

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAVID GREENE and LIZBETH GREENE,)
as parents and natural guardians)
of THALYA GREENE, a minor,)
)
Petitioners,)
)
vs.) Case No. 00-4536N
)
FLORIDA BIRTH-RELATED NEUROLOGICAL)
INJURY COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
R. WILLIAM QUINLAN, M.D. and)
REGIONAL OBSTETRIC CONSULTANTS, P.A.,)
)
Intervenors.)
_____)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings,
by Administrative Law Judge William J. Kendrick, held a final
hearing in the above-styled case on June 11, 2001, by telephone.

APPEARANCES

For Petitioners: Richard L. Nichols, Esquire
3000 Hartley Road, Suite 5
Jacksonville, Florida 32257

For Respondent: Lynn Walker Wright, Esquire
Wright, Railey & Harding, P.A.
2716 Rew Circle, Suite 102
Ocoee, Florida 34761

For Intervenor: Ronald S. Wasilenko, Esquire
Gobelman, Love, Gavin, Blazs & Mathis
815 South Main Street, Suite 300
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

At issue in this proceeding is whether Thalya Greene, a minor, suffered an injury for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On November 2, 2000, David Greene and Lizbeth Greene, as parents and natural guardians of Thalya Greene, a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on November 7, 2000. NICA reviewed the claim, and on December 15, 2000, gave notice that it had "determined that such claim is not a 'birth-related neurological injury' within the meaning of Section 766.302(2), Florida Statutes," and requested that the administrative law judge "enter an order setting a hearing in this cause on the issue of the compensability of this claim." Such a hearing was duly held on June 11, 2001.

At hearing, the parties stipulated to the matters set forth in paragraphs 1 and 2 of the Findings of Fact, and that Joint Exhibit 1 (the medical records filed with DOAH on November 2, 2000), Joint Exhibit 2 (the deposition of Charles Kalstone, M.D., filed with DOAH on April 12, 2001), Joint Exhibit 3 (the deposition of Joseph A. Cimino, M.D., filed with DOAH on April 12, 2001), Joint Exhibit 4 (the deposition of James B. Perry, M.D., filed with DOAH on April 19, 2001), and Joint Exhibit 5 (the Three Member Panel Report signed by Doctors A. D. Brickler and James Perry) be received into evidence. No witnesses were called and no other exhibits were offered.

The hearing transcript was filed June 20, 2001, and the parties were accorded 10 days from that date to file proposed final orders. The parties elected to file such proposals and they have been duly considered.

FINDINGS OF FACT

Fundamental findings

1. Daniel Greene and Lizbeth Greene, are the parents and natural guardians of Thalya Greene (Thalya), a minor. Thalya was born a live infant on August 27, 1998, at Baptist Medical Center, a hospital located in Jacksonville, Florida, and her birth weight was in excess of 2,500 grams.

2. The physician providing obstetrical services during Thalya's birth was R. William Quinlan, M.D., who was, at all

times material hereto, a participating physician in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.

Thalya's birth

3. At or about 4:35 a.m., August 27, 1998, Mrs. Greene (with an estimated date of confinement of September 19, 1998, and the fetus at 36+ weeks) presented to Baptist Medical Center in early labor. Vaginal examination revealed the membranes to be intact, and the cervix at 3 centimeters dilatation, effacement at 50 percent, and the fetus at station -2. External fetal monitoring applied at 4:37 a.m., reflected a reassuring fetal heart tone, and Mrs. Greene was admitted to labor and delivery at or about 4:40 a.m.

5. Mrs. Greene's labor progressed steadily, and external fetal monitoring reflected a reassuring fetal heart tone throughout the course of labor and delivery. At or about 7:30 a.m., dilatation was noted as complete; at 7:49 a.m., the membranes were artificially ruptured, with clear fluid noted; and at 7:55 a.m. Thalya was delivered spontaneously (cephalic presentation) without incident.

