

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

JAMES L. DOE 21,	*	
as best friend of his son,	*	
JAMES L. DOE, JR.,	*	No. 02-411V
	*	The Honorable Susan G.
	*	Braden
Petitioner,	*	Special Master Moran
	*	
v.	*	
	*	Filed: January 4, 2012
SECRETARY OF	*	
HEALTH AND HUMAN SERVICES,	*	Damages; decision based on
	*	proffer; diphtheria-tetanus-
	*	acellular pertussis vaccine.
Respondent.	*	
	*	

John F. McHugh, Law Office of John McHugh, New York, NY, for Petitioner;
Michael P. Milmo, U.S. Department of Justice, Washington, DC, for Respondent.

PUBLISHED DECISION AWARDING DAMAGES*

On April 30, 2002, James L. Doe 21 (“John Doe/21”) filed a petition, as best friend of his son, James L. Doe, Jr. (“Child Doe/21”) seeking compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §§ 300aa-1 et seq., alleging that the diphtheria-tetanus-acellular pertussis (“DTaP”) vaccine caused an injury to his son. On July 17, 2009, the Honorable Susan G. Braden of

* Because this decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

Previously, the Court ordered that the name of the petitioner be redacted in a decision available to the public. In accord with the Court’s October 9, 2008 order, this decision is being issued without the petitioner’s name. See 42 U.S.C. § 300aa—12(d)(4); Vaccine Rule 18(b).

the United States Court of Federal Claims found that Child Doe/21 is entitled to compensation under the Vaccine Act. The Court remanded for a determination of the amount of compensation. 88 Fed. Cl. 178.

Since the remand, the parties have been attempting to quantify the amount of compensation. To facilitate this process, 14 status conferences have been held. Testimony relating to the appropriate form of the award was heard on two different days. This process eventually led to an agreement as to the amount of compensation.¹

On December 30, 2011, respondent filed a Proffer on Award of Compensation, to which petitioner agrees. Based upon the record as a whole, the special master finds the proffer reasonable and that petitioner is entitled to an award as stated in the Proffer. Pursuant to the attached Proffer, with Tab A, the court awards petitioner:

1. **A lump sum payment of \$2,431,153.51, representing compensation for life care expenses for the first two years after judgment (\$110,302.60), the discounted present value of twenty-five percent (25.0%) of the remainder of life care expenses as measured by the cost of an annuity (\$1,399,290.01), lost future earnings (\$718,487.87), and pain and suffering (\$203,172.03), in the form of a check payable to petitioner as the guardian of the estate of Child Doe/21, for the benefit of Child Doe/21. No payments shall be made until petitioner provides respondent with documentation establishing that he has been appointed as the guardian of Child Doe/21's estate; and**
2. **A lump sum payment of \$75,000.00, representing compensation for past unreimbursable expenses, payable to John Doe/21, petitioner; and**
3. **An amount sufficient to purchase an annuity contract, subject to the conditions described in the attached Proffer (attached as Appendix A), that will provide payments for seventy-five percent (75.0%) of the remainder of the life care items contained in the life care plan, as illustrated by the chart at Tab A (attached), paid to the life insurance company from which the annuity will be purchased. Compensation for Year Three (beginning on the second anniversary of the date of**

¹ In addition, petitioner received an award to reimburse him for costs that he expended on an interim basis. Decision, filed October 26, 2011.

judgment) and all subsequent years shall be provided through respondent's purchase of an annuity, which annuity shall make payments directly to petitioner as guardian of the estate of Child Doe/21, for the benefit of Child Doe/21, only so long as Child Doe/21 is alive at the time a particular payment is due. At the Secretary's sole discretion, the periodic payments may be provided to petitioner in monthly, quarterly, annual or other installments. The "annual amounts" set forth in the chart at Tab A describe only the total yearly sum to be paid to petitioner and do not require that the payment be made in one annual installment.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith. **The Clerk's Office is instructed to provide a copy of this decision to the presiding judge.** Vaccine Rule 28.1(a).

Any questions may be directed to my law clerk, Jennifer C. Chapman, at (202) 357-6358.

IT IS SO ORDERED.

