

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 05-0295V

Filed: 13 April 2007

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TANYA WEEKS, legal representative of a
minor child, TE'SIJAH WEEKS, deceased,

Petitioner,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

* * * * *

Stephen A. Bruschi, Esq., St. Thomas, Virgin Islands, for Petitioner;

Vincent James Matanoski, Esq., United States Department of Justice, Washington, D.C., for Respondent.

PUBLISHED

Anaphylactic Shock, Encephalopathy;
Blunt Force Trauma, Child Abuse;
IPV, DTaP, MMR, Hib, Hep B, PCV,
Varicella; Onset

DECISION¹

ABELL, Special Master:

On 11 March 2005, the Petitioner filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986 (Vaccine Act or Act)² alleging that her child, Te'sijah, suffered anaphylactic shock,³ and eventually death, as a result of several vaccinations received 10 March 2003 (the "Petition"). By the terms of the Petition itself, Petitioner brought this action under

¹ This opinion constitutes my final "decision" in this case, pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Therefore, unless a motion for review of this decision is filed within 30 days after the time given herein to Petitioner to make such filing has elapsed, the Clerk of this Court shall enter judgment in accord with this decision. Moreover, the Petitioners are reminded that, pursuant to 42 U.S.C. § 300aa-12(d)(4) and Vaccine Rule 18(b)(2), they may seek the redaction of material in this decision that "would constitute a clearly unwarranted invasion of privacy."

² The statutory provisions governing the Vaccine Act are found in 42 U.S.C. §§300aa-10 et seq. (West 1991 & Supp. 1997). Hereinafter, reference will be to the relevant subsection of 42 U.S.C.A. §300aa.

³ For our purposes here, 'anaphylaxis' and 'anaphylactic shock' refer to "an acute, severe, and potentially lethal systemic allergic reaction. Most cases resolve without sequelae. Signs and symptoms begin minutes to a few hours after exposure. Death, if it occurs, usually results from airway obstruction caused by laryngeal edema or bronchospasm and may be associated with cardiovascular collapse." 42 C.F.R. § 100.3(b)(1).

a cause-in-fact theory of recovery, as the acute symptoms and death suffered by Te'Sijah occurred outside of the statutory Table period for anaphylaxis or anaphylactic shock (four hours).⁴

This petition was reassigned to my chambers on 18 October 2005. Shortly thereafter, an evidentiary hearing on the issue of injury onset was scheduled for 6 June 2006, to be held in Charlotte Amalie, within the Virgin Islands Territory of the United States (the "Onset Hearing"). Hearing Transcript ("Tr.") at 4. Whereupon, the Court heard from the Petitioner's fact witnesses, Tanya Weeks, Trevor Montclair Williams, Santa Weeks, Jamal Lewis, Judith D. Plair, Alson L. Lockhart, and Kimba Turnbull, as well as from Respondent's witness, Dr. Francisco J. Landron, who offered fact witness testimony as well as a medical opinion regarding causation of Te'Sijah's death.

Subsequent to that hearing, parties were ordered on 14 July 2006 to contact the Court so that a briefing schedule could be discussed. When Petitioner failed to respond or otherwise comply, the parties were once more ordered on 15 August 2006 to contact the Court. On 30 August 2006, the Court ordered Petitioner to obtain and file a medical expert report in support of the petition. Due to the torpor manifested by Petitioner's Counsel, that Order threatened a ruling on the record as it existed if Petitioner did not comply, pursuant to RCFC Appendix B Rule 8(d). When finally the Court was able to schedule a status conference, Petitioner's Counsel failed to appear on the date and time scheduled (despite a helpful reminder from the Court the day before), and another attorney from that office represented Petitioner therein. The Court presented four options for Petitioner, based on the circumstance of this case:

[T]he Court indicated that the case could proceed in one of several ways. First, the Petitioner could secure a medical expert to opine regarding the issues raised at trial. However, as this option has been on the table for four months with no apparent action taken, the Petitioner must file any such expert report, along with a Curriculum Vitae and any literature relied upon in reaching a conclusion, posthaste. The Court will brook no further delay in this regard.

Second, the Court could set a briefing schedule whereby counsel would give closing argumentation on the petition and particularly on the matters raised at the hearing. If that be the case, Petitioner would have 30 days to file a closing brief, Respondent would be given 30 days to respond, and Petitioner would then have 14 days to reply.

As a third option, the Court could issue a decision based on the evidentiary record as it presently stands.⁵ The Court would remind Petitioner that, as a statutory matter, compensation may not be awarded unless the medical records or medical opinion demonstrates by preponderant evidence that either a cognizable Table Injury occurred

⁴ Remarkably, Petitioner argued for the first time in "Point I" of her posthearing brief that Te'Sijah "suffered a Table injury during a Table period" such that the Court should presume that the death was vaccine-related. Petitioner's Brief ("Pet. Br.") at 4. As this jejune argument is not supported by any pleading, exhibit, or evidence heretofore provided to the Court, or explained therein, the Court does not deem that argument worthy of further consideration or discussion.

⁵ "Decision Without Evidentiary Hearing. The special master may decide a case on the basis of written filings without evidentiary hearing. . . ." RCFC Appendix B Rule 8(d).

or that the child's death was caused-in-fact by the vaccination in question. 42 U.S.C. §300aa-13(a)(1).

A final option would be that the Court dismiss the case for failure to prosecute and/or failure to comply with an Order of the Court as per Vaccine Rule 21. The Court typically prefers not to dismiss a case in this manner. But the Court would note at this juncture its serious displeasure that four months have elapsed since the hearing without any apparent action having taken place on behalf of the Petitioner.

Order of the Undersigned Special Master, 5 October 2006. In her response a few days later, "the Petitioner opted to set a briefing schedule as she is unable to obtain a medical expert to testify on her behalf." Order of the Undersigned Special Master, 11 October 2006. Eventually, as the terminus of calendar year 2006 drew near, the parties filed briefs with the Court, and the case is now sufficiently ripe for a ruling.

Based upon the Court's Findings of Fact and Conclusions of Law set forth herein, this ruling shall constitute a Decision on the record on the matter of entitlement to recovery from the Vaccine Program, denying compensation, as the Court's findings on the issue of onset do not leave open the possibility that the injury suffered was sustained or significantly aggravated as a result of receiving the vaccine(s) at issue. § 11(c).

As a preliminary matter, the Court notes that Petitioner has satisfied the pleading requisites found in § 300aa-11(b) and (c) of the statute, by showing that: (1) she is a valid legal representative of the deceased infant, Te'Sijah; (2) the vaccines at issue are set forth in the Vaccine Injury Table (42 C.F.R. § 100.3); (3) the vaccine was administered in the United States or one of its territories (in this case, the U.S. Virgin Islands); (4) no one has previously collected an award or settlement of a civil action for damages arising from the alleged vaccine-related death; and, (5) no previous civil action has been filed in this matter. Additionally, the § 300aa-16(a) requirement that the petition be timely filed has been met. On these matters, Respondent tenders no dispute. See Tr. at 10-11.

The Vaccine Act authorizes the Office of Special Masters to make rulings and decisions on petitions, which shall include findings of fact and conclusions of law. §12(d)(3)(A)(I). In order to prevail on a petition for compensation under the Vaccine Act, a petitioner must show by preponderant evidence that a vaccination listed on the Vaccine Injury Table either caused an injury specified on that Table within the period designated therein, or else that such a vaccine actually caused an injury not so listed. § 11(c)(1)(c).

The purpose of the Onset Hearing was to establish the existence *vel non* of certain preliminary facts, for the purpose of establishing the relevant factual circumstances in this case, so that the parties could address their theories of causation to explain Te'Sijah's injury based upon that set of facts. Central to the Court's focus was the issue of whether it was indeed anaphylactic symptoms that Te'Sijah experienced subsequent to his vaccination, prior to his death. In the event that no such facts were found by the Undersigned on this immediate issue, further proceedings on the ultimate issue of entitlement would be rendered moot. Therefore, it was with this focus that the Court considered the evidence presented, which follows in summary fashion.

I. FACTUAL RECORD

The Court turns first to the recorded facts drawn from the sources offered by the parties in this case. There is no dispute regarding the following facts:⁶ Te'Sijah was born on 3 October 2001, received vaccinations of inactivated polio (IPV), diphtheria-tetanus-acellular pertussis (DTaP), measles-mumps-rubella (MMR), Hemophilus influenzae type b (Hib), hepatitis B, varicella, and pneumococcal conjugate (PCV) on 10 March 2003, and died on 11 March 2003.

