

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

(E-Filed: August 7, 2007)¹

No. 04-112V

_____)	
VICTORIA ANN SHEPPARD, the Estate of,)	
by and through, TARRELL SHEPPARD,)	
Personal Representative,)	
)	
Petitioner,)	
)	
v.)	Factual findings;
)	Contemporaneous documentary
)	evidence silent on detail
)	addressed in oral testimony
SECRETARY OF THE DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
_____)	

Anne C. Toale, Sarasota, FL, for petitioner.

Alexis B. Babcock, with whom were Peter D. Keisler, Assistant Attorney General, Timothy P. Garren, Director, Mark W. Rogers, Deputy Director, and Gabrielle M. Fielding, Assistant Director, United States Department of Justice, Torts Branch, Civil Division, Washington, DC, for respondent.

CORRECTED RULING ON FACTUAL FINDINGS²

¹The Ruling issued on July 31, 2007 was struck by an Order dated August 7, 2007 to permit the reissuance of the Ruling correcting the error in the factual finding set forth in Section III, paragraph eight.

²Vaccine Rule 18(b) states that all of the decisions of the special masters will be made available to the public unless an issued decision contains trade secrets or commercial or financial information that is privileged or confidential, or the decision contains medical or similar information the disclosure of which clearly would constitute an unwarranted invasion of privacy. When a special master files a decision or substantive order with the Clerk of the Court, each

On January 28, 2004, petitioners, Leslie Richards and Tarrell Sheppard, as co-personal representatives of the estate of Victoria Ann Sheppard, filed a petition pursuant to the National Vaccine Injury Compensation Program³ (the Act or the Program). Petitioners allege that their minor daughter, Victoria, “received DTAP (Diphtheria, Tetanus, Acellular Pertussis), Polio, Hepatitis B, Haemophilus influenza type B (HIB) and Pneumococcal vaccines on August 5, 2003.” Petition (Pet.) at ¶ 1. The petition states that “Victoria died within 12 to 15 hours of administration of the [received] vaccines” and that “Victoria’s death was ‘caused-in-fact’ by the [received] vaccines.” Id. ¶¶ 2-3.

Among the documents that were filed in support of the petition were: (1) Victoria’s birth certificate, see Petitioners’ Exhibit (Ps’ Ex.) 1; (2) prenatal records, see Ps’ Ex. 2; (3) birth records, see Ps’ Ex. 3; (4) pediatric records, see Ps’ Ex. 4; (5) vaccination records; see Ps’ Ex. 5; (6) the affidavit of Ms. Richards, Victoria’s mother, see Ps’ Ex. 6; (7) the affidavit of Mr. Sheppard, Victoria’s father, see Ps’ Ex. 7; (8) records of the emergency services response to and the police investigation of Victoria’s death, see Ps’ Ex. 8; (9) records from the Office of the Medical Examiner and the autopsy report, see Ps’ Ex. 9; (10) Victoria’s death certificate, see Ps’ Ex 10; (11) the order appointing Ms. Richards and Mr. Sheppard as co-personal representatives of Victoria’s estate and the corresponding letters of administration, see Ps’ Ex. 11; and (12) additional records from the Office of the Medical Examiner, see Ps’ Ex. 12.

After filing most of the supporting documentation on petitioners’ behalf, petitioners’ initial counsel withdrew as counsel of record upon his retirement from the practice of law. See January 25, 2005 Order; March 14, 2005 Motion to Withdraw; March 22, 2005 Order. After the withdrawal of petitioners’ counsel, petitioners failed to contact the court as directed by Order dated March 29, 2005, and a show cause order issued based on petitioners’ failure to continue the prosecution of this action. See Order to Show Cause, August 12, 2005. In response to the show cause order, Mr. Sheppard indicated his desire to move forward with his claim. See Response to Show Cause Order, September 6, 2005.

party has 14 days within which to identify and move for the redaction of privileged or confidential information before the document’s public disclosure.

³ The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. § 300aa-10-§ 300aa-34 (West 1991 & Supp. 2002) (Vaccine Act or the Act). All USC citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

The case was reassigned to the undersigned, and several attempts were made to contact Ms. Richards by certified mail. Ms. Richards, however, failed to respond to the issued show cause order and to the certified mailings from the court regarding the Show Cause Order. By Order dated March 23, 2006, the undersigned dismissed Ms. Richards' action for failure to prosecute and amended the case caption to reflect Mr. Sheppard's current status as sole petitioner in this case. See Order of March 23, 2006. Shortly thereafter, with the consent of petitioner and at the request of the Chief Special Master, petitioner's counsel, Ms. Toale, agreed to represent Mr. Sheppard in this proceeding. See Order of April 19, 2006.

