is a screen shot of what is currently on the hospital's website. Arlene Morea, patient access director at Wellington Regional, was asked if the current maternity pre-registration page is the same as it appeared in 2014, when Mrs. Favius filled out the pre-registration form. She replied "to the best of my knowledge, yes." She further explained that other than some formatting changes, "everything is the same as far as the pre-registration," including the red exclamation point. The screen shot in evidence shows the red exclamation point immediately below the three methods of pre-registration.

7. Mrs. Favius does not recall reviewing the instruction on the pre-registration page regarding downloading the NICA pamphlet or downloading and completing the NICA consent form. Notwithstanding, she received a REGIE registration confirmation by e-mail which thanked her for submitting the online REGIE request to Wellington Regional "where it will be processed." There is nothing on the face of the registration confirmation

document that references downloading the NICA materials, or to indicate whether or not she had downloaded the pamphlet or acknowledgment form.

8. According to Ms. Morea, it is the routine practice of Wellington Regional that when a maternity patient completes the demographics portion of the online pre-registration, the hospital mails a pre-registration packet to the patient containing a confirmation of the registration, an account number, information regarding payment and insurance benefits, the NICA acknowledgement form, a return envelope for the patient to return the acknowledgment form, the NICA "Peace of Mind" pamphlet, and information regarding different services the hospital provides, such as information on breast feeding and sibling passes. The hospital did not receive any returned mail sent to Mrs. Favius. However, there is no signed NICA acknowledgment form in Mrs. Favius' hospital record from the pre-registration process. Mrs. Favius denies receiving the pre-registration packet, or any other documents from the hospital, by mail following the submission of the online pre-registration demographic information. The registration confirmation letter does not reference NICA. Mrs. Favius confirmed that her address is the same address which is on record for her at Wellington Regional.

9. The confirmation registration established a "visit date" of July 17, 2014, and assigned a confirmation number to

Mrs. Favius. Ms. Morea explained that July 17, 2014, was the "visit date" scheduled for Mrs. Favius to go to the hospital. However, Mrs. Favius presented to Wellington Regional 10 days prior to her assigned visit date on the night of July 7, 2014, for a "labor check", because she thought she was going into labor. She went to the labor and delivery floor where she was hooked up to a fetal monitor, had a vaginal exam and an ultrasound. Mrs. Favius does not recall whether she told anyone at the hospital that she intended to deliver there.

10. At the July 7, 2014, hospital visit, Mrs. Favius signed various documents including authorizations for financial billing and a consent to treat. There is no record of a signed NICA acknowledgment form in her file for the July 7, 2014, hospital admission. Mrs. Favius recalls signing papers but does not recall receiving copies of any paperwork during this visit and does not recall any of the discussions she had with the nurses during this visit.

11. According to Ms. Morea, the routine practice in labor and delivery is that the NICA pamphlet and acknowledgment form are given to the patient when she arrives at the hospital either for a labor check or in labor. So, using routine practice, the patient should have received the NICA pamphlet and the acknowledgment form during the July 7, 2014, hospital visit. However, there is no NICA acknowledgment form in Mrs. Favius'

hospital record for her July 7, 2014, admission. Ms. Morea noted that the NICA pamphlet could have been given to Mrs. Favius, but it was not scanned into her account.

12. Ms. Morea's statement as to the hospital's routine practice is consistent with that of Jamie Gabbard, R.N., who worked at Wellington Regional as a labor and delivery nurse at the time of Ryder's birth. According to Nurse Gabbard, nurses would routinely give the NICA pamphlet to the maternity patient "as soon as we were able to. You know, if they were for induction, we would give it the first thing with all their consents. If they came in in labor, we would do it as soon as we could, you know."

13. Nurse Gabbard further described the routine practice in 2014 in regard to providing NICA notice and various consent documents to patients who presented to the labor and delivery floor. That is, packets were put together which included the NICA pamphlet, the NICA acknowledgment form, and various consent forms for the patient. The nurse would present the packet to the maternity patient for signing.