Despite their accord on these factual predicates, there is, unsurprisingly, a pronounced conflict between the parties as to whether one or several of those received vaccines actually caused the death of Te'Sijah. There is also notable dispute regarding the clinical indicia and observable phenomena manifested by Te'Sijah between his vaccination and his untimely death, including his postmortem examination by autopsy. The primary contentions involve discrepancies between the fact witness testimony and the contemporaneous medical records. Therefore, it behooves the Court to explain the legal standard by which factual findings are made.

It is axiomatic to say that the Petitioners bear the burden of proving, by a preponderance of the evidence – which this Court has likened to fifty percent and a feather – that a particular fact occurred. Put another way, it is required that a special master, "believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [special master] of the fact's existence." In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring). Moreover, mere conjecture or speculation does not meet the preponderance standard. Snowbank Enterprises v. United States, 6 Cl. Ct. 476, 486 (1984).

As is often the case, the Court must decide what weight to afford parol testimony as compared to the contemporaneous medical records. In such instances, the following standard is routinely applied:

It has generally been held that oral testimony which is in conflict with contemporaneous documents is entitled to little evidentiary weight. That rule has been followed in Program cases. The rule should not be applied blindly, however. Written records which are, themselves, inconsistent, should be accorded less deference than those which are internally consistent. Records which are incomplete may be entitled to less weight than records which are complete. If a record was prepared by a disinterested person who later acknowledged that the entry was incorrect in some respect, the later correction must be taken into account. Further, it must be recognized that the absence of a reference to a condition or circumstance is much less significant than a reference which negates the existence of the condition or circumstance.

⁶ See Joint Prehearing Submission of the Parties, filed 16 May 2006.

Murphy v. Secretary of HHS, 23 Cl. Ct. 726, 733 (1991), aff'd, 968 F.2d 1226 (Fed. Cir. 1992), cert. denied sub nom. Murphy v. Sullivan, 113 S. Ct. 263 (1992) (citations omitted).

The reason medical records are accorded greater weight than oral testimony has been elucidated by this Court and by the Federal Circuit:

Medical records, in general, warrant consideration as trustworthy evidence. The records contain information supplied to or by health professionals to facilitate diagnosis and treatment of medical conditions. With proper treatment hanging in the balance, accuracy has an extra premium. These records are also generally contemporaneous to the medical events.

Cucuras v. Secretary of HHS, 993 F.2d 1525, 1528 (Fed. Cir.1993). This Court recognizes that contemporaneous written documentation from a disinterested party may well be more reliable than a petitioner's recollection some years after the fact.

However, that is not the end of the matter. When inconsistencies arise between the parol testimony and contemporaneous records, such discrepancies may be overcome by "clear, cogent and consistent testimony" offered by the fact witnesses in explanation of the discrepancy. Stevens v. Secretary of HHS, No. 90-221V, 1990 WL 608693, at *3. (Cl. Ct. Spec. Mstr. Dec. 21, 1990). However, parol testimony that is inconsistent or unclear, particularly where it is at odds with contemporaneous medical records, may not be relied upon in reaching a decision.

The Court turns first to the pertinent medical records filed in this case. The EMT Record, located at Petitioner's Exhibit ("Pet. Ex.") 15, states that, when the emergency responders arrived at the scene, Te'Sijah was observed to be pulseless and apneic (not breathing), with fixed, dilated pupils. *Id.* at 1. After noting the history given by Tanya Weeks and Jamal Lewis, the report noted a hematoma⁷ on Te'Sijah's forehead, adding that Weeks and Lewis "den[ied] any trauma." *Id.* The Hospital Emergency Room Records state that Te'Sijah was dead on arrival to the hospital (Pet. Ex. 16 at 1, 2), and likewise noted the "swollen," "contused" mark on Te'Sijah's forehead (*Id.* at 2, 3). The Autopsy Report notes as external evidence of trauma (i) an abrasion and contusion to the forehead, (ii) a contusion of the upper lip, and (iii) contusions along the upper and lower back. Pet. Ex. 17 at 1. The same document lists as internal evidence of trauma (i) a hemothorax⁸ apparent by x-ray prior to the autopsy examination, (ii) broken but healed ribs on both sides, as well as more recent rib fractures accompanied by hemorrhaging, (iii) a lung contusion, (iv) scalp contusions, (v) internal abdominal lacerations and hemorrhaging, (vi) hematoma of the liver, and (vii) a collection of blood as the result of internal bleeding. *Id.* at 1-2. The Autopsy Report gives the cause of death

⁷ A hematoma, often referred to by laymen as a bruise, is "a localized collection of blood, usually clotted, in an organ, space, or tissue, usually due to a break in the wall of a blood vessel. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (30th ed. 2003) (SAUNDERS) at 825.

⁸ Hemothorax, known also as hemorrhagic pleurisy, is bloody effusion in one or both of the pleurae, which are membraneous sacs holding the lungs. DORLAND'S, supra, at 836, 1451-52.

as "Hemoperitoneum⁹ due to lacerated liver due to blunt force trauma," and lists "Homicide" as the manner of death. *Id.* at 4. The Death Certificate incorporates that statement of the cause of death, listing "hemoperitoneum" as the immediate cause of death, which itself was caused by "lacerated liver," which, in turn, was caused by "blunt force trauma." *Pet. Ex. 18.*

The Court will next examine the information provided by the Petitioner's fact witnesses. After that, the Court will then turn to Respondent's witness, who testified regarding factual knowledge acquired while acting as the doctor who performed Te'Sijah's autopsy, as well as offering medical opinion.

A. TANYA WEEKS

Tanya Weeks is the mother of, and was the primary care-giver for, the deceased infant Te'Sijah (Petitioner's Exhibit ("Pet. Ex.") 1; *Tr.* at 14 and 18), and acts in this case as legal representative as well. Te'Sijah's father predeceased these proceedings. *Pet. Ex. 2; Tr.* at 15.

According to Tanya Weeks' direct examination testimony, Te'Sijah was an "active" child, who, with the exception of three colds, never fell sick; in fact, she said, Te'Sijah's only visits to a doctor were for routine check-ups and scheduled vaccinations. *Tr.* at 17-18. On the morning of the day he received the vaccines at issue, her recollection was that Te'Sijah appeared by all outward signs to be of regular, normal health, although he had recently experienced wheezing in the days immediately preceding. *Tr.* at 19. Following the vaccination, however, Tanya Weeks noted a substantial change in Te'Sijah's behavior:

When he came home, he was very weak and down. He wasn't moving. He had a fever, and I was trying to give him something to eat. He wouldn't take anything. He stay up about 30 minutes, and then he went to sleep, and he wake up about two to three hours later and eat something, and he was just playing but not playing normal. Just sitting down in a chair and like talking to us but wasn't moving like his regular basic, and like around 9:30 I left my house. I went down by my boyfriend...because he came from school and while we get there, I make my son a Ovaltine bottle. He vomited up while he drink it, and I wipe him off. When I done wipe him off, I went and give him some juice. He wouldn't really drink anything.

At the same time he had a fever and I give him some Tylenol, and about 30 minutes to a hour he went and sleep, and from time he went to sleep around four something he wake up like breathing funny. Like he's short of breath, and I call my mom because I was very scared. I didn't know what to do. I call my mom, and my mom call the ambulance, and they come to my boyfriend house, Jamal, and they take him, and they went to the hospital.

Tr. at 21-22. Upon questioning by the Court, Tanya Weeks described the fever Te'Sijah experienced that night as "a little slight fever but not too heavy." *Tr.* at 23. However, when questioned further

⁹ Hemoperitoneum is a bloody effusion in the peritoneal cavity, which invests the viscera. DORLAND'S, *supra*, at 833, 1407.

by the Court with regard to the degree of this fever, Tanya Weeks testified that Te'Sijah had "never had a fever like that," noting that "he was very weak." Tr. at 24. Tanya Weeks stated further that the emergency response personnel did not "work on" (attempt to resuscitate) Te'Sijah before embarking for the hospital, but that, en route to the hospital, they did make such attempt. Tr. at 25. She testified later in the hearing that she observed the emergency response workers performing CPR (but nothing else) while riding in the ambulance. Tr. at 55-56. When questioned by the Court for specifics on this matter, however, Tanya Weeks was less clear in her testimony:

THE COURT: What is your recollection of what they did as CPR; cardiac pulmonary resuscitation? What did you observe? In other words, you've indicated yes, they did CPR, and presumably that's in the records. But what did you observe? In other words, were they trying to breathe into his mouth? Were they putting a mask on his mouth? You said they may have done that. Or were they doing some type of compression with their hands or did they have some machine? What were they doing?