The parties subsequently filed expert opinions in this case. The opinions of the experts were based on the experts' respective interpretations of the facts set forth in the record documents. To address the questions raised by the record documents and to clarify the factual record, a fact hearing was held in Panama City, Florida in February 2007. The following ruling details the factual findings in this case.

II. Discussion

A. The Documentary Record

Victoria was born on June 15, 2003 at Fort Walton Beach Medical Center in Fort Walton Beach, Florida. Ps' Ex. 1. Victoria's birth records indicate that she was the product of an uneventful pregnancy. Ps' Ex. 2 at 24. She was healthy at birth, Ps' Ex. 3 at 4, and prior to August 5, 2003, the date of the vaccinations at issue, she was described as a normally developing child, Ps' Ex. 4 at 13, 19, 20, 21.

On August 5, 2003 at approximately 3:00 p.m., Victoria received her DTaP, Hep B, HIB, IPV, and pneumococcal vaccines at the Okaloosa County Health Department in Fort Walton Beach, Florida. Ps' Ex. 5 at 2. Several hours after the vaccinations, Victoria became cranky and began crying. Ps' Ex. 6 at ¶ 15; Ps' Ex. 7 at ¶ 168. Neither holding nor feeding Victoria appeared to console her. Ps' Ex. 6 at ¶ 8; Ps' Ex. 7 at ¶ 8. An administered dose of children's Tylenol did not appear to assist her. Ps' Ex. 6 at ¶ 9; Ps' Ex. 7 at ¶ 9.

Victoria's parents recall "calm[ing] her a bit," putting her to bed at approximately 7:45 p.m., and checking on her about fifteen minutes later as she rested. Ps' Ex. 6 at ¶¶ 10-11; Ps' Ex. 7 at ¶ 10-11. Victoria did not cry during the night. Ps' Ex. 6 at ¶ 13; Ps' Ex. 7 at ¶ 13.

At approximately 5:30 a.m. the next day, August 6, 2003, Victoria's parents found her "pale," "cool," and not breathing. Ps' Ex. 6 at ¶ 15; Ps' Ex. 7 at ¶ 16. Ms. Richards

carried Victoria from Victoria's room to the living room, Ps' Ex. 6 at ¶ 16, and called "911" for emergency assistance, id. at 14⁴; Ps' Ex. 7 at 17.

The Okaloosa County Emergency Medical Services report states, in pertinent part:

Responded to a 2 mos old female cardiac arrest. Arrived on scene to find the mother holding the pt. Pt was found sleeping in her crib by . . . mother this AM[,] moved by mother to living room where she was found by EMS. Pt[']s only h[istory]: 2 mos immunizations yesterday (8/5/03) and is currently being t[reated] for thrush. . . .

Pt. is unconscious, ap[ne]ic, pulseless, cyanotic, and in rigors. . . . No signs of current or old trauma noted.

P's Ex. 8 at 2 (first unnumbered page).

The Fort Walton Police Department report dated August 6, 2003, described the following findings during the investigation of Victoria's death:

On the morning of 08/06/03 Leslie Ann Richard[s] (mother) contacted EMS in reference to her 7 week old daughter. Richard[s] stated the child was cold to the touch and not breathing. Both EMS and the Fort Walton Beach Fire Department were dispatched to the home.

Upon arrival at the home . . . contact was made with Richard[s] and her boyfriend Tarrell Sheppard (father). Richard[s] was sitting on the floor cradling the deceased child in her arms. The officer felt the child's body which was cold to the touch. The child was wearing a one piece jumper style suit. The child's eyes were closed, both hands were clinched closed. The house was very hot during the investigation Richard[s] showed this officer the bab[y's] room. Richard[s] stated the child was sleeping face down in her crib. A large wet spot was observed on the bottom right hand corner of the crib. Richard[s] stated, "All of my children have slept on their stomachs." Richard[s] said she put the child down at 2000 [8:00 p.m.]. The child had been fe[ed] at 1930 [7:30 p.m.]. Richard[s] stated, "I was wondering why she had slept through the night." Richard[s] went to check on the child around 0526. Richard[s] noticed the child was cold to the touch and not breathing.

⁴ This paragraph is actually the seventeenth paragraph in Ms. Richards' affidavit, but has been mistakenly numbered fourteen. See Ps' Ex. 6. It is the second paragraph fourteen in the affidavit. Id.

After finding the child in this condition Richard[s] picked the child up and took her to the living room. After placing the child on the floor Richard[s] called 911.

Ps' Ex. 8 at 10. A supplemental investigative report prepared by Sgt. Curtiss Pond of the Fort Walton Police Department indicated that the preliminary findings of the investigation "were leaning towards the possibility of a SIDS death." Id. at 11.