14. Mrs. Favius was admitted to the hospital on July 22, 2014, for a scheduled induction. When she arrived at labor and delivery, she was put on a monitor. The monitor indicated she was experiencing contractions of early labor, but she did not

feel any contractions until Dr. Carlson ruptured her membranes a few hours after she arrived.

15. Upon arrival at labor and delivery, Mrs. Favius signed paperwork. One of the documents she signed was the NICA acknowledgment form, although she does not recall doing so. Nurse Gabbard witnessed Mrs. Favius's signature on the NICA acknowledgment form dated July 22, 2014, which is routine practice. Nurse Gabbard's signature appears on the obstetrical consent forms signed by Mrs. Favius on July 22, 2014, and the NICA acknowledgment form.

16. Mrs. Favius signed the form entitled Receipt of Notice to Obstetric Patient, which reads as follows:

RECEIPT OF NOTICE TO OBSTETRIC PATIENT

I have been furnished information in the form of a Brochure prepared by the Florida Birth-Related Neurological Injury Compensation Association (NICA), pursuant to Section 766.316, Florida Statutes, by Wellington Regional 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, (850)398-2129.

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

17. The signed NICA acknowledgment form is not time-stamped, but the other documents in the packet which were signed by Mrs. Favius were signed around 6:30 a.m., shortly after her arrival at the hospital on July 22, 2014.

18. Despite her signature appearing on the acknowledgement form, Mrs. Favius does not recall receiving a NICA pamphlet at the hospital on July 22, 2014, or on any other occasion. She also does not recall receiving a NICA pamphlet, and signing a NICA acknowledgment form, at Dr. Carlson's office. However, she concedes that she did sign an acknowledgment form at the hospital on July 22, 2014, and at Dr. Carlson's office. It is concluded that Mrs. Favius received the NICA pamphlet from Wellington Regional on July 22, 2014, shortly after she was admitted that morning, while in early labor.

19. Petitioners have stipulated that Mrs. Favius was provided notice from Dr. Carlson and OB/GYN Specialists, despite her not remembering receiving the NICA pamphlet or signing the acknowledgment form there, although she clearly did so.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat. (2012).

21. 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.
(emphasis added)

22. 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.

23. 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.

24. Mrs. Favius contends that she did not receive sufficient notice from Wellington Regional pursuant to section 766.316. Wellington Regional contends that sufficient notice was provided pursuant to section 766.316. As the proponent of the proposition that appropriate notice was given, 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).

25. It is important to remember that the notice requirement contained in section 766.316 refers to the NICA pamphlet, not the acknowledgment form. See Dianderas v. Fla. Birth Related Neurological, 973 So. 2d 523 (Fla. 5th DCA 2007). The statute states that "the hospital or participating physician may elect to

have the patient sign a form acknowledging receipt of the notice form." Thus, the use of an acknowledgment form is permissive, not mandatory.

26. The greater weight of the evidence establishes that Mrs. Favius received the NICA pamphlet from Wellington Regional when she signed the acknowledgement form dated July 22, 2014, despite her not remembering that this happened. Section 766.316 provides that a signed acknowledgement creates a rebuttable presumption that notice has been provided, and Petitioners have not rebutted the presumption that notice was provided by the hospital.

27. However, Petitioners also contend that any notice given to her by Wellington Regional on July 22, 2014, was untimely, and therefore, insufficient, because she was already in early labor and, by definition, in an emergency medical condition. See § 766.302(8)(b)3., Fla. Stat. The undersigned agrees that at the time of her receipt of the NICA pamphlet on July 22, 2017, she was in an emergency medical condition and, standing alone, it would be too late as there had been earlier opportunities to provide notice.

28. The question becomes, did Mrs. Favius receive NICA notice either through the pre-registration process and/or on July 7, 2014, when she was admitted to the hospital for a labor check?

29. 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.