THE WITNESS: They was working with their hands plus working with their, maybe I think they worked with their hand first but and maybe then they used the machines, and that's practically it. They were just doing whatever they were doing.

THE COURT: Your recollection is they first worked with their hands?

THE WITNESS: Yes.

THE COURT: Then they worked with some kind of a machine?

THE WITNESS: Yes.

THE COURT: They may have put a mask on his face? You're not certain?

THE WITNESS: Me ain't too sure about that but maybe, yes.

Tr. at 61-62.

In response to further questioning on direct examination concerning the period between the vaccinations and Te'Sijah's death, Tanya Weeks testified (a) that she did not hit Te'Sijah at all, (b) that she did not see her boyfriend, Jamal Lewis, hit Te'Sijah at any point, and (c) that, to her knowledge, Te'Sijah had not fallen down; however, Tanya Weeks did not recall the appearance of Te'Sijah's face when he awoke in the early hours of 11 March 2003. Tr. at 27-28.

Despite her testimony on direct examination, when cross-examined, Tanya Weeks admitted that on 13 March 2002 she had personally taken Te'Sijah to the hospital for an illness involving white discharge from his ears, although she disputed (or did not recall) the rash on his wrist also noted in contemporaneous records corresponding to that visit. Tr. at 34-35. Another admitted doctor's visit occurred on 23 February 2003, just over two weeks before Te'Sijah's death: this time for a red, swollen penis, which Tanya Weeks attributes to his having not been circumcised, and discomfort diagnosed in the medical records as an ear infection—a diagnosis with which Tanya Weeks strongly disagreed. Tr. at 35. Further questioning on cross-examination resulted in the following exchange:

Q In fact, on March 10, 2003, there was concern at the time because he had had a cold for several days and a fever, and your mother was concerned because she thought that a roach or roaches may have been in his ears?

A Well, that's what she was saying because at the same time we had a roach problem but nothing was in his ear.

Tr. at 35-36.

Regarding the forehead contusion noted in Te'Sijah's medical records, Tanya Weeks explained that while playing with his grandmother (Tanya's mother), Santa Weeks, Te'Sijah had hit his head against a wall and received a cut to his forehead; her recollection was that this happened several days before receiving the vaccinations at issue, but that the injury had substantially healed over by the vaccination date, with only a "small mark" remaining at that time. Tr. at 40-44. Even once Te'Sijah had been pronounced dead at the hospital, Tanya Weeks averred that the injury was "practically healed" such that "you couldn't really see anything." Tr. at 44-45.

Focusing on the moments leading up to the onset of Te'Sijah's acute symptoms, Tanya Weeks reiterated that she woke around 3:00 AM, and proceeded, as was her wont, to waken her boyfriend Jamal. Tr. at 50. Shortly thereafter, Te'Sijah awoke, and, while the two adults watched him, he "started breathing funny." Tr. at 50-51. Tanya Weeks said she then called her mother, who then summoned the ambulance. Tr. at 52-53. Tanya Weeks recalls that Te'Sijah was still breathing at the time she handed him to Jamal, who then carried him straightaway to the ambulance. Tr. at 62-63. On the way to the hospital, she rode in the front of the ambulance that carried Te'Sijah to the hospital, and spoke with the emergency response personnel therein. Tr. at 56 and 61.

B. TREVOR MONTCLAIRE WILLIAMS

Trevor Williams classified himself as a "cousin" of Tanya Weeks, but further detailed his consanguinity by saying that Santa Weeks, mother of Tanya Weeks, grandmother of Te'Sijah Weeks, is his cousin. Tr. at 79. A father of five himself, he affectionately referred to Te'Sijah as "a fun guy." Tr. at 80. Williams carried Te'Sijah to the hospital the morning of 10 March 2003 to receive the vaccinations at issue, noting of that morning that Te'Sijah was "playful as usual," but "seemed like he was just getting over from a flu," such that "his air was like irritant." Tr. at 80-81. Such flu symptoms prompted Williams to take Te'Sijah to see a doctor within the hospital before going to the immunization room for Te'Sijah's immunizations. Tr. at 81-82.

Upon leaving the doctor's office within the hospital and entering the immunization clinic also located within the hospital, Williams held Te'Sijah while the immunization staff administered "[a]bout seven" inoculations to Te'Sijah in his legs. Tr. at 84-85. Once the vaccinations were administered, Williams took Te'Sijah back to his mother, and stayed some time there, until between 6:00 and 6:30 PM that evening. Tr. at 87. After receiving the vaccination, Te'Sijah appeared to Williams "like a kid that...gets his shots," experiencing nausea, and feeling "groggy and sleepy." *Id.* Upon further questioning by Petitioner's Counsel, Williams remarked of Te'Sijah:

Well, he wasn't as playful as he usually was. He wasn't moving around. You know I offer him things to eat. He won't eat any -- too much you know. So I know in my

experience with shot do I know you know that it tends to go through a little change after you know they got their shot but really he was sick on his.

Tr. at 88. When questioned by the Court on whether Te'Sijah felt "warm or hot," Trevor Williams averred: "Yes. He had a fever even at -- when I deliver him because I could feel it over the body he done change his temperature and that was about it." Id. However, Williams later testified that Te'Sijah did not feel similarly warm that morning, before receiving the vaccination. Tr. at 90.

Trevor Williams also explained his observation that Te'Sijah was not as playful as usual by explaining:

[H]e's a kid that used to be running back and forth through the house and things like that. He was not like that. He just went -- he I think his grandmother was lying on the bed, and he went and he just sit on her leg and that was about most of the thing he was doing. Offer him things to eat, he won't eating. You know what I mean?

Tr. at 89. However, when questioned, Williams, in his own parental experience, did not find a lowered activity level to be abnormal for recently-vaccinated children, noting that, after a vaccination, children "don't tend[] to be as active as they [were] before they get the shot." Tr. at 92.

After counsel for both parties had exhausted their queries for Trevor Williams, the Court questioned him on whether he had noticed any marks on Te'Sijah's forehead, or anywhere else on his body, on the morning he took Te'Sijah to the hospital to get immunized. Tr. at 93. In response, Williams did not recall Te'Sijah showing any evidence of physical marks, adding "he had no marks on him." Id.

C. SANTA WEEKS

Santa Weeks is Tanya Weeks' mother, and grandmother to Te'Sijah Weeks. Tr. at 97. She testified of Te'Sijah that he was a "very loving," "sweet," "nice child" that was "very active" and full of love and joy. Id.

Santa Weeks noticed a change in Te'Sijah between when he left with Trevor Williams to the hospital and when he returned midday; she observed that "When he got back home, he was very crabby. Crying. Crying. Crying." Tr. at 100. She also noticed his heightened temperature, adding that Te'Sijah "had a high fever." Id. At some time that day she left for work, and did not return home until after Midnight, to find Tanya and Te'Sijah had left for the home of Tanya's boyfriend. Tr. at 100-101. She received a phone call from Tanya at 5:15 AM. Tr. at 101-102. In fact, Santa Weeks was insistent on her recollection of the timing of the call at 5:15. Id., Tr. at 108. Tanya engaged her mother to listen to Te'Sijah's breathing, which Santa Weeks recalls sounded like "gasping for breath." Tr. at 102. At that time, Santa Weeks called the ambulance to go get Te'Sijah, and she herself headed for the hospital. Id. When she arrived at the hospital, she was informed that Te'Sijah had died. Tr. at 103.

Santa Weeks addressed, when questioned on cross-examination, her concern that Te'Sijah might have had cockroaches in his ears: "I was living in a roach infestation apartment. One roach went in my ear. I saw the child. You know they get in his ear. They get in his ear." Tr. at 105.

When questioned about the issue of whether Te'Sijah had been the victim of child abuse, Santa Weeks was adamant that Te'Sijah "never got abused," but was a "well[-]loved child." Tr. at 115. Also, when cross-examined on the specific question of the 'bump' on Te'Sijah's forehead, Santa Weeks displayed no knowledge of how he had received that bump:

Q How did Te'Siyah get the bump on his head that he had on March 10?

A I really don't know what bump you are talking about because when I buried Te'Siyah, Te'Siyah had a bump on his head big like that. I don't know where it came from. I really don't know. That morning when Te'Siyah died, he was there in just a Pamper. No marks. No marks was on that child's skin. None. I don't know. When I buried him, that -- and then they open the coffin. All I could see is a big mark to his head. I don't know where it came from.

Q On March 10 before he went to the immunization clinic, did he have a bump on his head?

A He had no bump. Te'Siyah -- where I was living, he had a little -- he had bumped his head playing. It was just a little, little mark. No bump. And then it was old. There wasn't none swollen on Te'Siyah.

Tr. at 116.