S/ Christian J. Moran

Christian J. Moran
Special Master

B. Lost Future Earnings

The parties agree that based upon the evidence of record, Child Doe/21 will never be gainfully employed. Therefore, respondent proffers that Child Doe/21 should be awarded full lost future earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(B). Respondent proffers that the appropriate award for Child Doe/21's lost future earnings is \$718,487.87. Petitioner agrees.

C. Pain and Suffering

Respondent proffers that Child Doe/21 should be awarded \$203,172.03 in actual and projected pain and suffering. This amount reflects that the award for projected pain and suffering has been reduced to net present value. See 42 U.S.C. § 300aa-15(a)(4). Petitioner agrees.

D. Past Unreimbursable Expenses

Evidence supplied by petitioner documents his expenditure of past unreimbursable expenses related to Child Doe/21's vaccine-related injury. Respondent proffers that petitioner should be awarded past unreimbursable expenses in the amount of \$75,000.00. Petitioner agrees.

E. Medicaid Lien

Petitioner represents that there are no outstanding Medicaid liens against Child Doe/21.

II. Form of the Award

The parties recommend that the compensation provided to Child Doe/21 should be made through a combination of lump sum payments and future annuity payments as described below, and request that the special master's decision and the Court's judgment award the following:

A. A lump sum payment of \$2,431,153.51, representing compensation for life care expenses for the first two years after judgment (\$110,203.60), the discounted present value of twenty-five percent (25.0%) of the remainder of life care expenses as measured by the cost of an annuity (\$1,399,290.01),² lost future earnings (\$718,487.87), and pain and suffering (\$203,172.03), in the form of a check payable to petitioner as the guardian of the estate of Child Doe/21, for the benefit of Child Doe/21. No payments shall be made until petitioner provides respondent with documentation establishing that he has been appointed as the guardian of Child Doe/21's estate;

B. A lump sum payment of \$75,000.00, representing compensation for past unreimbursable expenses, payable to John Doe/21, petitioner;

C. An amount sufficient to purchase an annuity contract,³ subject to the conditions described below, that will provide payments for seventy-five percent (75.0%) of the remainder of the life care items contained in the life care plan, as illustrated by the chart at Tab A attached hereto, paid to the life insurance company⁴ from which the annuity will be purchased.⁵

² Petitioner has provided testimony and other documentary evidence demonstrating a net worth in excess of \$15,000,000. In addition, petitioner has provided evidence that he is an experienced and savvy businessman who is regularly involved with multi-million dollar business ventures. As a consequence, petitioner has provided credible evidence that he has the unique ability to manage a lump sum funding this portion of the award for life care items.

³ In respondent's sole discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

⁴ The Life Insurance Company must have a minimum of \$250,000,000 capital and surplus, exclusive of any mandatory security valuation reserve. The Life Insurance Company must have one of the following ratings from two of the following rating organizations:

- a. A.M. Best Company: A++, A+, A+g, A+p, A+r, or A+s;
- b. Moody's Investor Service Claims Paying Rating: Aa3, Aa2, Aa1, or Aaa;
- c. Standard and Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+, or
(continued...)

Compensation for Year Three (beginning on the second anniversary of the date of judgment) and all subsequent years shall be provided through respondent's purchase of an annuity, which annuity shall make payments directly to petitioner as guardian of the estate of Child Doe/21, for the benefit of Child Doe/21, only so long as Child Doe/21 is alive at the time a particular payment is due. At the Secretary's sole discretion, the periodic payments may be provided to petitioner in monthly, quarterly, annual or other installments. The "annual amounts" set forth in the chart at Tab A describe only the total yearly sum to be paid to petitioner and do not require that the payment be made in one annual installment.

1. Growth Rate

Respondent proffers that a four percent (4%) growth rate should be applied to all non-medical life care items, and a five percent (5%) growth rate should be applied to all medical life care items. Thus, the benefits illustrated in the chart at Tab A that are to be paid through annuity payments should grow as follows: four percent (4%) compounded annually from the date of judgment for non-medical items, and five percent (5%) compounded annually from the date of judgment for medical items. Petitioner agrees.