6. On delivery, Thalya was noted as "pale blue" in color, and was bulb suctioned and accorded free flow oxygen; however, she breathed spontaneously, and did not require resuscitation. Initial newborn assessment noted no apparent abnormalities.

Apgar scores were recorded as 7 at one minute and 8 at five minutes.

7. The Apgar scores assigned to Thalya are a numerical expression of the condition of a newborn infant, and reflect the sum points gained on assessment of heart rate, respiratory effort, muscle tone, reflex irritability, and color, with each category being assigned a score ranging from the lowest score of 0 through a maximum score of 2. As noted, at one minute, Thalya's Apgar score totaled 7, with heart rate, muscle tone, and reflex irritability being graded at 2 each; respiratory effort being graded at 1; and color being graded at 0. At five minutes, Thalya's Apgar score totaled 8, with heart rate, respiratory effort, muscle tone, and reflex irritability being graded at 2 each, and color again being graded at 0.

8. Thalya was admitted to the newborn nursery at or about 8:50 a.m. Assessment on admission was grossly normal.

9. Thalya's status post-delivery was uneventful until 11:30 a.m. (approximately 3 1/2 hours after delivery) when she experienced a choking episode (secondary to spitting up) and turned dusky over the face and chest. In response, Thalya was placed under a radiant warmer, suctioned, and given blow by oxygen (for approximately 3 minutes) until she pinked up.

10. Thereafter, Thalya's course was again uneventful until 1:00 a.m., August 28, 1998, when she again appeared dusky, and

was accorded blow by oxygen. At the time, it was noted that the CBC drawn during the first dusky spell was within normal limits and that the blood culture that had been obtained was preliminarily negative.

11. Thereafter, Thalya's course was again without apparent complication until approximately 10:23 p.m., when she "became dusky not associated with feed," and was again suctioned and accorded blow by oxygen. At that time, Thalya was noted as "pink and intermittently tachypneic with rare grunting." Following neurologic consult, Thalya was transferred to the neonatal intensive care unit (NICU) for further observation and management.

12. Thalya was received in the NICU at 10:34 p.m. At the time, she was observed as "warm and pink with grunting noted." EKG leads were applied and revealed a heart rate of 180, respiratory rate of 50, blood pressure of 76/49, and a rectal temperature of 100.3. Examination revealed nystagmus (an involuntary rapid movement of the eyeball) and some jerky movements of her extremities. CBC showed a white blood count of 5,000, and blood culture was ordered. Working diagnosis was "suspected sepsis" and Thalya was started on ampicillin and gentamicin.

13. At 12:35 a.m., August 29, 1998, Thalya evidenced symptoms of seizure activity, and was loaded with phenobarbital.

Spinal tap of August 29, 1998, as well as the results of the blood culture drawn of August 28, 1998, was positive for Group B Streptococcus.

14. An infectious disease consult was obtained and Thalya was managed on antibiotics for three weeks, and maintained on phenobarbital for her seizure activity. CT and MRI of the head on August 29, 1998, were normal; however, a head ultrasound of September 3, 1998, showed minimal intra-axial fluid. Chromosomal studies were normal.

15. Thalya was discharged to her parents' care on September 15, 1998, on phenobarbital and ampicillin. Final diagnosis on discharge included bacterial infection due to Streptococcus, Group B; streptococcal meningitis; and seizures.

Thalya's subsequent development

16. Following her discharge from Baptist Medical Center, Thalya was initially followed by Carlos H. Gama, M.D., a pediatric neurologist. Dr. Gama's first neurological examination occurred on November 3, 1998, when Thalya was 2 months of age, and was reported as follows:

I had the opportunity of seeing Thalya for a neurological evaluation. The following are my diagnosis and recommendations.