D. JAMAL LEWIS

Jamal Lewis was unsure about the occurrence and sequence of much of the events surrounding the evening of 10 March 2003 and the early morning hours of 11 March 2003. Tr. at 120-38. What can be gleaned is as follows: At some time during the night, he and Tanya Weeks were both asleep, and at a later time they awoke. Tr. at 124-26. Lewis carried Te'Sijah to the ambulance. Tr. at 126. He remembers Te'Sijah vomiting on his right shoulder, but he was unable to recall whether Te'Sijah was breathing at that time. Tr. at 127. His recollection of why the ambulance was called was that Te'Sijah "wasn't looking all right." Tr. at 129. When questioned about his recollection of Te'Sijah's behavior, he noted that Te'Sijah, who typically was "always moving about," instead "wasn't really up," "wasn't active that night," and "wasn't being himself." Tr. at 130. Jamal Lewis went on to testify that he "never" punched, beat, or hit Te'Sijah, and that Te'Sijah had not fallen down at any time that evening. Tr. at 130.

Upon cross-examination, Jamal Lewis was able to recollect that Tanya had indeed awakened him, but was yet unable to remember what time they awoke. Tr. at 132-33. He was also able to recollect that he had tried to treat Te'Sijah with Vick's Vapo-Rub earlier that night, because at that time, Te'Sijah was already having trouble breathing. Tr. at 135-36.

E. JUDITH D. PLAIR

Judith Plair works as a registered nurse for the Department of Health, and the individual who administered the vaccinations to Te'Sijah. Tr. at 140. She administered seven vaccinations to Te'Sijah on 10 March 2007, none of them in combination. Tr. at 142. She was, and is aware of no contraindications for administering those seven vaccinations at once. Tr. at 143-44.

According to Plair's testimony, at the time of Te'Sijah's vaccinations, there was no mark on Te'Sijah's forehead, or any other "unusual signs marks, [or] behaviors" for that matter, and he behaved normally. Tr. at 144. When Te'Sijah came into the immunization clinic, it was represented to Plair that Te'Sijah "was a well child that day," and she did not notice any symptoms of fever. Id.

F. ALSON L. LOCKHART

Alson Lockhart is a self-described emergency medical technician cardiac, having worked for the local Department of Health since 1982. Tr. at 148. Lockhart was also the person who received the emergency call from Santa Weeks to send the ambulance. Tr. at 151. He himself first observed Te'Sijah when he joined the ambulance carrying Te'Sijah en route to the hospital; by that time, Te'Sijah was "pale and without vital signs" (i.e., "he was not breathing and had no pulse"). Tr. at 150.

Alson Lockhart has received general certification to correctly perform general cardio-pulmonary resuscitation ("CPR") from the American Heart Association, which includes training on how to perform such on neonates and infants, as well on older children and adults. Tr. at 154. Once he joined the crew in the ambulance which conveyed Te'Sijah, he took over the 'pulmonary' component of the resuscitation attempt, by operating the artificial respiration equipment, freeing up Kimba Turnbull (whose testimony follows) to focus entirely on massaging Te'Sijah's heart for artificial circulation. Tr. at 154-56. No use was made of the "shock paddles" in the attempt to resuscitate Te'Sijah, at least not once Lockhart joined the ambulance. Tr. at 158-59. Despite these best efforts, and the efforts that the other hospital staff continued to employ once the ambulance reached the hospital, however, Te'Sijah never resumed autonomic respiration or a heartbeat. Tr. at 159-60.

Regarding the potential for broken ribs as a result of attempts at resuscitation, Alson Lockhart testified on direct examination from his experience in the CPR training he received that "[t]here's always a fear of breaking ribs" once emergency response personnel "initiate CPR," adding, "There's always a potential." Tr. at 161. However, later, when questioned further on this point during cross-examination, Lockhart could not recollect "ever break[ing] a child's ribs performing CPR," noting that a child's ribs would be more flexible or pliable than an adult's ribs "because of being still in the growing stages." Tr. at 177. Even still, he stressed that "as a rule of thumb with CPR," he was trained "that you can have broken ribs with anyone, whether an infant, child or adult," and therefore he would take the same care in performing CPR upon an individual from any age group. Id.

When asked generally on cross-examination if he recollected whether "there were any marks on Te'Sijah's body," he responded without hesitation or prompting by stating, "Hematoma to the

forehead." Tr. at 165. When questioned by the Court on where he first noticed this hematoma, Lockhart stated that he observed it both in the ambulance and upon arrival in the emergency room, but that it was in the emergency room that clearer examination was possible, and that "[o]n the way in" to the emergency room was where he "was sure of the hematoma." Id. Though Lockhart could not describe the color of the hematoma, he said the mark was large, and "was evident without having to look for it." Tr. at 167.

Also on cross-examination, Counsel for Respondent questioned Alson Lockhart specifically on the appropriate techniques and training for performing CPR in a safe, appropriate way:

Q Based on your 25 years of experience and what [did] you observe[] Ms. Turnbull doing?

A Appropriate compressions.

Q She was doing the procedure properly for a child the size of neonate or a child, a toddler like Te'Siyah?

A Okay. For child which would be there.

Q That's for a child.

A One hand.

Q The one-hand compressions?

A Yes. With the heel of the hand.

Q Based on what you saw, was she depressing too firmly or too hard?

A No.

...

Q At that point, everything that had been done was being done in your experience per protocol, correct?

A Yes, we were following protocol.

...

Q Based on your experience and what you saw, was there anything that emergency technician Turnbull was doing that would cause the grave injuries of cracking ribs and causing a laceration of the liver to this child?

A Not out of the ordinary for the case we were dealing with.

Q Anything that you saw there that would explain multiple contusions of the head?

A No.

Q Anything that you saw while you were there that would explain multiple contusions in the back?

A No, I wasn't aware of that.

Q Anything that you saw while you were there that could explain multiple lacerations of the mesenteric region, that is in the intestines?

A No.

Tr. at 180-183. Alson Lockhart did qualify this testimony on redirect examination, agreeing that it is true, "[b]ased on [his] experience and [his] training and education [he] has received...that even if [he] properly administer[s] CPR[, he] can have broken ribs and lacerated lungs and livers[.]" Tr. at 184.

G. KIMBA TURNBULL

Kimba Turnbull did not recall the emergency call to bring Te'Sijah to the hospital in the morning hours of 11 March 2003, and needed to review the official statement she made to the police at the opening of her testimony. Tr. at 190. Upon reviewing the EMS record, Kimba Turnbull recognized her authorship of the same, which she testified she composed within twenty-four hours of Te'Sijah's death. Tr. at 191.

Kimba Turnbull testified on direct examination that when she received Te'Sijah, she "realized that he was pulseless, apneic," and she noted that his mouth and hands were "cyanotic...meaning blue" due to "a lack of oxygen to those body parts." Tr. at 193. Also at that time, Te'Sijah's pupils were "fixed and dilated," which meant that his eyes did not respond to light, as would "any living individual." Tr. at 196. Nevertheless, Turnbull's impression was that he was simply not breathing, but not "actually dead" when she received him, and, in accord with that impression, she did not indicate in her records that Te'Sijah was dead on arrival. Tr. at 196-97. On cross-examination, however, she explained that she does not typically make assessments of actual death, only the presence, absence, or degree of vital signs. Tr. at 198.

During direct examination, Kimba Turnbull confirmed what Alson Lockhart stated earlier, that she used the "heel of one hand" to perform the chest compressions and also used the respiratory "apparatus" concurrently, until Lockhart joined the ambulance to help. Tr. at 195-96. When CPR was addressed on cross-examination, Turnbull explained that she has been CPR certified for the entirety of the fifteen years she has served as an emergency medical technician, that she receives training and recertification for CPR every two years, and that such training includes specific attention to performing CPR on infants such as Te'Sijah. Tr. at 201-202. She is not aware of any time in her experience that she has broken a child's ribs while administering CPR to children. Tr. at 202. She acknowledged the potential for "bruised or broken ribs" when performing CPR, and stated that she took steps to prevent that from happening with Te'Sijah, adding further that she "responded appropriately" to Te'Sijah's emergent condition. Tr. at 202-203. Specifically, she agreed that the first thing she did was to remove Te'Sijah's clothing to look for the "landmark", which is the target for chest compressions in CPR. Tr. at 203. She described further how exactly one locates the landmark on an infant like Te'Sijah, the pressure and depth of the contractions used, and the means by which emergency technicians stabilize themselves in moving vehicles when performing such important procedures. Tr. at 203-205.

