

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WESLEN BASTIEN, on behalf of and
as parent and natural guardian
of TAYLOR JOSEPH, a minor,

Petitioner,

vs.

Case No. 17-1830N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

BETHESDA HOSPITAL, INC.,

Intervenor.

_____ /

FINAL ORDER ON NOTICE

Pursuant to notice, a final hearing on the issue of notice was held in this case on December 19, 2017, via video teleconference with sites in West Palm Beach and Tallahassee, Florida, before W. David Watkins, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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For Intervenor Selva Ganesh, M.D.^{1/}:

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STATEMENT OF THE ISSUES

The issues in this case are whether Selva Ganesh, M.D. (Dr. Ganesh), and Bethesda Hospital, Inc., provided appropriate notice as required by section 766.316, Florida Statutes.

PRELIMINARY STATEMENT

On March 13, 2017, Petitioner, Weslen Bastien (Ms. Bastien), individually and on behalf of Taylor Joseph (Taylor), a minor, filed a Petition 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 Dr. Ganesh as the physician who provided obstetric services at the birth of

Taylor on July 4, 2015, at Bethesda Hospital East (Bethesda), in Boynton Beach, Florida.

DOAH served Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), with a copy of the Petition on April 10, 2017. DOAH served Dr. Ganesh with a copy of the Petition on March 28, 2017. DOAH served Bethesda with a copy of the Petition on March 30, 2017.

On April 14, 2017, a Motion to Intervene was filed by Dr. Ganesh. On April 17, 2017, an Order was entered granting Dr. Ganesh's Motion to Intervene. On May 10, 2017, Bethesda filed a Motion to Intervene. On May 12, 2017, an Order was entered granting Bethesda's Motion to Intervene.

On July 27, 2017, NICA filed a Motion for Partial Summary Final Order on the issue of birth-related neurological injury. Also on July 27, 2017, NICA filed a Response to Order of July 20, 2017, in which it was represented that:

Counsel for the Petitioners and Intervenors have agreed that they do not need a hearing on the issue of Compensability and that the ALJ can enter an Interim Order finding the Claim to be Compensable, reserving jurisdiction to determine whether the notice requirements of section 766.316 were satisfied and to determine the issue of an award pursuant to section 766.31, if necessary.

On September 15, 2017, a Partial Summary Final Order was entered, finding that Taylor sustained a birth-related

neurological injury, which is compensable under the Plan. Jurisdiction was retained on the issues of notice and award.

On December 12, 2017, the parties filed a Pre-hearing Stipulation.

The final hearing was held on December 19, 2017. Ms. Bastien testified on her own behalf. In addition, the deposition testimony of Monique Scholine, R.N., and MacKenzie Gleason, R.N., were offered in lieu of their live testimony. Ms. Bastien's deposition transcript was also offered and received in evidence. The "admitted facts" in paragraph (e) of the Amended Pre-hearing Stipulation were received in evidence, as were Joint Exhibits J1 through J6.

At the conclusion of the hearing, the parties stipulated that proposed final orders would be filed not later than 10 days following the filing of the official transcript at DOAH. The Transcript was filed on January 16, 2018, and thereafter, Petitioner and Intervenors timely filed proposed final orders, which have been carefully considered in the preparation of this Final Order.

On January 19, 2018, the parties filed an "Agreed Order on Whether Dr. Ganesh's Failure to Give NICA Notice was Excused Due to Petitioner's Emergency Medical Condition." On January 25, 2018, an Order of Dismissal as to Intervenor Selva Ganesh, M.D.,

was entered by the undersigned, dismissing Petitioner's NICA claim as to Dr. Ganesh only.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made^{2/}:

1. Weslen Bastien is the natural parent of Taylor Joseph.

2. Selva Ganesh, M.D. is a licensed Florida physician in the active practice of obstetrics and gynecology. At all times material, Dr. Ganesh was a "participating physician" as defined in section 766.302(7), Florida Statutes (2017).^{3/} Under the circumstances described in greater detail below, Dr. Ganesh provided obstetrical services to Ms. Bastien in the course of labor, delivery, and resuscitation in the immediately post-delivery period of Taylor's birth.

3. Prior to Taylor's birth, Ms. Bastien received prenatal care from a non-participating provider, Sam Wanis, M.D. (Dr. Wanis). Dr. Wanis had staff privileges at Bethesda.

4. On July 1, 2015, Dr. Wanis sent Ms. Bastien to Bethesda for prenatal testing in the Labor and Delivery Department. The professional relationship between Bethesda and Ms. Bastien, relating to this pregnancy, began at that time.