Diagnosis:

1. Status post neonatal Group B Streptococcal meningitis.

2. Seizures.
3. Hypotonia.

Recommendations:

1. Obtain EEG.
2. Obtain trough Phenobarbital level.
3. Obtain records.
4. Return to this office in one month for reevaluation and further recommendations.

Comments:

* * *

. . . Since discharged from NICU mother reports that Thalya had done well. She is feeding well and thriving. No seizures have been noted. She continues on Phenobarbital, taking 4mls po bid. A blood level was obtained prior to this visit but this result is not available. Mother reports that Thalya has normal awake and sleep cycles. She seems to be moving all extremities spontaneously and symmetrically. There has not been any apneic spells or unusual behaviors suggestive of seizure like activity

The examination today reveals a head circumference is 40.5cm (in the 90th percentile). Her weight is in the 90th percentile and height is in the 50th percentile. The baby is alert. She is able to turn her eyes to light, but does not track the examiner in a 90 degree range. The pupils were equal and reactive. Red reflex was present bilaterally. Facial grimace was symmetric. Suck was appropriate. Strength seems to be grossly unremarkable. Deep tendon reflexes were +2 in the upper extremities, +3 in the lower extremities at the knees and +2 at the ankles. No clonus was seen. Babinski's were present bilaterally. There was evidence of hypotonia of her axial musculature, being approximately moderate in severity. There was also decrease in head control. The patient's moro

reflex reveals appropriate abduction of her upper extremities symmetrically. Traction response was decreased. Tone and neck reflex was absent. Palmar and Plantar reflexes were present. Muscle tone was low. The sensory examination to touch seemed to be unremarkable. Spine examination was noncontributory. The patient has no obvious dysmorphic features, organomegalies or skin abnormalities. Anterior fontanel was open and normal tense with no musculatures.

Therefore, it is my opinion that Thalya has a history of neonatal Group B Streptococcal meningitis and sepsis associated with seizures. She is now seizure free. Her examination is remarkable for hypotonia, which most likely is on central basis. Therefore, the above recommendations were made. She will be reassessed in one month in this office.

17. The EEG (Electroencephalogram) recommended by Dr. Gama was obtained on November 9, 1998, and read as abnormal. Specifically, the EEG report noted:

This EEG is abnormal because of mild background disorganization which was seen bilaterally but more prominently over the right hemisphere, especially in the frontal region. This finding suggest[s] a diffused cerebral dysfunction such as seen in mild encephalopathy. In addition, a structural lesion in the right hemisphere cannot be excluded.

18. Thalya was next seen by Dr. Gama on December 7, 1998. The results of that examination were reported as follows:

Diagnosis:

1. Seizure disorder. Stable on Phenobarbital.

2. S/P [status post] Bacterial Group B Streptococcal Meningitis.
3. Hypotonia. Developmental delay.
4. Abnormal EEG.

* * *

Comments:

. . . Thalya continues to be active. She is feeding well and gaining weight properly. She is making more cooing sounds and attempting to roll over, but she has not been successful in this area.

Her examination demonstrates that her head circumference is 42cm. She is alert. She follows the examiner. Her pupils are equal and reactive. Face is unremarkable. She does seem to stick her tongue out intermittently. The motor examination demonstrates that she has decrease traction and head control for her age. She also has a tendency to keep her hands fisted, but this is only intermittently. She does not reach for objects yet. She is unable to hold weight in her lower extremities. Muscle tone seems to be slightly decreased in the axial musculature in particular.

Therefore, it is my recommendation that we proceed with an MRI of the brain to rule out structural abnormalities of the right hemisphere.¹ In addition, we have discussed the treatment with Phenobarbital. This should be continued for at least six months before making any further recommendations . . . She will be reassessed in this office in 1-2 months.