On cross-examination by Respondent, Turnbull noted her recording of a hematoma noticed on Te'Sijah, which she described as a "bump" on Te'Sijah's forehead. Tr. at 199-200. However, when questioned by the Court on this point, she admitted that her testimony to that fact was based upon the contemporaneous record she had written, and not on her "independent recollection." Tr. at 200. Later, she referenced her contemporaneous notations indicating that she noticed the hematoma on Te'Sijah's forehead "at the time [she] arrived at the scene." Tr. at 207-08. She stated further that the contusions on, and internal lacerations within, Te'Sijah's body, which were noted in the contemporaneous records composed by her and others, could not have been caused by her attempts to resuscitate Te'Sijah. Tr. at 208. She reiterated this point on re-direct examination: When asked by Petitioner's counsel whether CPR could result in rib fractures as well as to lacerations of the lungs and liver, she denied that the lacerations stated could result from CPR, even while accepting that bruised or broken ribs could result therefrom. Tr. at 212.

H. DR. FRANCISCO J. LANDRON

Dr. Landron testified both as to fact, as the attending physician who performed Te'Sijah's autopsy, and as an expert offering his professional opinion, based on specialized training and experience. At the time of the hearing, Dr. Landron was chief of pathology at Ray Schneider Hospital in St. Thomas, and medical examiner for St. Thomas at St. John's. Tr. at 215. His Curriculum Vitae was filed as part of the record in this case by the Respondent, as were several medical articles in support of Respondent's theory of alternate causation. Resp. Ex. C-H. His experience in medical examinations relating to forensic pathological work on children, including infants between one and two years of age, extends to somewhere between 100 and 200 individual cases. Tr. at 216.

Dr. Landron's first level of review for Te'Sijah was an external examination, which revealed an "abrasion/contusion on the forehead" that he believes was received in the several hours before death, not days or weeks before death. Tr. at 223-24. Landron does not believe that the abrasion/contusion was a result of a "cerebral concussion," nor that it could be. Tr. at 224.

In discussing the results of his autopsy examination of Te'Sijah, Dr. Landron discussed the initially shallow-depth incisions he made along Te'Sijah's back, done as an investigative measure to detect bruises that might otherwise pass notice, after which, he incised more deeply to completely expose the body cavities for closer review. Tr. at 222. Those first incisions "revealed multiple bilateral contusions in the subcutaneous soft tissues as well as muscle," which indicates, in simple terms, that Te'Sijah received "impact injuries, blunt force trauma on both sides of the back, on the upper back as well as on the lower back," and that he had received said injuries within the 24 hours preceding death. Tr. at 225-26. However, he later explained that these injuries preceded Te'Sijah's death by hours, and were not perinecrotic (occurring either immediately before, during, or after death). Tr. at 229. Although that trauma to the back may not have been life-threatening in and of itself, the Doctor continued, the evidence of this trauma is useful for understanding injuries sustained in Te'Sijah's abdominal region. Tr. at 226. After further questioning, Dr. Landron testified that the blunt force trauma to Te'Sijah's back that he observed could have damaged internal organs or

fractured ribs, by means of "energy transfer" passing through Te'Sijah's back, causing bruising in the process. Tr. at 228.

Another external injury noted by Dr. Landron was a contusion on the "membrane connecting the upper lip to the [gums]," which, in Dr. Landron's opinion, was similarly incurred in the recent hours prior to Te'Sijah's death. Tr. at 231. Dr. Landron did not rule out the possibility that the CPR procedures applied to Te'Sijah could have caused the injury to Te'Sijah's lip, but stated that the contusions sustained on Te'Sijah's back were "not consistent" with force applied during CPR. Tr. at 232-33.

Moving on to the internal examination, Dr. Landron noted in his original autopsy report a finding of "Bilateral healing rib fractures with callous formation laterally involving the six to eight ribs." Tr. at 233. As fractures that had healed, Dr. Landron believed these several ribs had been broken months before and had since healed prior to Te'Sijah's death. Tr. at 234. In Dr. Landron's opinion, such fractures were indicative of specific elements:

As a general rule, whenever you see fractures in children that are less than two years of age[,] unless there is a history of a severe accident such as a car accident or some bone disease that would predispose the bones to easily fracture, if you don't have any of those two situations they're almost [always] specific for child abuse, and child abuse being blunt force trauma, direct impacts to the ribs or violent squeezing of the rib cage that would produce fractures.

Tr. at 236. Further, Dr. Landron explained that these fractures would not be the result of normally-applied force, but rather a "violent squeeze." Id.

Dr. Landron noted recent fractures that were yet unhealed at the time of Te'Sijah's death, which he believed were incurred only hours before death. Tr. at 237. He believed that these fractures caused bleeding in those few hours within the chest cavity, a condition known as "hemothorax", which Dr. Landron explained "do not occur with CPR." Tr. at 238-39. Dr. Landron was emphatic that this bleeding followed fractures to the seventh rib that Te'Sijah would have suffered hours before, and could not have resulted from the CPR administered to Te'Sijah in the minutes surrounding Te'Sijah's death. Tr. at 239. Whatever forcible trauma caused the rib fracture also damaged Te'Sijah's lung, causing contusion and hemorrhaging. Tr. at 239-240. Dr. Landron forcefully reiterated that these injuries were not consistent with a theory of causation linked to the CPR that Te'Sijah received the night of his death. Tr. at 240.

Dr. Landron's examination of the scalp tissue manifested "several hemorrhagic injuries" that likewise indicated contusions from blunt force injuries, and were also only a few hours old when Te'Sijah died. Tr. at 241-42. There were several of these injuries, and Dr. Landron similarly ruled out CPR as a cause for these injuries as well. Tr. at 242.

Continuing, Dr. Landron testified about another finding of his autopsy of Te'Sijah. In describing his summary of "Mesenteric lacerations and hemorrhage with perirenal and parapancreatic soft tissue hemorrhages," the Doctor elaborated:

Again, [this is consistent with] blunt force impact injuries. The mesentery is an apron of fat that connects the loops of bowel. Within that fat there are some blood vessels that give the blood supply to the intestines themselves. These fat pads showed extensive hemorrhage because of blunt force trauma, and one of the areas was lacerated. That means there was a visible tear or defect in the apron which is secondary to blunt force trauma.

In addition to that, the soft tissues, the fat that we see surrounding the pancreas and surrounding the kidneys were hemorrhagic indicating blunt force trauma to these soft tissue areas which also caused hemorrhage.

Tr. at 243. Dr. Landron emphatically denied that this damage could be caused by "inappropriately applied CPR...in a moving vehicle that was bouncing, [where] the heel of the hand [was] applied below the sternum," insisting instead that it is "consistent with a punch, with a kick, stepping on the child or perhaps slamming or throwing this child or slamming him against some object,...[which is] the type of force we are talking about here." Id.

In distinguishing these injuries from those that could occur through CPR, Dr. Landron explained what he termed "the whole context":

We're talking about head injuries. We're talking about bruising bilateral parts of the back, bilateral parts of the head. We're looking to very significant internal injuries. We're looking at old fractures. So we're looking at a conglomerate of injuries that speak a lot more than just looking at individual injury....[Inappropriately given CPR might cause] a small minor injury. Certainly not the injuries we're looking at in this case. The injuries in this case are in my opinion absolutely not consistent with CPR....I would say they are – they would not have been caused by CPR even inappropriately performed, and I would say that the gamut of injuries on the body was just not consistent with that.

Tr. at 244-46.

The next internal injury Dr. Landron discussed in his testimony was "[a] very large blood clot under the capsule of the liver so that it's visible externally," along with a sizable laceration to the liver that he believes was caused by "an impact injury" resulting in "shearing and tearing forces" exerted on the liver tissue. Tr. at 247. When questioned, Dr. Landron elaborated on this injury in greater detail:

THE COURT: Could that be caused by a broken rib?

THE WITNESS: You might get a small -- if you can -- in adults if you can find the broken rib with a sharp edge broken off opposed to the surface of the liver, and there's a small injury there that corresponds to the location, you can say yes. This was a very large laceration on the front of the liver which is unassociated with the rib fracture in this case. This again laceration is indicative of a tremendous, violent blunt force injury or impact to the body of the child, and again not consistent with CPR. Not consistent with the broken rib.

BY MR. MATANOSKI:

Q When you said laceration, did you mean a slicing or a stabbing force?

A No. A slicing or a stabbing force is a sharp force injury where you have a clean cut into the tissue. A laceration is a blunt force impact where you have shearing forces, you have tearing forces that's ripped the tissue apart. It's not a clean cut. It's caused by blunt force trauma.

Q What you observed then was this tearing and ripping?

A That's correct.

THE COURT: Could you say when this occurred?