2. Life-contingent annuity

Petitioner will continue to receive the annuity payments from the Life Insurance Company only so long as Child Doe/21 is alive at the time that a particular payment is due.

⁴ (...continued)
AAA;

d. Fitch Credit Rating Company, Insurance Company Claims Paying Ability Rating: AA-, AA, AA+, or AAA.

⁵ Petitioner authorizes the disclosure of certain documents filed by the petitioner in this case consistent with the Privacy Act and the routine uses described in the National Vaccine Injury Compensation Program System of Records, No. 09-15-0056.

Written notice shall be provided to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of Child Doe/21's death.

3. Guardianship

No payments shall be made until petitioner provides respondent with documentation establishing that he has been appointed as the guardian of Child Doe/21's estate. If petitioner is not authorized by a court of competent jurisdiction to serve as guardian of the estate of Child Doe/21, any such payment shall be made to the party or parties appointed by a court of competent jurisdiction to serve as guardian of the estate of Child Doe/21 upon submission of written documentation of such appointment to the Secretary.

D. Court of Federal Claims Opinions on Entitlement to Vaccine Award

The Court of Federal Claims has issued two decisions on the issue of petitioner's entitlement to a vaccine award. The latter of these decisions, issued on July 7, 2009, vacated the special master's denial of petitioner's claim, set forth the court's own findings of fact, and specifically held "the court has determined the record evidences that Petitioner's injury was caused by the vaccination." Respondent's proffer is limited only to the damages issues in this case. Respondent specifically reserves the right to seek reconsideration of the Court of Federal Claims's opinions, or to appeal those opinions to the Court of Appeals for the Federal Circuit pursuant to 42 U.S.C. § 300aa-12(f).

III. Summary of Recommended Payments Following Judgment

- | | | |
|----|---|-----------------------|
| A. | Lump sum paid to petitioner as guardian
Child Doe/21's estate: | \$2,431,153.51 |
| B. | Lump sum paid to petitioner: | \$ 75,000.00 |
| C. | An amount sufficient to purchase the annuity contract described | |

above in section II. C.

Respectfully submitted,

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Assistant Attorney General

MARK W. ROGERS
Acting Director
Torts Branch, Civil Division

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Dated: December 29, 2011

Appendix A: Items of Compensation for Child Doe/21

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ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Yr 1 & Yr 2	Compensation Year 2	Compensation Years 3-5	Compensation Years 6-7	Compensation Years 8-9	Compensation Year 10	Compensation Year 11	Compensation Years 12-13
				2011	2012	2013-2015	2016-2017	2018-2019	2020	2021	2022-2023
Medicare Premium	5%		M	-	-	-	-	-	-	-	-
Medicare Deductible	5%			-	-	-	-	-	-	-	-
Primary Care	5%	*		120.00	-	45.00	45.00	45.00	45.00	45.00	45.00
Primary Care Mileage	4%			2.92	-	1.10	1.10	1.10	1.10	1.10	1.10
Neuro Ophthal-mologist	5%	*		100.00	-	37.50	37.50	37.50	37.50	37.50	37.50
Neuro Ophthalmologist Mileage	4%			13.30	-	4.99	4.99	4.99	4.99	4.99	4.99
Neurologist	5%	*		100.00	-	37.50	37.50	37.50	37.50	37.50	37.50
Neurologist Mileage	4%			17.82	-	6.68	6.68	6.68	6.68	6.68	6.68
Individual Counseling	4%	*		1,800.00	-	450.00	450.00	450.00	450.00	-	-
Individual Counseling Mileage	4%			210.24	-	52.56	52.56	52.56	52.56	-	-
Lab Work	5%	*		-	-	-	-	-	-	-	-
Diagnostic Studies	5%	*		-	-	-	-	-	-	-	-
Case Mngt	4%			4,800.00	-	1,800.00	1,800.00	1,800.00	1,800.00	900.00	900.00
Adt'l Case Mngt	4%			-	-	-	-	-	1,800.00	1,800.00	-
Prism Glasses	4%			333.34	-	100.01	100.01	100.01	100.01	100.01	100.01
PT	4%	*		3,825.00	-	225.00	225.00	225.00	225.00	-	-
PT Mileage	4%			59.94	-	5.00	5.00	5.00	5.00	-	-
PT Eval	4%	*		100.00	-	37.50	37.50	37.50	37.50	37.50	37.50
PT Eval Mileage	4%			2.22	-	0.83	0.83	0.83	0.83	0.83	0.83
OT	4%	*		5,700.00	-	225.00	225.00	225.00	225.00	150.00	150.00
OT Mileage	4%			59.94	-	5.00	5.00	5.00	5.00	3.33	3.33
OT Eval	4%	*		-	-	-	-	-	-	37.50	37.50
OT Eval Mileage	4%			-	-	-	-	-	-	0.83	0.83
Speech Therapy	4%	*		400.00	-	150.00	150.00	150.00	150.00	-	-
Speech Therapy Mileage	4%			8.88	-	3.33	3.33	3.33	3.33	-	-
Speech Therapy Eval	4%	*		-	-	-	-	-	-	37.50	37.50
Speech Therapy Eval Mileage	4%			-	-	-	-	-	-	0.83	0.83
Academic Tutoring	4%			4,800.00	-	-	-	-	-	-	-
Private School	4%		M	25,000.00	-	18,750.00	18,750.00	-	-	-	-
Respite Care	4%		M	8,000.00	-	1,552.50	1,552.50	1,552.50	1,552.50	-	-
Personal Care Attendant	4%		M	54,750.00	-	20,531.25	23,953.13	23,953.13	23,953.13	-	-
Work/Day Program	4%		M	-	-	-	-	5,283.00	5,283.00	5,283.00	5,283.00

