

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NINOSHKA RIVERA, as parent and
natural guardian of KEVIN
TERRON-OTERO, a minor,

Petitioner,

vs.

Case No. 11-4320N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

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.,

Intervenors.

_____ /

SUPPLEMENTAL FINAL ORDER

By Opinion filed on July 25, 2014, the Fifth District Court of Appeal remanded this case to the Division of Administrative Hearings, requiring the Administrative Law Judge to "make a specific finding relating to the timing of the formation of the provider-obstetrician patient relationship between N.R. and Dr. Ojeda."

APPEARANCES

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STATEMENT OF THE ISSUE

The issue to be determined in this Supplemental Final Order is when the provider-obstetrical relationship was formed between Ninoshka Rivera and Ezer Ojeda, M.D., for the purpose of determining whether Dr. Ojeda provided notice to Ms. Rivera which meets the requirements of section 766.316, Florida Statutes.

PRELIMINARY STATEMENT

On October 11, 2012, a Final Order on Compensability and Notice was entered in this case finding that the claim was compensable, that Osceola Regional Medical Center complied with the notice provisions of section 766.316, and that Dr. Lance Maki and Dr. Ojeda did not comply with the notice provisions of section 766.316. The Final Order was appealed, and the Fifth District Court of Appeal affirmed the Final Order on the finding of compensability and the finding that Dr. Maki did not comply with the notice provisions of section 766.316. The Fifth District Court of Appeal held that the Administrative Law Judge did not make a specific finding relating to the timing of the formation of the provider-obstetrical patient relationship between Ms. Rivera and Dr. Ojeda. The portion of the Final Order

finding that Dr. Ojeda did not provide notice was reversed and remanded to the Division of Administrative Hearings for the purpose of making a specific finding of the timing of the provider-obstetrical relationship between Ms. Rivera and Dr. Ojeda. The Mandate was issued on August 13, 2014.

On August 11, 2014, Petitioner filed a proposed final order. A case management conference was held on August 21, 2014, and the parties were allowed to file proposed final orders on the issue no later than September 8, 2014. Additionally, the parties were given an opportunity to present oral argument by telephonic conference call on September 10, 2014.

On August 22, 2014, Petitioner filed Petitioner's Motion to Take Judicial Notice of Lamendola v. Florida Birth-Related Neurological Injury Compensation Association, Case Number 13-3870 (Fla DOAH August 13, 2014). The motion is granted, and official recognition is taken of the Lamendola case.

Intervenor, Dr. Ojeda, filed a Memorandum of Law in Support of Proposed Final Order on Compensability and Notice, which included a proposed final order. Petitioner and Dr. Ojeda presented oral arguments on September 10, 2014, by telephonic conference call. The proposed final orders and oral argument presented by Petitioner and Dr. Ojeda have been considered in the preparation of this Supplemental Final Order.

FINDINGS OF FACT

1. The following finding of fact is in addition to the findings of fact in the original Final Order on Compensability and Notice.

2. The provider-obstetrical relationship between Ms. Rivera and Dr. Ojeda was formed on October 21, 2009, when Ms. Rivera was seen by Dr. Maki, a physician who was providing obstetric services pursuant to a contract with OB Hospitalist Group LLC (OB Hospitalists). This finding is based on the contractual relationship between OB Hospitalist and Osceola Regional Medical Center (Osceola), which provided that all unassigned obstetric patients, such as Ms. Rivera, who presented at Osceola for obstetric care would be treated by physicians provided by OB Hospitalists.

CONCLUSIONS OF LAW

3. 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).

4. The following conclusions of law are in addition to those conclusions of law found in the original Final Order on Compensability and Notice.

5. Dr. Ojeda did not provide notice as required by section 766.316. 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.

6. The provider-obstetrical patient relationship between Ms. Rivera and all physicians from OB Hospitalists who were providing obstetrical services to unassigned patients at Osceola pursuant to the contract between Osceola and OB Hospitalists began when Ms. Rivera was first seen by a physician from OB Hospitalists. The method by which OB Hospitalists was providing services was like a group practice. An unassigned obstetric patient who presented at Osceola would be seen by the OB Hospitalist doctor who was on duty at the time the patient presented to Osceola, and, if the doctor's shift ended, another

doctor from the OB Hospitalists would take over the care of the patient. The physicians from OB Hospitalists were not practicing as individual physicians who would see an obstetric patient from the time she presented at the hospital until she delivered her baby, but as part of a group of physicians who handed the patient off to another physician in the group when his shift ended.

7. There was ample opportunity between October 21, 2009, and November 4, 2009, when Ms. Rivera presented at the hospital to deliver her baby, for Dr. Ojeda to provide notice which complied with the provisions of section 766.316, and he did not do so. Waiting until Ms. Rivera was in an emergency situation to give notice did not satisfy the requirements of section 766.316, when Dr. Ojeda could have given notice earlier.

CONCLUSION

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

ORDERED that Dr. Ojeda did not provide notice to Ms. Rivera which met the requirements of 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 Ms. Rivera; 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.

It is further ORDERED that in the event Petitioner files an election of remedies declining or rejecting NICA benefits, this case will be dismissed and DOAH's file will be closed.

DONE AND ORDERED this 17th day of September, 2014, in Tallahassee, Leon County, Florida.

Susan Belyeu Kirklund

SUSAN BELYEU KIRKLAND
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of September, 2014.

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).