THE WITNESS: Recent. Hours.

THE COURT: Within hours. Could it have occurred within minutes of death?

THE WITNESS: No. I think it occurred hours before death.

Tr. at 247-48.

The last internal injury to be noted in the autopsy and which Dr. Landron addressed on direct examination was related to the injuries sustained by Te'Sijah's liver: "Hemoperitoneum consisting of 200 [cubic centiliters] of dark red brownish blood," meaning that "the laceration in the liver as well as the laceration in the mesentery are causing bleeding into the abdominal cavity." Tr. at 249. He added that such bleeding could potentially "start in minutes" and "could take hours to build up," and agreed that this is "not something that would occur very quickly within several minutes but rather it would take a period of time." Id.

Dr. Landron concluded his direct testimony by restating his conclusion as to Te'Sijah's cause of death:

BY MR. MATANOSKI:

Q Doctor, as a result of your findings did you reach a conclusion as to the cause of Te'Siyah's death?

A Yes, I did.

Q What was your conclusion?

A The cause of death was internal bleeding due to blunt force trauma.

Q What was the conclusion that you reached as to the manner of death?

A The manner of death is homicide.

Tr. at 260.

On cross-examination, Dr. Landron admitted that he did not prepare a toxicology report concerning Te'Sijah, and that he did not collect blood or urine samples as part of his examination. Tr. at 266. He also referenced a consultation report submitted by the Armed Forces Institute of Pathology. Tr. at 262-63. Dr. Landron submitted his findings to them so that they could hone with greater precision the precise time period(s) between when Te'Sijah sustained his injuries and the moment of his death. Tr. at 263. This report substantially corroborated Dr. Landron's opinion (as set forth *supra*), without any more focused a timeline. Tr. at 263-64. Restating his previous conclusion that the injuries were at least over an hour old, Dr. Landron responded to cross-examination by stating, "My opinion is they occurred before the phone call," an opinion which he avers comports with accepted consensus in the medical community. Tr. at 274-76. Finally, the Court notes, Dr. Landron summarized the sequence of events and how those events correspond to form his diagnostic picture:

So, as I said, based on all the information I have from this case I can conclude the baby had come at a certain time for an appointment for a vaccination. At that point, he appeared well. Obviously nobody said the baby had something wrong with him at that time.

There's a window of time when you receive a phone call, and you have some injuries that are not consistent with CPR. That are consistent with child abuse happening within that specific time frame, and my opinion is that they -- I can't age them if -- I wish I could. I don't think anybody can. If you see a study that says that, please let me know.

Tr. at 277.

II. ULTIMATE FINDINGS OF FACT

Preliminarily, the Court here notes that it found Dr. Landron's testimony to be earnest and reliable. He was sincere without diminishing his professional credibility. Although the Court may not entirely incorporate his ultimate conclusion of child-abuse and homicide, it need not. The immediate and ultimate issues in this case, respectively, are whether the Court accepts facts which might support anaphylaxis as the injury that injured and killed Te'Sijah,¹⁰ and whether Te'Sijah's death was vaccine-related. Therefore, it is with those questions in mind that the Court reviews the

¹⁰ Petitioner's allegations have focused almost exclusively on a theory of anaphylaxis, and the Court does not *sua sponte* consider other potential *causa* in the absence of allegations from the petition. Where a petitioner alleging anaphylaxis does not allege or argue the separate Table injury of encephalopathy in the proceedings before the Special Master, that strategic litigative choice of omission constitutes a waiver on that issue, which disburdens the Special Master from considering an encephalopathy hypothesis, and which bars consideration of that issue upon review in the Court of Claims. Hellenbrand-Sztaba v. Secretary of HHS, 35 Fed. Cl. 222, 225 (Ct. Fed. Cl. 1996), citing, *inter alia*, Vaccine Rule 8(f). In her brief, Petitioner belatedly mentions that "Te'Sijah suffered from anaphylaxis and/or encephalopathy" (Pet. Br. at 6, 9 (emphasis added)), but provides no further analysis other than that Te'Sijah "became lethargic and disoriented" to the level of a "decreased level of consciousness" in the hours following vaccination (Id. at 10). The Court notes that an allegation of encephalopathy was not adequately raised in this case, but nevertheless addresses this exanimate alternate hypothesis *infra*, in the interest of sedulity.

testimony offered at the hearing. The Court must sort through several differing accounts, weighing each against the others, to arrive at one cohesive, coherent understanding of the instrumental facts that will be necessary then to reach an ultimate legal conclusion regarding entitlement.

Among Petitioner's several offered witnesses, there are distinct inconsistencies regarding Te'Sijah's state of health in the months preceding as well as on the morning of his vaccination, and regarding the appearance of the contusion Te'Sijah sustained to his forehead that was noticeable after his death. As Respondent has argued that Te'Sijah's death was due to a 'factor unrelated' (whether a preexisting health factor or a blunt trauma factor), these issues bear some significance in this case.

Under the Vaccine Statute, a petitioner should be prepared to offer evidence concerning any pre-existing conditions experienced by the injured party, addressing which symptoms are attributable to the vaccination, a burden of proof that is required by the Vaccine Act itself. Whitecotton v. Secretary of HHS, 81 F.3d 1099 (Fed. Cir. 1996) (holding that "the statute implicitly requires a comparison of the person's pre-vaccination condition with the person's current, post-vaccination condition"). Likewise, within the Vaccine Program, proving the facts surrounding the onset of the injury alleged is a burden to be borne by the Petitioner. Matkovich v. Secretary of HHS, No. 90-1676V, 1996 WL 251403 (Fed. Cl. Spec. Mstr. Apr. 29, 1996) ("The crucial question devolves, then, to this: To what did the first symptom or manifestation belong?"). On the issue of injury onset, the law in the Vaccine Program "is well settled that consistent medical records are given weight over [] conflicting oral testimony offered after the fact." Canino v. Secretary of HHS, No. 93-0401, 1995 WL 715632 (Fed. Cl. Spec. Mstr. Dec. 8, 1995) citing Murphy v. Secretary of HHS, *supra*.

None can dispute the unquestioned evidence that Te'Sijah had generally been a happy, active, playful baby, a fact to which Tanya Weeks, Trevor Williams, and Santa Weeks testified. It is also evident that he was less so disposed in the hours that followed his vaccinations; however, the testimony discussing his discomfort did not strike the hearer as acute symptoms of a reaction, but instead, as Trevor Williams put it, "like a kid that...gets his shots," showing decreased activity levels and a general, albeit slight, malaise. Those witnesses also testified that Te'Sijah had a fever in the evening preceding his death, although the nature and extent of that fever were unclear. Santa Weeks testified that Te'Sijah had a high fever and Trevor Williams stated that Te'Sijah's skin was warm to the touch, which it had not been earlier that same day. Tanya Weeks was unclear about Te'Sijah's fever, noting one moment that the fever was little, slight, and not too heavy, but averring shortly thereafter that it was a fever unlike any Te'Sijah had ever experienced up till then. The Court finds that, more likely than not, Te'Sijah did have a fever in the afternoon and evening following his vaccination; however, a fever without more is not indicative of an exceptional adverse reaction to a vaccine. See, e.g., Cain v. Secretary of HHS, No. 91-0817V, 1992 WL 183202 (Fed. Cl. Spec. Mstr. Jul. 15, 1992).

As to the mark, bump, or contusion on Te'Sijah's forehead, there is distinct controversy as to its severity and the timing of its appearance. It seems clear from the testimony of two of Petitioner's most credible witnesses, Trevor Williams and Judith Plair, that Te'Sijah "had no marks" on his forehead or anywhere else when he was vaccinated. Likewise, the other arguably disinterested witnesses Petitioner offered, Alson Lockhart and Kimba Turnbull, both noted that Te'Sijah had

incurred the large contusion on his forehead by the time he was in their care, in the ambulance and in the hospital. Turnbull did not recall the mark at the hearing, but she had recorded her notice of the "bump" in her contemporaneous records. However, consistent with the citation to Cucuras, supra, such record is afforded weight because it was composed more or less contemporaneously with Te'Sijah's death. *A fortiori*, Lockhart resoundingly offered his recollection of the contusion with little guidance in questioning; he remembered seeing it and the circumstances surrounding when he did. In contrast, Tanya Weeks testified that Te'Sijah sustained the bump to his head when he hit his head against a wall while playing with Santa Weeks. Furthermore, her testimony was that the injury had all but healed prior to the day of Te'Sijah's death, with only a "small mark" remaining at that time, and that, even upon death, she observed that the injury was "practically healed" such that "you couldn't really see anything." This account is not consistent with those offered by the other witnesses, and it is not even consistent with what Santa Weeks said. Santa Weeks testified that Te'Sijah had bumped his head playing, but that it left no bump, only a very small mark. She stated that Te'Sijah did not have a mark on his forehead at the time of his death in the emergency room, but that she did notice a large bump on his forehead when Te'Sijah was buried.