19. Dr. Gama's next neurological examination of Thalya occurred on January 12, 1999, and was reported as follows:

Diagnosis:

1. Seizure disorder. Stable on Phenobarbital.
2. S/P bacterial group B streptococcal meningitis.
3. Hypotonia. Improving. Borderline developmental delay.
4. Abnormal EEG

* * *

Comments:

Thalya is doing extremely well. She is getting physical therapy twice a week and making progress. She is more attentive. She follows the examiner in a 180 degree range. She has good social skills. Anterior fontanel is soft. Head circumference is 44cm which is slightly above the 90th percentile, but she has been growing parallel to this with no problems. Cranial nerve examination is unremarkable. Motor examination demonstrates that she is unable to put weight in lower extremities, otherwise, she moves all extremities spontaneously. Deep tendon reflexes were unremarkable. No obvious pathological reflexes were elicited during today's visit. Muscle tone was normal to low. Denver Developmental Screen test reveals that she seems to be appropriate for her age in most of the areas. However, she is unable to roll over but she is showing some attempts to do this. The rest of the examination was noncontributory.

20. Thalya was last seen by Dr. Gama on April 29, 1999, and he reported the results of that follow-up neurological examination as follows:

Diagnosis:

1. Seizure disorder. Stable on Phenobarbital.

2. S/P Bacterial Group B Streptococcal Meningitis.

3. Hypotonia. Improved.

Comments:

Thalya continues to do extremely well, with no recurrent seizures. She is tolerating the medication properly The patient continues to make progress in her development.

The examination today demonstrates that her head circumference is 46.7cm. She is maintaining this in the 90th percentile. She has no obvious focal or lateralizing deficits. Her muscle tone has improved considerably and she is gaining milestones appropriately. She was felt to be at her age level in most of the areas tested

21. Thalya's subsequent neurologic development was followed by Joseph A. Cimino, M.D., a board-certified pediatric neurologist. Dr. Cimino reported the results of his first neurological examination by October 15, 1999, as follows:

DIAGNOSES: 1) GBS meningitis/sepsis.
2) Neonatal seizures.
3) Static encephalopathy with motor and language delay.

* * *

DEVELOPMENTAL HISTORY: The history is obtained from the parents. The child rolled from front to back at 7 months, back to front at 8 months, sat at 7 to 8 months, crawled at 11 months. She was getting in to sitting at 10 to 11 months, pulled to stand at 12 months, began to cruise at 13 months, is not yet walking independently, says mama but not specifically, does not say dada nor does she wave hi or bye. She began physical therapy at 3 months of age and this was initially

twice a week and 1 month ago was decreased to once a week.

She is not in speech therapy, although the family states the EIP evaluation at 10 months showed she had a receptive language at 4 months. The concern is that audiological evaluation have shown some missed frequency hearing deficit.

* * *

PHYSICAL EXAMINATION:

The head circumference is 48 1/4 cms which is between the 75th and 98th percentile for chronologic age of 14 months.

GENERAL EXAM: On inspection this is a well-nourished, healthy youngster who is alert and attentive. The abdomen was soft and nontender without organomegaly. The cardiovascular exam revealed regular rate and rhythm and no murmurs were appreciated. No cranial bruits are noted. The extremities were normal. The lungs were clear to auscultation. The skin exam was without café au lait spots or hypopigmented macules. The spine was without hair tufts or dimpling. In observing this child crawl and again reaching for objects I did not see any focality, nothing to suggest an old infarction which may be a complication of neonatal bacterial meningitis. In addition a CT scan was reported as negative.

NEUROLOGICAL EXAM: The child is very social and attentive with good reciprocal play with a puppet. She smiled quite easily. Although with hands-on evaluation she did become irritable and cried. Assessment of tone was quite difficult. She tracked very nicely with full extraocular movements no ophthalmoparesis or nystagmus. The pupils were equal and reactive to light and facial movements were symmetric. I was not able to get an adequate look at the fundi.

