

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

N.R., AS PARENT AND NATURAL GUARDIAN  
OF K.T.O., A MINOR.,

Appellant/Cross-Appellee,

Case No. 5D12-4340  
5D12-4401  
5D12-4319

v.

FLORIDA BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION ASSOCIATION,  
EZER OJEDA, M.D., ANGELINA PERA, M.D.,  
PEDIATRIX MEDICAL GROUP OF FLORIDA,  
INC., OSCEOLA REGIONAL MEDICAL  
CENTER, LANCE MAKI, M.D., TANYA  
MEDINA, M.D., AND J. RAPHA MEDICAL, P.A.,

Appellees/Cross-Appellants.

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Opinion filed July 25, 2014

Administrative Appeal from the  
Division of Administrative Hearings.

Rebecca B. Creed and Jessie L. Harrell, of  
Creed & Gowdy, P.A., Jacksonville, for  
Appellant/Cross-Appellee.

J. Stephen Menton, Stephen A. Ecenia,  
and Craig D. Miller, of Rutledge Ecenia,  
P.A., Tallahassee, for Appellee, Florida  
Birth-Related Neurological Injury  
Compensation Association.

Robert E. Biasotti and Annette M. Lang, of  
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Appellee/Cross-Appellant, Osceola  
Regional Medical Center.

Bradley P. Blystone, of Marshall,

Dennehey, Warner, Coleman & Goggin, Orlando, and Joseph S. Justice and Robert D. Henry, of Ringer, Henry, Buckley & Seacord, P.A., Orlando, for Appellee/Cross-Appellant, Ezra Ojeda, M.D.

Kevin T. O'Hara and Gabrielle S. Osborne, of Beytin, McLaughlin, McLaughlin, O'Hara & Bolin, P.A., Altamonte Springs, for Appellee/Cross-Appellant, Lance Maki, M.D.

### **ON MOTION FOR REHEARING**

PER CURIAM.

The Cross-Appellant, Dr. Ezer Ojeda, has filed a motion for rehearing. We grant rehearing only as to the issue raised in Dr. Ojeda's cross-appeal. We, therefore, withdraw our prior opinion and substitute the following in its place.

We affirm as to all issues raised by the parties in this appeal, except as to the notice issue raised by Dr. Ojeda in his cross-appeal under section 766.316, Florida Statutes (2011). Dr. Ojeda bases his motion for rehearing on Weeks v. Florida Birth-Related Neurological, 977 So. 2d 616 (Fla. 5th DCA 2008), wherein this court specifically held that under section 766.316, "the formation of the provider-obstetrical patient relationship is what triggers the obligation to furnish the notice." Id. at 618-19. This court further made it clear that "[t]he determination of when this relationship commences is a question of fact" and concluded that "[w]hen 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." Id. at 619, 620.

Our analysis of the Order under review does reveal, as correctly stated in Dr. Ojeda's brief, that the Administrative Law Judge (ALJ) did not make a finding as to when the relationship commenced between N.R. (the patient) and Dr. Ojeda, and this finding is required under Weeks.<sup>1</sup> Therefore, we reverse that part of the Order under review relating to the notice issue raised by Dr. Ojeda in his cross-appeal and remand this case for further proceedings to determine when that relationship was formed. See § 766.309(1)(d), Fla. Stat. (2011) ("The administrative law judge shall make the following determinations based upon all available evidence: . . . Whether, if raised by the claimant or other party, the factual determinations regarding the notice requirements in § 766.316 are satisfied. The administrative law judge has the exclusive jurisdiction to make these factual determinations."); Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 948 So. 2d 705, 717 n.18 (Fla. 2007) (noting that the 2006 amendment to section 766.309, Florida Statutes, "clarifies that since July 1, 1998, the administrative law judge has had the exclusive jurisdiction to make factual determinations as to whether the notice requirements in s. 766.316, Florida Statutes, are satisfied." (quoting Ch. 2006-8, § 2, at 194, Laws of Fla.)); see also Fla. Health Scis. Ctr., Inc. v. Div. of Admin. Hearings, 974 So. 2d 1096, 1099-1100 (Fla. 2d DCA 2007) ("Because it was the healthcare providers who sought the affirmative application of these provisions, the burden rested on them to show that the statutory requirements were met." (citing Balino v. Dep't of Health & Rehabilitative Servs., 348 So. 2d 349, 350

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<sup>1</sup> As Dr. Ojeda states in pertinent part in his reply brief, "the proper evaluation as to Dr. Ojeda, individually, would have been for the ALJ to ascertain when the provider-obstetrical relationship was established between Dr. Ojeda and N.R. This is mandated by Weeks. While the ALJ specifically made a finding as to when Dr. Maki formed a professional relationship with N.R., the ALJ did not do so as to Dr. Ojeda."

(Fla. 1st DCA 1977) (observing that “the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal”))).

Accordingly, we reverse that part of the Order under review relating to Dr. Ojeda and remand this case for further proceedings. On remand, the ALJ should make a specific finding relating to the timing of the formation of the provider-obstetrical patient relationship between N.R. and Dr. Ojeda.

AFFIRMED in part; REVERSED in part; REMANDED.

SAWAYA, WALLIS, JJ. and JACOBUS, Senior Judge, concur.