Officer Pond's supplemental report included the following description of events:

The mother (Leslie Richard[s]) and father (T[arrell Sheppard) of the deceased infant (Victor[ia]) stated that the deceased had been put down to sleep around 1930-2000 hours [7:30-8:00 p.m.]. The mother and the father retired to their bedroom shortly afterwards and the father had fallen asleep, while the mother watched television until approximately 2200 hours [10:00 p.m.]. The mother and father awoke the next morning around 0530 hours [5:30 a.m.] and upon checking on the deceased, located her lying on her stomach, within a corner of the crib, lifeless. The mother began screaming which alerted the father (bathroom) to the situation. The mother then carried the deceased into the living room and waited for emergency personnel, who had been alerted via telephone.

Ps' Ex. 8 at 11-12. Officer Pond also included in his report portions of a conversation that he overheard between Ms. Richards and Ms. Debra Blackwell, an investigator from the Medical Examiner's Office.⁵ Id. at 13. Officer Pond wrote:

Leslie [Richard(s)] responded [to Ms. Blackwell's questions stating] that the deceased was able to wiggle (move) and roll-over. Leslie described the position of the deceased as lying face down in a corner of the crib. Leslie was questioned on medication use on the deceased and noted that the deceased had received a series of immunizations at approximately 1500 hours [3:00 p.m.] the day before, which was administered at the Okaloosa Health Department. Leslie claimed that the deceased was "cranky" after the injections.

Id. (emphasis added). Officer Pond noted that Ms. Richards accompanied Ms. Blackwell, the investigator from the Medical Examiner's Office, back into the home "to place a toy

⁵ Ms. Blackwell is also referenced as Ms. Perkins in the documentary record. Ps' Ex. 8 at 4.

baby in the crib to further describe the locat[ion] and position of the deceased at the time of discovery. Id.

In Ms. Blackwell's narrative of the scene and reported circumstances of Victoria's death, Ms. Blackwell writes:

Upon arrival on scene it was noted that this is a single story, one-family residen[ce] . . . The residence temperature was 80-95 degrees. The decedent was found on the living room [floor] where she had been placed by EMS to administer CPR. She is dressed in an L[ong]S[leeve] . . . one piece sleeper with feet. Upon initial examination of the decedent, it was noted that rigor was present. Lividity is NFPD. Inappropriate for position in which mother states she was found. . . . There is a scratch (bruise) across the bridge of decedent's nose. There appear to be mongolian spots⁶ on her right buttock and lower back. . . . The last contact with the decedent was after she was fed approximately 7:30 PM; 8/05/03 and put to bed (in a prone position) approximately 8:00 PM. The decedent did not wake for the usual midnight feeding. The decedent received several immunizations shots on 08/05/03. Reportedly, the mother states that she found the baby in a prone position in the corner of the crib. The decedent was "rolling over and scooting."

P's Ex. 12 at 15. Ms. Blackwell further writes that "[p]hotographs were taken at the scene." Id. In a Statement of Unavailability filed on June 22, 2007, however, petitioner reports that the "Ft. Walton Beach Police Department has informed Respondent's counsel that [it] does not have photographs of the scene." P's Statement of Unavailability dated 6/22/07.

Officer Pond's supplemental report indicates that Ms. Blackwell privately expressed concern to him regarding the "post mortem l[i]vi[di]ty"⁷ on the back and buttocks of the deceased, which according to Ms. Blackwell, indicated that the deceased was lying on her back rather than her stomach. P's Ex. 8 at 14. Additionally, Ms. Blackwell expressed

⁶ Mongolian spots are "a congenital melanocytic nevus manifested by a flat, smooth, bluish gray to gray-brown macular patch(es), most often located on the central lumbosacral area, occurring especially in dark-skinned people including those of East Asian ancestry, and usually disappearing before 5 years of age." Dorland's Illustrated Medical Dictionary, 1745.

⁷ Postmortem lividity is "livor mortis", "a discoloration appearing on dependent parts of the body after death, as a result of cessation of circulation, stagnation of blood, and settling of blood by gravity; called also postmortem lividity." Dorland's at 1060.

concern, which Officer Pond shared, regarding Ms. Richards' statement that the deceased could move and rollover. Id. Officer Pond noted that the second concern "was dispelled" after he learned from personnel with the Department of Family and Children that documented cases exist of infants the same age as the decedent who are able "to wiggle/shimmy which result[s] in actual movement in a direction and rollovers." Id.

Notwithstanding her expressed concerns, Ms. Blackwell telephoned Officer Pond on August 7, 2003 and left a message indicating that the performed autopsy had not raised any concerns, the decedent's body was unremarkable, and pending a negative toxicology report, the cause of death was likely to "be ruled as a Sudden Infant Death Syndrome or a Re-Breathing Death." Id. The autopsy report from the Office of the Medical Examiner listed "Sudden Infant Death Syndrome" as the cause of death. Ps' Ex. 9 at 2. Victoria's death certificate listed "Sudden Infant Death Syndrome" as the immediate cause of death. Ps' Ex. 10.