On one hand, we have two credible witnesses who testified that Te'Sijah did not have a mark on his forehead the morning of 10 March 2003 and another two who testified that he did bear the mark in the ambulance and in the hospital the early hours of 11 March 2003 (one of whom had recorded it in a contemporaneous medical record). On the other hand, we have two witnesses who offered contrary testimony, and they constitute two of the three witnesses with the greatest propensity for bias under the facts in this case. The Court is inclined to believe the first grouping of witnesses over the latter. Therefore, the Court finds, to a preponderance of the evidence, that Te'Sijah did not bear a noticeable mark on his forehead during the day on 10 March 2003, but that the contusion (hematoma) was apparent in the waking hours of 11 March 2003, and was incurred in the evening or overnight hours in between. This finding is certainly corroborated by Dr. Landron's testimony, which stated that Te'Sijah's blunt force trauma injuries noted in the autopsy (including the contusion on the forehead) were most likely incurred within the few hours immediately preceding Te'Sijah's death.

Moving onward, the Court viewed favorably the credibility of Trevor Williams as a concerned family member, and received the testimony given by Santa Weeks as that of a concerned mother and grandmother. However, the first-hand knowledge possessed by these two witnesses terminates in the afternoon or evening of 10 March 2003, and therefore they were not able to testify directly regarding the last few (overnight) hours leading up to Te'Sijah's death, except to note a generalized lethargy and/or malaise that may have continued from the afternoon and evening. The only witnesses who possess direct knowledge of the events leading up to Te'Sijah's acute symptoms and loss of vital signs are Tanya Weeks and Jamal Lewis. In contrast, their testimony was neither clear nor cogent, which it would need to be in order to overcome the weight of contemporaneous medical records.

The Court notes that, apart from specific logical inconsistencies or other particular components of their testimony, the Court was generally unimpressed with the overall credibility in the testimony of Tanya Weeks and Jamal Lewis. Viewing each closely during testimony, the Court

had ample opportunity to review their presentation, comportment and demeanor, and that firsthand experience only served to diminish and taint their credibility with the Court. Jamal Lewis affected the Court with a disquieting disposition, bordering on baleful. Tanya Weeks was generally combative in her testimonial demeanor, and communicated a bellicose disposition.

As to specific elements in their testimony, Jamal Lewis was unclear in his testimony, to the point of being unresponsive on many questions. The testimony of Tanya Weeks was somewhat more decipherable, but it was not cogent, it was not internally consistent, and it was often not consistent with the testimony given by other witnesses. Tanya Weeks stated on direct examination that with the exception of three colds, Te'Sijah was never sick, that his only visits to a doctor were for routine check-ups and scheduled vaccinations. However, on cross-examination, Tanya Weeks admitted that she had taken Te'Sijah to the hospital for more serious illnesses, such as one involving white discharge from his ears, and another one involving a red, swollen penis, which took place just over two weeks before Te'Sijah's death. Regarding additional diagnoses rendered by the treating physicians at those visits, including a skin rash and an ear infection, Tanya Weeks disagreed contentiously. She disputed an issue raised by her mother concerning the potential for cockroaches to infest Te'Sijah's ears. Additionally, she also stated that on the morning of his vaccination, Te'Sijah appeared by all outward signs to be of regular, normal health; however, she also admitted that he had only recently experienced wheezing in the days immediately preceding vaccination.¹¹ Lastly, her testimony was shaky and uncertain regarding the CPR treatment that Te'Sijah received in the ambulance, which she observed first-hand. All of these inconsistencies and disagreements tend to undermine the testimony given by Tanya Weeks, and the Court does not find that such testimony is clear, cogent, or convincing enough to overcome other fact witness testimony or contemporaneous medical records.

As the credibility ascribed to Tanya Weeks and Jamal Lewis is afforded lesser weight, it remains for the Court to determine the changing condition of Te'Sijah over the course of that fateful night. At some point in the evening (roughly 9:30 PM), while Santa Weeks was gone, Tanya Weeks decided that Te'Sijah was healthy enough to spend the night at the home of Jamal Lewis. She departed thence, taking Te'Sijah with her. Both Tanya Weeks and Jamal Lewis testified that, not only did they not strike Te'Sijah, but also that he did not accidentally fall or otherwise receive blunt force trauma to his head and torso. As described by Dr. Landron, the autopsy findings portray a different scenario. If the Court is to believe Dr. Landron—and there has been no plausible reason given as to why it should not—Te'Sijah received blunt force trauma to his forehead, face, back, thorax, and abdomen.

Even if some of these traumata could be ascribed to the efforts of the emergency response personnel to revive Te'Sijah, most of them could not. The most that Petitioner could offer on this

¹¹ The Court notes that the acute symptom that Tanya Weeks asseverates was experienced by Te'Sijah, and which prompted her to seek emergency medical attention, was difficulty breathing. Rather than militating for a conclusion that the injury was vaccine-related, her own testimony leaves an open, unanswered question as to whether some pre-existing condition may have precipitated these symptoms. As noted above, it was incumbent upon Petitioner to address pre-existing conditions or other patent alternative *causa* as part of her burden of proof.

point is the testimony of Alson Lockhart and Kimba Turnbull (whom the Court does not question on the issue of veracity), both of whom stated that rib fractures are possible as an unintended consequence of cardio-pulmonary resuscitation (CPR), a result they have never encountered, but were taught in training was possible. In fairness, however, neither of these individuals is a licensed doctor qualified to opine on the likelihood or typical circumstances of such an occurrence. In contrast, Dr. Landron firmly reiterated on more than one occasion that these blunt force injuries were not consistent with CPR, and the Court can see no reason to gainsay such completely unrebutted medical opinion *sua sponte*.¹² Certainly, Petitioner has not convinced the Court of any reason to do so by her animadversions, nor from the paucity of factual proof offered. In contrast, Dr. Landron's lucid testimony is supported by all of the medical records filed in this case, such as the EMT Records (Pet. Ex. 15), the Emergency Room Records (Pet. Ex. 16 at 2), the Autopsy Report (Pet. Ex. 17), and the Death Certificate (Pet. Ex. 18). Therefore, faced with such a lopsided evidentiary record, the Court finds that, more likely than not, Te'Sijah suffered blunt force trauma in the hours between (approximately) 9:30 PM on 10 March 2003 and 5:00 AM on 11 March 2003.

Furthermore, on the issue of Dr. Landron's credibility, it is no small coincidence that he is both an accomplished doctor, with strong general experience in performing autopsy examinations on subjects of varied ages, as well as the doctor who actually examined Te'Sijah upon his death. As such, Dr. Landron had literally firsthand, tactile knowledge of Te'Sijah's several injuries. His testimony communicated educated, yet earnest conviction that Te'Sijah's death was the sequela of blunt force trauma. In light of this testimony, and the cavalcade of evidentiary proofs and exhibits proffered in support, the Court was convinced that this was true, not merely to a preponderance, but even beyond any reasonable doubt. Against this stout bulwark of evidence Petitioner has launched no credible attack: Petitioner has never attempted to explain or contradict the clear evidence presented in Dr. Landron's testimony and the numerous medical records filed in this case, despite numerous opportunities given expressly for that purpose.

The many injuries noted in the autopsy and other medical records presented are not consistent with a finding of anaphylactic shock, as that condition cannot explain the bruising of the subcutaneous tissue in the back, the external bump on the forehead, or the severe damage done to the mesentery and liver, and seemed solely to corroborate a finding of blunt force trauma. Although the 911 call was allegedly placed due to Te'Sijah's trouble breathing, postmortem analysis did not disclose "airway obstruction caused by laryngeal edema or bronchospasm [potentially] associated with cardiovascular collapse." See "Qualifications and Aids to Interpretation" ("QAI"), 42 CFR § 100.3(b)(1).