5. Ms. Bastien was scheduled for induction of labor on July 5, 2015, a Booking Sheet was prepared, and she was

instructed to return the following day for additional testing. The parties stipulated, and it is found, that Ms. Bastien was not provided with NICA notice, as contemplated by section 766.316, during the visit of July 1, 2015.

6. On July 2, 2015, Ms. Bastien returned to Bethesda's Labor & Delivery Department for repeat testing. Discharge instructions included: "Return to L&D on Sunday 7/5 for induction after NST on 7/4/15 at 5 pm." The parties stipulated, and it is found, that once again, Ms. Bastien was not provided with any form of NICA notice as required by section 766.316.

7. On July 4, 2015, at about 6:45 a.m., Ms. Bastien returned to Bethesda in active labor. The admission history notes SROM (spontaneous rupture of membranes) on admission. She was noted to be six centimeters dilated and 70 percent effaced, with evidence of the onset and persistence of uterine contractions. Dr. Wanis was unavailable at the time of Ms. Bastien's presentation to Bethesda, and obstetrician, Dr. Ganesh, was called to provide obstetrical services to Ms. Bastien. The parties stipulated, and it is found, that Ms. Bastien presented to Bethesda with an emergency medical condition as there was evidence of the onset and persistence of uterine contractions.

8. The patient chart notes that Taylor was delivered by Dr. Ganesh at 9:54 a.m. on July 4, 2015.

9. The professional relationship between Dr. Ganesh and Ms. Bastien, relating to this pregnancy, began when Ms. Bastien presented to Bethesda in an emergency medical condition as she had evidence of the onset and persistence of uterine contractions. The only care and treatment Dr. Ganesh provided to Ms. Bastien was during the emergency medical condition noted above.

10. Dr. Ganesh did not provide NICA notice to Ms. Bastien on July 4, 2015. However, the parties stipulated, and it is found, that he was excused from providing NICA notice on July 4, 2015, as Ms. Bastien presented in an emergency medical condition due to the onset and persistence of uterine contractions.

11. Bethesda contends that based on the medical records and the testimony of Bethesda employees, NICA notice was provided to Ms. Bastien on July 4, 2015. However, it is Bethesda's position that because Petitioner testified that she would have continued to treat at Bethesda even if she had received the notice earlier, whether or not notice was provided on the July 4, 2015, is irrelevant. However, Petitioner notes that Bethesda has not produced a signed form acknowledging receipt of NICA notice by Ms. Bastien. Rather, the only documentation of any notice is on a Medical Record Report, under Admit Hx L&D, there is a "Yes" next to the question "NICA Notice Given?" The adequacy of the notice is not documented.

Ms. Bastien denies receiving any form of NICA notice on July 4, 2015.

12. As noted, the parties stipulated that Ms. Bastien presented to Bethesda on July 4, 2015, in an emergency medical condition. Accordingly, it is unnecessary to resolve the question of whether NICA notice was provided on July 4, 2015, since even had it been given on that date, it would have been untimely.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat.^{2/}

14. 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.

15. Section 395.002(8)(b) 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.

16. 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.

17. 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).

18. Based upon the stipulation noted above, Dr. Ganesh was excused from providing NICA notice as Ms. Bastien had an emergency medical condition when she entered Dr. Ganesh's care.^{4/}

19. The Florida Supreme Court has made clear that Section 766.316 requires both participating physicians and hospitals with participating physicians on staff to provide obstetrical patients with notice of their rights and limitations under the plan. Fla. Birth-Related Neurological Injury Comp. Ass'n v. Dep't of Admin. Hearings, 29 So. 3d 992, 998 (Fla. 2010).

20. 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.

21. Bethesda asserts that Ms. Bastien was provided NICA notice upon her presentation to Bethesda on July 4, 2015. However, even if true, at the time she was given the notice, she was in labor. By definition, she had an emergency medical condition. § 766.302(8)(b)3, Fla. Stat. It was too late at that time for Bethesda to give notice pursuant to section 766.316 when it had an opportunity prior to Ms. Bastien's admission on July 4, 2015, to provide notice.

22. 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.

23. As discussed above, it is undisputed that Bethesda did not give Ms. Bastien NICA notice on July 1, 2015, or July 2, 2015, even though it was practicable to do so. It is also undisputed that even if Bethesda did give Ms. Bastien NICA notice on July 4, 2015, such notice was not sufficient to meet the notice obligation under the statute because it was not given before an emergency medical condition arose. See Weeks, 977 So. 2d at 616 (concluding that notice must be given within a reasonable time after the commencement of the relationship and that the failure to do so is not excused by a subsequent emergency).

24. Based upon the above findings, Bethesda did not provide NICA notice to Ms. Bastien in accordance with section 766.316.