Corneal reflexes were intact. With regards to the motor exam, she reached quite nicely for objects without preference. She in fact did crawl well, transitioned into a sitting position but did W sit, usually associated with low muscle tone. With hands-on exam it was very difficult as she was crying and had a lot of active resistance to know exactly the status of her tone. She pulls to stand with a mature pattern with hip flexion. She sat quite nicely with her back straight, able to manipulate objects. She did not slip through my grip on vertical suspension. Her deep tendon reflexes were 2/4 and symmetric in both the upper and lower extremities. The sensory exam was grossly intact to pain.

IMPRESSION:

- 1) GBS meningitis/sepsis . . . early onset.
- 2) Neonatal seizure without recurrence, successfully tapered off of Phenobarbital.
- 3) Prematurity 36 weeks gestation.
- 4) Language delay. I think at 13 months adjusted age she should be saying mama and dada specifically, have more jargoning, waving hi and bye, and say several other words in addition to mama and dada which are used specifically. There is clearly risk of hearing deficit given meningitis and the use of Gentamicin and this child needs to be followed closely.
- 5) History of motor delay. Clearly rolling at 6 months adjusted age is delayed. Sitting at 6 to 7 months adjusted age is normal, the family gave a chronologic age of 7 to 8 months but at 36 weeks gestation it is fair to make a 1 month adjustment which I am assuming they would do at EIP. She began to cruise at 13 months chronologic age which is 1 year. Her adjusted age is now 13 months and clearly walking independently can be normal up to 18 months at the outside limits. She appears to be making nice improvement in this area

22. Thalya was next seen by Dr. Cimino on May 1, 2000, and most recently on November 10, 2000. Dr. Cimino reported the results of his most recent follow-up examination as follows:

- DIAGNOSES: 1) GBS meningitis.
2) Neonatal seizures.
3) Prematurity 36 weeks gestation
4) Language delay.

CLINICAL HISTORY: This is a 2 year old female seen in follow up on 5/1/2000. At that time she was having episodes of spacing out. We obtained an EEG that was normal for the awake and sleep state. Because of the GBS meningitis and developmental delay we obtained an MRI also done in September that was normal. She underwent a speech evaluation on 6/23/2000 that showed auditory comprehension at 9-12 months, verbal expression at 6-9 months. Impression was overall global delay and she has been in speech therapy twice a week at Brook's Rehab. Her chronologic age at the time of the evaluation was 22 months.

At this time she began to walk at 15 months. She says mama and specifically, dada non-specifically. She will repeat words but does not have a lot of spontaneous words. She does wave hi and bye.

PHYSICAL EXAMINATION:

The head circumference is 50 1/4 cms which is between the 75th and 98th percentile. This continues to grow at the same rate. She is crying and extremely uncooperative. She is very frightened by many of her past appointments. She did track, had full extraocular movements without nystagmus or ophthalmoparesis. Her facial movements do appear symmetric. Tone is low even with her resisting. She ran to her mother, I did not see any abnormalities. Her gait certainly

was not wide based. She seemed to get off the floor well. Her sensory exam was grossly intact to pain. The deep tendon reflexes were difficult due to her withdrawal.

IMPRESSION:

- 1) Status-post Group B strep neonatal meningitis with neonatal seizure without recurrence.
- 2) Language delay. Most likely reflecting sequela of the meningitis. There is a good percentage of these children who do have severe deficits. However, the EEG and MRI did not show any abnormalities. There is no slowing of the background activity and no decrease or delay in myelination reported on the MRI.

PLAN: . . . Continue speech therapy . . .
Reassess in 6 months.

The cause of Thalya's neurologic dysfunction

23. Regarding the cause of Thalya's neurological dysfunction, the proof is compelling that during labor and delivery Mrs. Greene was vaginally infected with Group B Streptococcal (GBS), that during delivery the infection was transmitted to Thalya, and that over the next 24 to 48 hours the infection process rapidly progressed causing meningitis and the resultant brain injury. Consequently, it may be said that Thalya's neurologic dysfunction is associated with a brain injury caused by meningitis (an inflammation of the membranes that envelop the brain and spinal cord), secondary to a GBS infection acquired during the birthing process (most likely subsequent to rupture of the membranes and during the course of delivery).