B. Fact Testimony

Victoria's parents, Mr. Tarrell Sheppard and Ms. Leslie Richards, testified during the fact hearing. Mr. Sheppard testified first, and during his testimony, Ms. Richards remained sequestered outside of the courtroom.

1. Mr. Sheppard

Mr. Sheppard testified that his daughter, Victoria, died at six weeks of age and that prior to her death, she "was a growing little baby." Transcript of February 2007 Fact Hearing (Tr.) at 6. He stated that other than thrush and reflux, Victoria had no other health problems. Id.

Mr. Sheppard accompanied Victoria and her mother, Ms. Richards, to Victoria's two-month well-baby check-up. Id. at 6-7. On the date of her two-month well-baby check-up, Victoria received a complement of childhood immunizations. Id. at 7.

On the advice of the nurse who administered the vaccinations, Victoria's parents stopped to purchase infant Tylenol on the drive home from the county health department. Id. at 8. Mr. Sheppard testified that after leaving the health department at approximately 3:30 in the afternoon and during the drive home, Victoria became cranky. Id. Victoria remained irritable and continued crying for several hours. Id. Mr. Sheppard described the crying as high-pitched wailing, similar to the type of crying that Victoria began after she received the vaccinations at the health department. See id. at 29. A bath did not soothe her, and she drank only a few ounces of milk. Id. at 9-10. Mr. Sheppard and Ms. Richards

took turns walking with Victoria and trying to console her. Id. at 10. Although her parents were concerned about her, neither parent called anyone regarding Victoria's crying and fussiness. Id. at 29-30. About "sevenish," Victoria seemed to calm down and appeared exhausted. Id. Mr. Sheppard put Victoria to bed at around 8:00 p.m. or 8:30 p.m., her normal bed time. Id. at 12.

Mr. Sheppard explained that Victoria routinely was placed on her stomach in the middle of her crib with her head turned to the left and resting on a pillow. Id. Her hands rested "up about head." Id. Victoria's parents placed her on her stomach to sleep because Victoria had reflux and her parents were "scared" that she would choke if she were placed on her back. Id. at 12-13. Mr. Sheppard favored putting Victoria to sleep with her head on a twin-sized pillow with a pillowcase, the length of which pillow was positioned across the crib from side to side, to allow any regurgitation "to possibly roll down the side of the pillow." Id. at 55-57.

Mr. Sheppard explained that he checked to make certain that Victoria was asleep before retiring to the master bedroom across the hall from, and with a view line to, Victoria's room. Id. at 13-14. Mr. Sheppard testified that Ms. Richards checked on Victoria again around 9:30 p.m. and removed the pillow on which Victoria had been placed. Id. at 14. He stated that she put the pillow at the back end of the baby's bed. Id.

Mr. Sheppard had no further contact with Victoria until Ms. Richards awakened him for work at 5:20 a.m., the next morning. Id. at 15. Ms. Richards urged Mr. Sheppard to check on Victoria because she had not awakened during the night for a feeding. Id. at 16. Mr. Sheppard explained that Victoria ordinarily awakened during the night for a feeding. Id. at 15-16.

Mr. Sheppard testified that when he walked into Victoria's room to check on her at 5:20 a.m., he saw her "over in the corner," "on her stomach," and he saw "the back of her head and it didn't look right." Id. at 16-17. He explained that Victoria's forehead was resting against one of the slats on the crib. Id. at 17. Using his index finger to demonstrate more specifically the position of Victoria's head against the crib slat, Mr. Sheppard touched the tip of his index finger to his forehead above his nose and between his eyes. Id. at 18. He stated that the bridge of Victoria's nose rested along the crib slats and Victoria's chin rested on the mattress. Id. Neither Victoria's mouth or nose was covered by a crib slat or by the crib bedding. Id. at 20. There was no bumper around the crib or stuffed animals in the crib. Id. at 21. At the bottom of the crib were the pillow on which Victoria had been placed when Mr. Sheppard put her to bed and the little sheet that Victoria's parents normally put on top of her. Id. Mr. Sheppard testified that seeing Victoria in that position "scared" him. Id. at 22. It was Mr. Sheppard's habit to go into Victoria's room every

morning, and he had never found Victoria in a different place in the crib. Id. at 56-57. Ms. Richards removed Victoria from the crib and moved her to the living room where Mr. Sheppard tried to assist in calling “911”for help. Id. at 22.