30. The instructions on the hospital's online pre-registration page clearly instructs the patient to download the NICA pamphlet and acknowledgment form "in order to fully process the registration." Despite the red exclamation point immediately to the left of the instructions to download the pamphlet and form, and to sign the form and return it to the hospital, there is no evidence that Mrs. Favius did so. Moreover, Mrs. Favius denies doing so. While Ms. Morea credibly explained the routine practice of mailing the pamphlet and form to the patient

following online pre-registration, there is no evidence to show that Mrs. Favius received NICA notice when she submitted the pre-registration form. There is also insufficient evidence that the pre-registration process, which was not fully completed, established a provider-patient relationship between the hospital and Mrs. Favius.

31. Despite the inability of Ms. Morea to locate a copy of the signed NICA acknowledgment form in Mrs. Favius' file, the greater weight of the evidence did establish that more likely than not, Wellington Regional provided Mrs. Favius a copy of the NICA pamphlet when she was admitted for a labor check on July 7, 2014, when the provider-patient relationship began between Mrs. Favius and the hospital. The evidence presented of the hospital's routine practice is persuasive that the hospital provided maternity patients with a NICA pamphlet, and, therefore, NICA notice, when they presented for a labor check or presented in labor. "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." Tabb, 880 So. 2d at 1259. The evidence that the maternity patient is presented with a packet of documents, which included the NICA pamphlet, creates an inference that the patient was provided notice. It was the routine practice for the

NICA pamphlet to be included in a packet of information, which also contained various hospital consent forms. Both Ms. Morea and Nurse Gabbard credibly testified that the NICA pamphlet is routinely included within the packet of documents given to the maternity patient when she arrives at labor and delivery. Nurse Gabbard credibly testified that the NICA notice was given as soon as they were able to do so. This comports with Ms. Morea's testimony that the NICA notice is given as soon as the patient arrives. It is reasonable to assume that the NICA pamphlet (which is the notice document) was included in the packet of documents given to Mrs. Favius, despite that no signed acknowledgment form was found in her file.

32. Mrs. Favius did not remember ever getting the NICA pamphlet or signing the NICA acknowledgment form, despite having done so on at least two occasions. In contrast, Ms. Morea's and Nurse Gabbard's testimony was consistent and credible regarding the hospital's routine practice, and more persuasive. See Jackson v. Fla. Birth-Related Neurological, 932 So. 2d 1125, 1129 (Fla. 2006).

33. 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.

34. The greater weight of the evidence established that Wellington Regional gave proper notice at the time the provider-patient relationship was formed on July 7, 2014, in sufficient time to make a meaningful choice of whether to select another provider prior to her delivery, as contemplated in Weeks.

CONCLUSION

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

ORDERED:

1. Wellington Regional Medical Center provided notice in compliance with section 766.316.

2. Dr. Carlson and OB/GYN Specialists of the Palm Beaches provided notice in compliance with 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 Petitioners; 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 22nd day of May, 2017, 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 22nd day of May, 2017.

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 Number 7016 2710 0000 4543 0040)

Nancy La Vista, Esquire
Clark Fountain La Vista Prather Keen & Littky-Rubin
1919 North Flagler Drive, 2nd Floor
West Palm Beach, Florida 33407
(eServed)
(Certified Mail Number 7016 2710 0000 4543 0118)

Richard T. Woulfe, Esquire
Billing, Cochran, Lyles, Mauro & Ramsey, P.A.
SunTrust Center, Sixth Floor
515 East Las Olas Boulevard
Fort Lauderdale, Florida 33301
(eServed)
(Certified Mail Number 7016 2710 0000 4543 0125)

Jeffery L. Blostein, Esquire
The Law Office of Jay Cohen, P.A.
Suite 1500
100 Southeast Third Avenue
Fort Lauderdale, Florida 33394
(eServed)
(Certified Mail Number 7016 2710 0000 4543 0132)

David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest 6th Court
Plantation, Florida 33324
(eServed)
(Certified Mail Number 7016 2710 0000 4543 0149)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail Number 7016 2710 0000 4543 0156)

Justin Senior, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)
(Certified Mail Number 7016 2710 0000 4543 0163)

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).