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				2011	2012	2013-2015	2016-2017	2018-2019	2020	2021	2022-2023
Group Living/Live-In	4%		M	-	-	-	-	-	-	68,437.50	68,437.50
NPV of 25% of LCP Items				1,399,290.01							
Lost Future Earnings				718,487.87							
Pain and Suffering				203,172.03							
Past Unreimbursable Expenses				75,000.00							
Annual Totals				2,506,153.51	-	44,020.73	47,442.61	33,975.61	35,775.61	76,921.60	75,121.60

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.

Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner, as guardian/conservator of the estate of Child Doe/21, for the benefit of Child Doe/21, for Yr 1 and Yr 2 life care expenses (\$110,203.60), the NPV of 25% of LCP Items (\$1,399,290.01), lost earnings (\$718,487.87), pain and suffering (\$203,172.03): \$2,431,153.51.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner, John Doe/21, for past unreimbursable expenses: \$75,000.00.

Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment.

Annual amounts shall increase at the rates indicated above in column G.R., compounded annually from the date of judgment.

Items denoted with an asterisk (*) covered by health insurance and/or Medicare.

At respondent's discretion items denoted with an "M" payable in twelve monthly installments totaling the annual amount indicated.

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ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 14	Compensation Years 15-19	Compensation Years 20-23	Compensation Year 24	Compensation Years 25-43	Compensation Years 44-53	Compensation Year 54	Compensation Years 55-Life
				2024	2025-2029	2030-2033	2034	2035-2053	2054-2063	2064	2065-Life
Group Living/Live-In	4%		M	68,437.50	68,437.50	68,437.50	68,437.50	68,437.50	68,437.50	68,437.50	68,437.50
NPV of 25% of LCP Items											
Lost Future Earnings											
Pain and Suffering											
Past Unreimbursable Expenses											
Annual Totals				75,579.98	75,077.42	76,087.52	76,410.08	76,119.77	76,019.77	70,736.77	70,704.51

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.

Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner, as guardian/conservator of the estate of Child Doe/21, for the benefit of Child Doe/21, for Yr 1 and Yr 2 life care expenses (\$110,203.60), the NPV of 25% of LCP Items (\$1,399,290.01), lost earnings (\$718,487.87), pain and suffering (\$203,172.03): \$2,431,153.51.

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Items denoted with an asterisk (*) covered by health insurance and/or Medicare.

At respondent's discretion items denoted with an "M" payable in twelve monthly installments totaling the annual amount indicated.