When telephoning for help, Mr. Sheppard noted that Victoria was cold and that her hands were clenched. Id. at 24-25. Victoria was lying on her back on the living room carpet while her parents called for help. Id. at 25. Mr. Sheppard estimated that she remained in that position for about three hours before she was taken from the home. Id. at 26.

Mr. Sheppard indicated that at the time of the hearing, his memory was “not better” about the circumstances surrounding Victoria’s death than it was when he gave his police statements within the days following Victoria’s death. See id. at 39, 65. Mr. Sheppard stated that he had talked to Ms. Richards frequently in the weeks prior to the hearing regarding the hearing and the circumstances surrounding Victoria’s death. Id. at 44-45.

The undersigned found Mr. Sheppard to be a credible witness.

2. Ms. Richards

Nearly a month before Victoria was born, Ms. Richards experienced premature labor and required medication to stop the early labor. Id. at 97-98. Victoria was born approximately two weeks early on June 15, 2003. Id. at 98. Ms. Richards smoked between one half pack and one pack of cigarettes daily during her pregnancy with Victoria and after giving birth to Victoria. Id.

Ms. Richards testified that Victoria was nearly two months old when she died, and other than “a little bit of thrush” and “a tendency to spit up when she ate,” Victoria’s health was “perfect.” Id. at 76. On August 5, 2003, the day of the immunizations in question, Victoria’s “health was fine.” Id. at 76, 78.

Ms. Richards explained that Victoria received her immunizations after her two month appointment at “the WIC office.”⁸ Id. Her daughter cried when she received the shots, and the personnel at the immunization clinic informed Ms. Richards and Mr. Sheppard to get Tylenol because Victoria might run a fever. Id. at 79-80. Ms. Richards

⁸ Commonly referenced as the WIC Program, the Special Supplemental Nutrition Program for Women, Infants and Children is intended to “safeguard the health” of low income women, infants, and children under the age of 5 years old by providing nutritious foods and referrals to health care. See <http://www.fns.usda.gov/wic/aboutwic>.

described Victoria's cry in the clinic, after receiving her vaccinations, as a "constant" cry. Id. at 99.

Ms. Richards recalled that after leaving the clinic, she went to the Dollar Store to get Tylenol, went to pick up her five year old daughter, Ellie Mae from day care, and went home. Id. at 80. Victoria slept for a period while riding in the car. Id. at 99, 120.

At home, Victoria cried. Id. Ms. Richards testified that Victoria "couldn't get comfortable, . . . was moving around[,] . . . and was very uneasy." Id. at 81. Notwithstanding her "constant" cry, Victoria took two feedings of two ounces of formula. Id. at 81-82. She continued to cry during her evening bath. Id. at 82. Although Ms. Richards "was a little concerned," she did not telephone the doctor's office. Id. at 101.

Ms. Richards dressed Victoria for bed, and Mr. Sheppard put her down for the evening "[a]lmost right after" her bath. Id. at 83. After Mr. Sheppard put Victoria down for the night, Ms. Richards went into Victoria's room and removed the pillow that was under Victoria's head. Id. at 85. Ms. Richards testified that Victoria was lying on her stomach with her face to side. Id. A thin blanket covered Victoria's back. Id. at 86. Victoria also had a "spit-up" blanket between her chest and her mouth. Id. at 109. Ms. Richards explained that Victoria was lying at the foot of the crib, the bed position that her parents favored because that placement permitted Victoria's parents to see her from their room. Id. at 85.

Contrary to Victoria's usual routine, Victoria did not awaken that night for a feeding. Id. at 87. When Victoria's parents awakened early the next morning, Mr. Sheppard first and then Ms. Richards went into Victoria's room to check on her. Id. at 88. Ms. Richards found Victoria "in the corner of the crib, [with] her hands out in front of her." Id. at 89. Victoria "had moved to the more right of herself . . . at the foot of the crib" where she had been placed when Mr. Sheppard put her to bed. Id. at 90. Ms. Richards testified that she and Mr. Sheppard routinely placed Victoria at the foot of the crib when putting her down for bed because they could see Victoria in that position from their room. Id. Ms. Richards explained that there were no bumpers in the crib, simply the crib mattress, a baby sheet and a baby blanket. Id.

Ms. Richards described the position in which she found Victoria in the crib. "Her head would have been at probably the first post [vertical crib slat] from the foot of the bed and she was in a diagonal position." Id. at 91. Her arms were resting on her sides; "her right hand[] was some inches down from the right corner" of the crib." Id. Her forehead was touching the crib slat, which was "kind of holding her head up," and "the rest of her face was . . . in between the mattress and the post." Id. at 92. Ms. Richards further

explained that “[a]lmost [from] the top of [Victoria’s] forehead” to the “[b]ridge of her nose” was touching the crib slat, and the bottom of her chin was resting on the crib mattress. Id. at 93-94. Neither Victoria’s mouth or nose was covered by the mattress or the crib slat. Id. at 95.