25. At hearing, Bethesda argued that it should be excused for failing to provide NICA notice because Ms. Bastien testified in a deposition that even if she had received the NICA notice on July 1 or 2, 2015, she would have continued to be treated at Bethesda. For the reasons set forth below, this argument is rejected as irrelevant.

26. Section 766.316 requires hospitals and participating physicians to give notice of their participation in NICA as a condition precedent to the providers' invoking NICA as the patient's exclusive remedy. See Galen of Fla., Inc. v. Braniff, 696 So. 2d 308, 309 (Fla. 1997). Nothing in the statute allows for waiver of this condition precedent based upon the introduction of evidence as to what the patient would have done had she been given proper notice. What a patient would or would not have done is simply not relevant to the issue of whether a hospital met its condition precedent of providing notice in accordance with section 766.316. This tribunal does not have the authority to construe an unambiguous statute in a way that extends its express terms. See, e.g., Fla. Carry, Inc. v. Univ. of N. Fla., 133 So. 3d 966, 971 (Fla. 1st DCA 2013); Jeffrey A. Hunt, D.O., P.A. v. Huppman, 28 So. 3d 989, 992 (Fla. 2d DCA 2010); see also Levine v. Dade Cnty. Sch. Bd., 442 So. 2d 210, 213 (Fla. 1983) (consideration of the efficacy of or need for the notice requirement is a matter wholly within the legislative domain).

27. This conclusion is supported by case law in which arguments similar to Bethesda's were rejected. For instance, in Board of Regents v. Athey, 694 So. 2d 46 (Fla. 1st DCA 1997), approved sub nom. University Medical Center, Inc. v. Athey, 699 So. 2d 1350 (Fla. 1997), the health care providers argued that

they had no opportunity to provide NICA notice pursuant to the Act. They claimed that no "informed choice" by the patients was possible because the patients were Medicaid recipients and there were no other facilities in the county accepting Medicaid. The First District Court of Appeal found this argument to be meritless. The court determined that accepting the providers' argument would, inter alia, "encourage uncertainty . . . by permitting health care providers to 'ignore the notice requirement and then assert the NICA exclusivity to defeat a civil action.'" Id. at 50.

28. Additionally, in Athey, the court held that "health care providers who have a reasonable opportunity to give notice and fail to give predelivery notice under Section 766.316, will lose their NICA exclusivity regardless of whether the circumstances precluded the patient making an effective choice of provider at the time the notice was provided." Id. at 50-51. Finally, the court concluded that "[h]aving failed to take advantage of a reasonable opportunity to provide predelivery notice, a health care provider will not be heard to complain that notice, if given, would have been ineffective." Id. at 51.

29. The undersigned finds the court's decision in Athey to be controlling here. Underlying that case was a claim by the provider that NICA notice was not necessary under the circumstances because the patient was going to deliver at the

facility regardless of whether timely NICA notice had been given. As in Athey, accepting Bethesda's argument would encourage uncertainty by allowing Bethesda to "ignore the notice requirement and then assert the NICA exclusivity to defeat" this action. Id. at 50. The NICA Act establishes a bright line rule requiring providers to give predelivery notice, except in circumstances not relevant here, in order to claim NICA exclusivity. The undersigned cannot and will not accept Bethesda's invitation to create a caveat to that clear legislative mandate.

30. Ms. Bastien became an obstetrical patient of Bethesda well before her delivery, thus triggering the obligation to furnish her with the notice within a reasonable time, which was not excused by the subsequent emergency (presenting in labor to delivery her baby).

31. By July 4, 2015, Ms. Bastien did not have sufficient time to make an informed choice on whether to use a participating health care provider prior to delivery, as she was in labor. The hospital had two opportunities to provide notice to Ms. Bastien prior to her presenting for delivery, but did not do so. Thus, even if notice was provided by Bethesda on July 4, 2015, it was insufficient to meet the requirements of section 766.316.

CONCLUSION

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

ORDERED:

1. Bethesda failed to provide notice for the hospital in compliance with section 766.316.

2. 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.

3. In the event Petitioner files an election of remedies declining or rejecting NICA benefits, this case will be dismissed with prejudice and DOAH's file will be closed.

DONE AND ORDERED this 16th day of February, 2018, in
Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of February, 2018.

ENDNOTES

^{1/} On January 25, 2018, an Order of Dismissal as to Intervenor Selva Ganesh, M.D. was entered by the undersigned, dismissing Petitioner's NICA claim as to Dr. Ganesh.

^{2/} The undersigned notes that the dispositive facts are not in dispute.

^{3/} Unless otherwise noted, all statutory references are to the 2017 version of the Florida Statutes.

^{4/} See Endnote 1.

COPIES FURNISHED:
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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).