Te'Sijah's fatal injuries are likewise irreconcilable by any explanation of encephalopathy. The symptoms observed by Te'Sijah's family members fall short of demonstrating that he suffered

¹² The Federal Circuit has consistently maintained that "medical records and medical opinion testimony are favored in vaccine cases, as treating physicians are likely to be in the best position to determine whether 'a logical sequence of cause and effect show[s] that the vaccination was the reason for the injury.'" Cappizano v. Secretary of HHS, 440 F.3d 1317, 1326 (Fed Cir. 2006) (quoting Althen v. Secretary of HHS, 418 F.3d 1274, 1280 (Fed. Cir. 2005)).

an encephalopathy. Far from rising to the crisis of an acute event, the worst that could be said of Te'Sijah's post-vaccinal state was, to paraphrase, that he just wasn't his typical, happy-go-lucky, playful self. Te'Sijah had a slight to moderate fever and an overall malaise, but nothing in this record manifests a "significantly decreased level of consciousness," as that term of art has been interpreted in the Vaccine Program. In her own posthearing brief (Pet. Br. at 9), Petitioner herself excerpts the QAI section pertaining to encephalopathy, which expressly states that "sleepiness, irritability (fussiness), high-pitched and unusual screaming, [and] persistent inconsolable crying," whether appearing "alone, or in combination, do not demonstrate an acute encephalopathy." 42 CFR § 100.3(b)(2)(i)(E).

Furthermore, even if Petitioner, *arguendo*, could prove that Te'Sijah had suffered from an encephalopathy, an outcome belied even by the discrepant witness accounts offered by Petitioner, such would be neither a substantial cause nor the 'but-for' cause of Te'Sijah's death. An encephalopathy could not have caused the violent injuries to Te'Sijah's external and internal tissues, suffered throughout Te'Sijah's body, unexplained by Petitioner throughout this proceeding. Those injuries are attributed by the medical records as the cause of Te'Sijah's death, and the Court accepts the explanation given by those records, as they have not been discredited by Petitioner through the presentation of clear and cogent contradiction. These blunt force traumata are the cause of Te'Sijah's death, and the administered vaccines did not significantly aggravate or otherwise affect Te'Sijah's injuries.

It therefore appears to this Court that Te'Sijah was not injured by, nor died as a result of, a the vaccine he received on 10 March 2003. Based upon the testimony and exhibits presented at the hearing, the Court finds, to a preponderance of the evidence, that Te'Sijah appears to have been injured by blunt force trauma, and to have died as a result of those injuries, or their sequelae.

II. CONCLUSIONS OF LAW

As aforementioned, the Court is authorized to award compensation for claims where the medical records or medical opinion have demonstrated by preponderant evidence that either a cognizable Table Injury occurred within the prescribed period or that an injury was actually caused by the vaccination in question. § 13(a)(1). The Vaccine Injury Table lists specific injuries and conditions, which, if found to occur within the period prescribed therein, create a rebuttable presumption that the vaccine(s) received caused the injury or condition. §14(a).

The Petitioner has alternatively claimed to have suffered a "Table" injury, and, according to §13(a)(1)(A), bears the burden of proving such by a preponderance of the evidence, as derived from the above-referenced evidentiary sources. As noted above, Petitioner did not present factual evidence to demonstrate a Table injury within the Table period, which would have created a presumption of causation in Petitioner's favor. While the Petitioner is not entitled to a presumption of causation afforded by the Vaccine Injury Table, this petition would yet prevail if it could be demonstrated to a preponderant standard of evidence that the vaccination in question, more likely

than not, actually caused the injury that led to Te'Sijah's death.¹³ See § 11(c)(1)(C)(ii)(I) & (II); Grant v. Secretary of HHS, 956 F.2d 1144 (Fed. Cir. 1992); Strother v. Secretary of HHS, 21 Cl. Ct. 365, 369-70 (1990), aff'd, 950 F.2d 731 (Fed. Cir. 1991). The Federal Circuit has indicated that, to prevail, every petitioner must:

show a medical theory causally connecting the vaccination and the injury. Causation in fact requires proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury. A reputable medical or scientific explanation must support this logical sequence of cause and effect.

Grant, 956 F.2d at 1148 (citations omitted); see also Strother, 21 Cl. Ct. at 370.

Furthermore, the Federal Circuit recently articulated an alternative three-part causation-in-fact analysis as follows:

[Petitioner's] burden is to show by preponderant evidence that the vaccination brought about [the] injury by providing: (1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury.

Althen v. Secretary of HHS, 418 F.3d 1274, 1278 (Fed. Cir. 2005).

Under this analysis, while Petitioner is not required to propose or prove definitively that a specific biological mechanism can and did cause the injury leading to Te'Sijah's death, she must still proffer a plausible medical theory that causally connects the vaccine with the injury alleged. See Knudsen v. Secretary of HHS, 35 F.3d 543, 549 (1994).

Of importance in this case, it is part of Petitioner's burden in proving actual causation to "prove by preponderant evidence both that [the] vaccinations were a substantial factor in causing the illness, disability, injury or condition and that the harm would not have occurred in the absence of the vaccination. Pafford v. Secretary of HHS, 451 F.3d 1352, 1355 (2006) (emphasis added), citing Shyface v. Secretary of HHS, 165 F.3d 1344, 1352 (Fed. Cir.1999). This threshold is the litmus test of the cause-in-fact (a.k.a. but-for causation) rule: that petitioner would not have sustained the damages complained of, *but for* the effect of the vaccine. See generally Shyface, *supra*.

¹³ Of course it is a *sine qua non* that the Petitioners must also prove that the death was sequela to a vaccine-related injury. See, e.g., Hossack v. Secretary of HHS, 32 Fed. Cl. 769, 776 (1995).

Here, Petitioner has not offered a theory of causation as such, but this is certainly not due to lack of opportunity to present a medical expert opinion.¹⁴ However, this lapse does not encumber the Court's ability to render a decision here.¹⁵ As noted above, the Court finds as a matter of fact that Te'Sijah died as a direct result of blunt force trauma(ta) which he suffered over much of his small body. There is no way for a vaccine to cause that sort of injury, and Petitioner has not advanced a single plausible method to controvert this conclusion. Based on this finding, there is no colorable theory which could link the vaccine to the injuries suffered so as to satisfy the legal standards referenced above. Most telling of all, there is positively no way that Petitioner could maintain that "the harm would not have occurred in the absence of the vaccination." See Pafford, supra.

Returning to the legal standard pertaining to actual causation, as stated by the Federal Circuit in Grant and then reiterated in Althen, a petitioner must "show a medical theory causally connecting the vaccination and the injury. Causation in fact requires proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury." Grant, 956 F.2d at 1148; Althen at 1278. Here the Petitioners have not demonstrated "a medical theory causally connecting the vaccination and the injury," nor have they set forth "a logical sequence of cause and effect showing that the vaccination was the reason for the injury." Althen at 1278. In short, Petitioner has not met her burden of proof.¹⁶ Petitioner has presented none of the evidence required by the Act in the form of corroborative medical records, and failed to rebut the clear facts set forth in the medical records that contradicted her contentions.

¹⁴ See the several written Orders of this Court referenced above, especially those dated 30 August 2006 and 5 October 2006.

¹⁵ The Undersigned has often bifurcated the issue of actual causation into the "can it" prong and the "did it" prong: (1) whether there is a scientifically plausible theory which explains that such injury could follow directly from vaccination; and (2) whether that theory's process was at work in the instant case, based on the factual evidentiary record extant. Finally, then, the Court considers the two factual concerns of legal causation-in-fact analysis as it pertains to the specific procedural posture of the instant case, which follows an Onset hearing: *can* the vaccine at issue cause the injuries that the Court finds were in fact suffered, and might the petitioner be able to prove a colorable theory that the vaccine *did*, in fact, cause the injury suffered?

¹⁶ See Raley v. Secretary of HHS, No. 91-0732, 1998 WL 681467 (Fed. Cl. Spec. Mstr. Aug. 31, 1998) (stating "[t]he requirement that [a] petitioner[']s claims must be supported either by medical records or medical expert opinion simply addresses the fact that the special masters are not medical doctors, and, therefore, cannot make medical conclusions or opinions based upon facts alone"); Bernard v. Secretary of HHS, No. 91-1301, 1992 WL 101097 (Fed. Cl. Spec. Mstr. Apr. 24, 1992) ("The medical significance of the facts testified to by the lay witnesses must be interpreted by a medical doctor, who, in turn, expresses the opinion either that a compensable Table injury has occurred or that the vaccine in question actually caused the injury complained of. If such an opinion appears in the medical records, then it is unnecessary to call a retained expert witness in order to establish a prima facie case; if, on the other hand, the medical records do not provide such substantiation, then a petitioner must retain a medical doctor who, upon review of the entire record, concludes that it is more likely than not that a compensable injury has occurred.").

Therefore, in light of the foregoing, no alternative remains for this Court but to **DENY** this petition. In the absence of the filing of a motion for review, filed pursuant to Vaccine Rule 23 within 30 days of this date, the clerk shall forthwith enter judgment in accordance herewith.

IT IS SO ORDERED.

Richard B. Abell
Special Master