When Ms. Richards found Victoria in her crib, she “turned her over and got really scared . . . I couldn’t believe what I was seeing. It took me a couple of seconds to come to and I picked her up and we called 911. . . . [Mr. Sheppard was] [r]unning around everywhere. . . . [W]e were just like in shock.” Id. Told by the 911 personnel to put Victoria on a flat surface, Ms. Richards placed Victoria on her back on the living room floor, where Victoria remained for “hours” while “the ambulance people” checked Victoria’s vital signs and questioned Ms. Richards. Id. at 95-96.

Ms. Richards recalled that the day after Victoria’s death, she went to talk to Keith Krist, M.D., a pediatrician, about SIDS, vaccines and Victoria’s death. Id. at 105-06; see Petitioner’s Notice of Filing attached to Petition, filed January 28, 2004. Approximately two weeks later, Ms. Richards and Mr. Sheppard completed statements for the Fort Walton Police Department. Id. at 107.

Ms. Richards remained sequestered while Mr. Sheppard testified at the fact hearing. Ms. Richards testified, however, that prior to the fact hearing, she had spoken with Mr. Sheppard as recently as two days before the hearing. Id. at 107-08.

The undersigned found Ms. Richards to be a credible witness.

C. Contested Fact

The parties’ disagree in their submissions of proposed factual findings on one critical factual detail, specifically, the position of Victoria’s head when her parents found her lifeless in her crib on the morning of August 6, 2003. Citing the testimony of Mr. Sheppard and Ms. Richards during the fact hearing, petitioner asserts:

22. When her parents went into her room, they found Victoria lying on her stomach, with her head in the corner of the crib (T 17-18; 34-35; 90). Her head was tilted upwards so that her forehead was pressed against one of the crib slats, from the top of her forehead down to the bridge of her nose. (T 18-20; 34-35; 92-95). Her nose was away from the crib slat, and the bottom of her chin was touching the crib mattress (T 19-20; 95).

23. Victoria’s nose and mouth were not covered by the crib slat or the mattress, nor

were they covered by bedding (T 21; 96). There was nothing in the crib between Victoria's head and the crib slats (T 23; 95-96). Victoria's arms were stretched upward towards her head, and her hands were approximately 1-1 ½ inches away from her head (T 117-18). Her hands were not in front of her mouth or nose (T 119).

24. The bedding present in the crib at this time consisted of the fitted sheet, the previously described pillow, and a top sheet/blanket, both of which were at the opposite end of the crib from Victoria (T 21-22). There were no stuffed animals or toys in the crib (T 22-23).

25. Prior to that morning, Victoria had always been found in the position that she had been placed to sleep (T 58). However, sometimes Victoria turned her head from side to side during the night (T 116-17).

Petitioner's Proposed Factual Findings, ¶¶ 22-25 (citing Transcript of February 2007 Fact Hearing). Respondent, however, cites the documentary evidence in this case that is more contemporaneous to Victoria's death. Respondent asserts that "Ms. Richards went to Victoria's room, and saw that Victoria was lying face down in the corner of the crib." Respondent's Proposed Factual Findings, ¶ 12 (internal citations omitted).

Petitioner argues that respondent's use of the term "face down," not only reflects that Victoria was sleeping on her stomach in the prone position, but also "suggests" that her face was "actually oriented downwards, facing the crib mattress." Objection to Respondent's Proposed Factual Findings at 1-2. Pointing to particular record cites in which the phrases "face down," "prone position," and "lying on her stomach" are used interchangeably, petitioner asserts that the evidence in this case "certainly supports a finding that Victoria was discovered in a prone or stomach-sleeping position, but not a finding that she was 'face down.'" Id. at 2 (emphasis omitted).

Responding to petitioner's objection, respondent asserts that petitioner's distinction between the descriptive phrase "lying on her stomach" or the term "prone" and the descriptive phrase "lying face down" is "without merit." Response to Petitioner's Objection to Respondent's Proposed Findings of Fact at 2. Respondent observes that the term "prone" is defined in two medical dictionaries to mean "lying face downward." Id. (quoting Stedman's Medical Dictionary 1575 (28th ed. 2006) and Dorland's Medical Dictionary 1468 (29th ed. 2000)).

Respondent further argues that petitioner has alleged "for the first time at hearing[] that Victoria's head was pressed against one of the crib slats." Response to Petitioner's Objection to Respondent's Proposed Findings of Fact at 2. Noting that "this alleged fact is

not documented anywhere in the contemporaneous medical records,” respondent urges the court to “give greater weight contemporaneous records than conflicting statements by witnesses at hearing, because ‘testimony in conflict with contemporaneous documentary evidence deserves little weight.’” Id. (quoting Curcuras v. Secretary of Health and Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993) and citing United States v. United States Gypsum Co., 333 U.S. 394, 396 (1947) and Murphy v. Secretary of Health and Human Servs., 23 Cl. Ct. 726, 733 (1991)).