The dispute regarding compensability

24. As a touchstone to resolving the dispute regarding compensability, it is worthy of note that the Plan establishes a no-fault administrative system that provides compensation for an infant who suffers a narrowly defined "birth-related neurological injury." Under the Plan, a "birth-related neurological injury" is defined as:

[I]njury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired.

Section 766.302(2), Florida Statutes.

25. Here, there is no serious dispute that Thalya is neurologically impaired or that such impairment is attributable to a brain injury caused by the infection process discussed infra. Rather, what is at issue is whether the cause of Thalya's brain injury and the nature of her impairment fit the narrowly defined term "birth-related neurological injury." In this regard, it is Intervenor's view that Thalya's brain injury (occasioned by an infectious process) may reasonably be described as having been "caused by mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period," and that such injury rendered her

"permanently and substantially mentally and physically impaired." Conversely, Petitioners and Respondent are of the view that that the cause of Thalya's brain injury was not a "mechanical injury," and that she was not rendered "permanently and substantially mentally and physically impaired." Of the two, Petitioners' and Respondent's view is by far the more compelling.

The nature and timing of Thalya's injury

26. To address the nature and timing of Thalya's injury, the parties offered the opinions of three physicians: Charles Kalstone, M.D., a physician board-certified in obstetrics and gynecology; Joseph Cimino, M.D., a physician board-certified in pediatric neurology; and James Perry, M.D., a Fellow of the American Academy of Neurology. (Joint Exhibits 2-4). Notably, these physicians shared strikingly similar views, and were of the opinion that Thalya's brain injury was caused by infection induced meningitis, a process distinguishable from an injury caused by oxygen deprivation or mechanical injury. Stated otherwise, the physicians were of the opinion that Thalya's injury could not reasonably be described as having been caused by oxygen deprivation or mechanical injury.² Given the plain and ordinary meaning of the words used in the term "mechanical injury" (as physical harm or damage caused by machinery, tools, or physical forces), their conclusion was most reasonable.³ Consequently, it is resolved that Thalya's brain injury was not

caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period.

Thalya's current mental and physical presentation

27. At hearing, the only authoritative proof offered with regard to Thalya's current mental and physical presentation was the testimony of Dr. Cimino, Thalya's pediatric neurologist. It was Dr. Cimino's opinion that while Thalya may evidence substantial cognitive impairment, she does not evidence substantial physical impairment. Such opinions are grossly consistent with the record and are credited.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, this proceeding. Section 766.301, et seq., Florida Statutes.

29. The Florida Birth-Related Neurological Injury Compensation Plan (the "Plan") was established by the Legislature "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims" relating to births occurring on or after January 1, 1989. Section 766.303(1), Florida Statutes.

30. The injured "infant, his personal representative, parents, dependents, and next of kin," may seek compensation under the Plan by filing a claim for compensation with the

Division of Administrative Hearings. Sections 766.302(3), 766.303(2), 766.305(1), and 766.313, Florida Statutes. The Florida Birth-Related Neurological Injury Compensation Association (NICA), which administers the Plan, has "45 days from the date of service of a complete claim . . . in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." Section 766.305(3), Florida Statutes.

31. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the administrative law judge to whom the claim has been assigned. Section 766.305(6), Florida Statutes. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned administrative law judge in accordance with the provisions of Chapter 120, Florida Statutes. Sections 766.304, 766.307, 766.309, and 766.31, Florida Statutes.

32. In discharging this responsibility, the administrative law judge must make the following determination based upon the available evidence:

(a) Whether the injury claimed is a birth-related neurological injury. If the claimant has demonstrated, to the satisfaction of the

administrative law judge, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.303(2).

(b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.