In response to respondent’s urging that the court give greater weight to contemporaneous records than to the “purportedly conflicting statements” made by the decedent’s parents at the fact hearing, petitioner argues “that contemporaneous records of law enforcement officials investigating a suspicious death do not possess the same indicia of reliability as contemporaneous medical records.” [Petitioner’s] Memorandum of Law on Reliability of Contemporaneous Records at 4. Petitioner reasons that among the hearsay exceptions enumerated in Federal Rule of Evidence (FRE) 803 are: (1) “[s]tatements for purposes of medical diagnosis or treatment,” FRE 803(4), and (2) “records, reports [or] statements . . . of . . . matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases[,] matters observed by police officers and other law enforcement personnel,” FRE 803(8). [Petitioner’s] Memorandum of Law on Reliability of Contemporaneous Records at 2 (quoting FRE 803) (emphasis added).

D. Legal Standard and Analysis

In determining whether a petitioner is entitled to compensation under the Vaccine Program, a special master must consider “all . . . relevant medical or scientific evidence contained in the record,” including “any diagnosis, conclusion, medical judgment, or autopsy or coroner’s report . . . regarding the nature, causation, and aggravation of the petitioner’s illness, disability, injury, condition, or death” § 300aa-13(b)(1)(A). The special master must consider “the record as a whole,” § 300aa-13(a)(1), and cannot make a finding of entitlement based on the claims of a petitioner that are not substantiated by medical records or by medical opinion, id. The special master’s decision regarding entitlement must include findings of fact and conclusions of law. § 300aa-12(d)(3)(A).

Before addressing the issue of whether petitioner is entitled to Program compensation in this case, the undersigned must resolve the pending factual dispute regarding the position of the decedent’s head when her parents found her not breathing. This ruling is limited to fact finding that resolves the parties’ factual dispute.

In Vaccine Act cases, petitioner must prove, by a preponderance of the evidence, the factual circumstances surrounding his claim. § 300aa-13(a)(1)(A). This evidentiary standard requires that the Special Master “believe that the existence of a fact is more probable than its nonexistence before [she] 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) (quoting *F. James*, *Civil Procedure* 250-51 (1965)).

To resolve the present fact issue, the undersigned must determine what weight to assign the documentary record, which includes the contemporaneous investigation records of the local police department and the coroner’s office, and what weight to assign the later-given oral testimony that includes a factual detail that is absent from the existing documentary record. The case law instructs that oral testimony that conflicts with contemporaneous documentary evidence generally receives less evidentiary weight. See *United States v. United States Gypsum Co.*, 333 U.S. 364, 396 (1948) (“Where [witness] testimony is in conflict with contemporaneous documents we can give it little weight[.]”); *Montgomery Coca-Cola Bottling Co. v. United States*, 615 F.2d 1318, 1327 (Ct. Cl. 1980) (“The subjective intent testimony of the plaintiff can only be seriously considered to the extent it is consistent with the objective evidence.”). Similarly, conflicting oral testimony is afforded less evidentiary weight than written medical records. See *Cucuras v. Sec’y of Health & Human Servs.*, 993 F.2d 1525, 1528 (Fed. Cir. 1993).

The usefulness of record evidence in the court’s analysis of a case, however, turns on what is contained in the records. As the United States Claims Court observed:

[T]he 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. Since medical records typically record only a fraction of all that occurs, the fact that reference to an event is omitted from the medical records may not be very significant.

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. 463 (1992) (citations omitted). The Federal Circuit has stated that a decision concerning whether to accord greater evidentiary weight to contemporaneous medical records or to later-given oral testimony “is uniquely within the purview of the special master” and will be upheld if rationally determined. *Burns v. Sec’y of Health & Human Servs.*, 3 F.3d 415, 417 (Fed. Cir. 1993).