Section 766.309(1), Florida Statutes. An award may be sustained only if the administrative law judge concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth." Section 766.31(1), Florida Statutes.

33. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes, to mean:

. . . injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include

disability or death caused by genetic or congenital abnormality.

34. As the claimants, the burden rested on Petitioners to demonstrate entitlement to compensation. Section 766.309(1)(a), Florida Statutes. See also Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977), ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.")

35. Here, the proof failed to demonstrate that Thalya's brain injury was "caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period." Moreover, notwithstanding any injury Thalya may have received to her brain, she was not rendered permanently and substantially physically impaired. Consequently, the record developed in this case failed to demonstrate that Thalya suffered a "birth-related neurological injury," within the meaning of Section 766.302(2), Florida Statutes. Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla. 1997.) Accordingly, the subject claim is not compensable under the Plan. Sections 766.302(2), 766.309(1), and 766.31(1), Florida Statutes.

33. Where, as here, the administrative law judge determines that ". . . the injury alleged is not a birth-related neurological injury . . . he [is required to] enter an order [to such effect] and . . . cause a copy of such order to be sent immediately to the parties by registered or certified mail." Section 766.309(2), Florida Statutes. Such an order constitutes final agency action subject to appellate court review. Section 766.311(1), Florida Statutes.

CONCLUSION

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

ORDERED that the petition for compensation filed by David Greene and Lizbeth Greene, as parents and natural guardians of Thalya Greene, a minor, be and the same is hereby denied with prejudice.

DONE AND ORDERED this 25th day of July, 2001, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of July, 2001.

ENDNOTES

1/ Whether an MRI of the brain was obtained, as recommended by Dr. Gama, is not apparent from the record; however, one was obtained on September 6, 2000, and read as normal.

2/ To quote Dr. Cimino, an injury caused by a bacteria is "not a mechanical injury by any stretch of the imagination."

3/ When, as here, the Legislature has not defined the words used in a phrase, they should usually be given their plain and ordinary meaning. Southeastern Fisheries Association, Inc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984). Pertinent to the context in which the words are used in the statutory provision at issue, "Mechanical" is commonly understood to mean pertaining to or accomplished by machinery, tools, or physical forces, and "injury" is commonly understood to mean physical harm or damage to a person. See Dorland's Illustrated Medical Dictionary, 28th Edition; Webster's New Twentieth Century Dictionary, Unabridged, Second Edition; and The American Heritage Dictionary of English Language (1979).

COPIES FURNISHED:
(By certified mail)

Lynn Larson, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
1435 Piedmont Drive, East, Suite 101
Tallahassee, Florida 32312

Richard L. Nichols, Esquire
3000 Hartley Road, Suite 5
Jacksonville, Florida 32257

Mary Bland Love, Esquire
Ronald S. Wasilenko, Esquire
Gobelman, Love, Gavin, Blazs & Mathis
815 South Main Street, Suite 300
Jacksonville, Florida 32202

Wilbur E. Brewton, Esquire
Kenneth J. Plante, Esquire
Brewton, Plante & Plante
225 South Adams Street, Suite 250
Tallahassee, Florida 32301

Lynn Walker Wright, Esquire
Wright, Railey & Harding, P.A.
2716 Rew Circle, Suite 102
Ocoee, Florida 34761

R. William Quinlan, M.D.
836 Prudential Drive, Suite 1800
Jacksonville, Florida 32207

Baptist Medical Center
800 Prudential Drive
Jacksonville, Florida 32207

Ms. Charlene Willoughby
Agency for Health Care Administration
Consumer Services Unit
Post Office Box 14000
Tallahassee, Florida 32308

Mark Casteel, General Counsel
Department of Insurance
The Capitol, Lower Level 26
Tallahassee, Florida 32399-0300

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Sections 120.68 and 766.311, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 120.68(2), Florida Statutes, and Florida Birth-Related Neurological Injury Compensation Association v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992). The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.