The observations of the Claims Court in *Murphy* regarding the significance of

omissions from medical records inform the undersigned's consideration of the investigation records in this case that do not contain the factual details about Victoria's death that are supplied by the later-given oral testimony of the decedent's parents. Here, with the exception of the particular detail about the position of Victoria's head when she was found not breathing in the crib, the documentary record in this case is generally consistent with the factual testimony of petitioner and Ms. Richards. It is clear from the documentary record that the decedent's parents described to various investigators the chronology of events prior to and after the discovered death of their daughter, including a description of Victoria's position in the crib. It also appears from the existing documentary evidence that the description that Victoria's parents gave to investigators regarding the position in which they found Victoria in the crib focused primarily on Victoria's prone rather than supine position without addressing the particular position of her head. Although the investigative reports indicate that photographs of the scene were taken, those pictures are no longer available. Additionally, although Ms. Richards was asked to demonstrate with a doll the position in which she found Victoria in the crib, no sketches or detailed description of Ms. Richards' doll demonstration are contained in the documentary record. Notwithstanding the investigators' apparent interest in the decedent's position in the crib, the reports simply state that she was in a prone position without clarifying whether her head and her body both were in a downward position on the crib mattress, a detail that does not appear to have been important to record at the time that the investigation notes were being taken.

What is reflected in the records concerning Victoria's position in the crib, however, is some suspicion by the investigators of Ms. Richards' description of finding Victoria in the corner of the crib. The suspicion appeared to be based on the investigator's uncertainty regarding whether a seven-week old would be capable developmentally of moving her body position by wriggling. This developmental question was addressed to the apparent satisfaction of the Officer Pond, the investigating police officer. See P's Ex. 8 at 14.

The noted suspicion by the investigators may also have been aroused by the observation recorded in the report of Ms. Blackwell, the investigator from the Office of the Medical Examiner, that Victoria had a scratch or a bruise across the bridge of her nose. See P's Ex. 12 at 15. Ms. Richards testified during the fact hearing that she did not have a memory of that detail, Tr. at 117-118, a detail which may or may not have been related to the tilted position of Victoria's head that her parents described at the fact hearing. The fact that Victoria would have been capable developmentally of holding her head up such that it could rest against a crib slat is supported in the literature addressing pediatric development. According to Nelson's Textbook of Pediatrics, by eight weeks old, a baby in a prone position can raise her head and hold her head in the plane of her body. See W. Nelson, et al., Textbook of Pediatrics (14th ed. 1992).

Considering the record evidence together with the testimony of the fact witnesses, the undersigned is persuaded that, notwithstanding the omission of the detail from the documentary evidence, Victoria's parents found her unresponsive and lying on her stomach with her head tilted against a crib slat on the morning of August 6, 2003.

III. CONCLUSION

Based on the foregoing, the undersigned makes the following factual findings:

1. Victoria Sheppard was born on June 15, 2003 in Fort Walton Beach, Florida.
2. Victoria's mother, Ms. Richards smoked during her pregnancy with Victoria and continued to smoke after Victoria was born.
3. Other than thrush and reflux, Victoria had no known health problems prior to her death on August 6, 2003.
4. On August 5, 2003, when Victoria was nearly seven weeks old, she received DTaP, IPV, Hep B, HIB, and Pneumococcal immunizations at the Okaloosa County Health Department in Fort Walton Beach, Florida.
5. Victoria cried immediately after receiving her immunizations. She continued to be cranky and she cried at various times during the afternoon. Although Victoria was fussy, she was not noticeably feverish.
6. Victoria slept in the car on the way home from the health clinic after she received her immunizations.
7. Consistent with the recommendation of the nurse at the health clinic, Victoria's parents administered a dose of Tylenol to Victoria when the family reached home.
8. Victoria took two bottle feedings during the nearly five and one-half hours between her immunizations and her bedtime.

9. After bathing Victoria, Mr. Sheppard put Victoria down in her crib for bed between 8:00 and 8:30 p.m. Victoria wore a long-sleeved, footed, one-piece sleeper. Victoria was lain on her stomach with her head, turned sideways, resting in the middle of a twin-sized pillow. Her back was covered by a thin blanket. She was positioned closer to the end of the crib that was within the view line of her parents room.
10. Before retiring for the evening at approximately 10:00 p.m., Ms. Richards checked on Victoria, removed the pillow from beneath her head, and put the pillow at the opposite end of the crib. Victoria was sleeping.
11. Unusually, Victoria did not awaken during the night.
12. At approximately 5:30 a.m., Mr. Sheppard and then Ms. Richards found Victoria lifeless in her crib. She was closer to the corner of the crib than she had been when her father put her to bed the night before. She lying on her stomach. Her head was tilted slightly upward from the crib mattress with her forehead resting on one of the crib slats and her chin resting on the crib mattress.
13. Ms. Richards removed Victoria from the crib, carried her to the living room, and called 911. In accordance with the telephone instructions from the 911 personnel, Ms. Richards placed Victoria on her back on the living room floor.
14. Victoria was still lying on her back on the living room floor when emergency medical services arrived at the home. The temperature in the home was noticeably warm. Victoria remained in that position for several hours during the review of the scene by the police department and the coroner's office.

The parties are directed to contact Camille Collett on or before **August 10, 2007** to schedule a status conference to address further proceedings in this case.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Special Master