

**OFFICE OF SPECIAL MASTERS**

(Filed: January 30, 2007)

DO NOT PUBLISH

ENGRACIA GUTSTADT,	)	
mother and next friend of her daughter,	)	
AMBER GUTSTADT,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 03-2683V
	)	Varicella Vaccine; Ataxia;
SECRETARY OF	)	Entitlement; Proffer on Damages
HEALTH AND HUMAN SERVICES,	)	
	)	
Respondent.	)	
	)	

**DECISION ON ENTITLEMENT AND DAMAGES<sup>1</sup>**

Petitioner, Engracia Gutstadt (Ms. Gutstadt), as next friend of her daughter, Amber Gutstadt (Amber), seeks compensation under the National Vaccine Injury Compensation Program (Program).<sup>2</sup> In a petition that she filed on November 17, 2003, Ms. Gutstadt alleges that Amber suffers “neurological, rheumatological, and immunological injuries” that are related to a diphtheria-tetanus-acellular pertussis (DTaP) vaccination, inactivated polio vaccine (IPV), a Prevnar vaccination and a varicella immunization that she received on February 13, 2001. *See* Petition (Pet.) at 1; Pet. ¶ 5. Ms. Gutstadt contends that Amber developed the first symptoms of ataxia within three days after her February 13, 2001 vaccination. *See* Pet. ¶¶ 6-14. In addition, Ms. Gutstadt contends that Amber developed the first symptoms of arthritis in mid-Summer 2002. *See* Pet. ¶¶ 15-18.

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<sup>1</sup> As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire decision” will be available to the public. *Id.*

<sup>2</sup> The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

On December 3, 2004, Ms. Gutstadt proffered a medical report from Richard I. Schiff, M.D., Ph.D. (Dr. Schiff). *See* Petitioner’s exhibit (Pet. ex.) 25. Dr. Schiff was one of Amber’s treating physicians when he was Director of Clinical Immunology at Miami Children’s Hospital. *See* Pet. ex. 25 at 1. Dr. Schiff states that Amber has exhibited both “ataxia” and “arthritis.” Pet. ex. 25 at 4. According to Dr. Schiff, he has concluded that Amber’s conditions represent two “independent” disease processes. *Id.* Indeed, in his medical report, Dr. Schiff limits his review to Amber’s ataxia. *See id.* Dr. Schiff opines that Amber’s February 13, 2001 varicella vaccine “is the only likely cause of [Amber’s] ataxia.” Pet. ex. 25 at 4. Dr. Schiff explains that “[t]he timing” between “the administration of” Amber’s varicella immunization and “the onset of [Amber’s] ataxia” is “consistent.” *Id.*; *see also* Pet. ex. 25 at 1. In addition, Dr. Schiff explains that Amber “had no other illness, such as a viral infection, that could have caused” the ataxia. Pet. ex. 25 at 4; *see also* Pet. ex. 25 at 1.

Based upon Dr. Schiff’s medical report, the special master ruled that Ms. Gutstadt has not established by the preponderance of the evidence any association between Amber’s February 13, 2001 vaccinations and Amber’s arthritis. *See Gutstadt v. Secretary of HHS*, No. 03-2683V, Order of the Special Master (Fed. Cl. Spec. Mstr. Dec. 7, 2004). As a consequence, the special master directed respondent to “file a medical report addressing *only* Dr. Schiff’s assertion that Amber’s ataxia represents ‘a varicella vaccine[-]mediated neurological injury involving coordination and balance.’” *Gutstadt v. Secretary of HHS*, No. 03-2683V, Order of the Special Master at 1 (Fed. Cl. Spec. Mstr. Dec. 7, 2004), citing Pet. ex. 25 at 1 (emphasis in original). Respondent did not submit a medical report. Instead, respondent filed on February 8, 2005, an amended Rule 4 report conceding that Ms. Gutstadt is entitled to Program compensation “for Amber’s vaccine-related cerebellar at[a]xia.” Respondent’s Amended Report (Am. Report), filed February 8, 2005, at 2.

On January 26, 2007, respondent filed a proffer reflecting respondent’s recommendation on damages in this case. *See* Respondent’s Proffer on Award of Damages (Proffer), filed January 26, 2007. Ms. Gutstadt agrees with all aspects of the Proffer. *See generally* Proffer. Based upon the record as a whole, the special master finds that the Proffer is reasonable and appropriate.<sup>3</sup>

### CONCLUSION

1. As provided in the Proffer, respondent shall pay as soon as practicable after entry of judgment \$706,325.41 in a lump sum to Engracia Gutstadt, as guardian/conservator of the estate of her daughter, Amber Gutstadt, for the benefit of Amber Gutstadt. *See* Proffer at 3, ¶ 6(a). The amount is the total of \$462,892.47 representing compensation for Amber’s lost future earnings, § 300aa-

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<sup>3</sup> By reference, the special master incorporates respondent’s Proffer into this decision on entitlement and damages.

15(a)(3)(B); of \$180,000.00 representing compensation for Amber's actual and projected pain and suffering and emotional distress, § 300aa-15(a)(4); of \$2,196.94 representing compensation for unreimbursable vaccine-related expenses before the date of judgment, § 300aa-15(a)(1)(B); and of \$61,236.00 representing compensation for Amber's life care expenses in the year following judgment, § 300aa-15(a)(1)(A). *See Proffer at 3, ¶ 6(a).*

2. As provided in the Proffer, respondent shall pay as soon as practicable after entry of judgment \$29,825.32 in a lump sum *jointly* to Engracia Gutstadt, as guardian/conservator of the estate of her daughter, Amber Gutstadt, and to State of Florida Agency for Healthcare Administration, Medicaid Third Party Liability. *See Proffer at 3, ¶ 6(b).* The amount represents compensation for the satisfaction of the State of Florida Medicaid lien. *See Proffer at 3, ¶ 6(b).*
3. Respondent shall purchase, and take ownership of, as soon as practicable after entry of judgment an annuity contract that will provide during Amber's lifetime the amount reflected in the Proffer, Tab 4, for each year following the one-year anniversary of entry of judgment, § 300aa-15(a)(1)(A). *See Proffer at 3-4, ¶ 6(c).* The annuity payments shall be payable to Engracia Gutstadt, as guardian/conservator of the estate of her daughter, Amber Gutstadt, for the benefit of Amber Gutstadt, only so long as Amber Gutstadt is alive at the time a particular payment is due. *See Proffer at 3-4, ¶ 6(c); see also Proffer at 4, ¶ 6(e).* *As provided in the Proffer, the annuity contract shall provide for a 4% compounded annual growth rate for all non-medical life care items listed in Proffer, Tab 4. See Proffer at 4, ¶ 6(d).* *As provided in the Proffer, the annuity contract shall provide for a 5% compounded annual growth rate for all medical life care items listed in Proffer, Tab 4. See Proffer at 4, ¶ 6(d).* *As provided in the Proffer, the growth rate shall be applied and compounded beginning on the date of judgment. See Proffer at 4, ¶ 6(d).* The insurer from whom respondent shall purchase the annuity contract must meet two criteria:
  - a. The company must have a minimum of \$250,000,000.00 of capital and surplus, exclusive of any mandatory security valuation reserve; and
  - b. The company must have one of the following ratings from two of the following rating organizations:

- (i) A.M. Best Company: A++, A+, A+g, A+p, A+r, or A+s;
- (ii) Moody's Investor Service Claims Paying Rating: Aa3, Aa2, Aa1 or Aaa;
- (iii) Standard and Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+ or AAA;
- (iv) Fitch Credit Rating Company Insurance Company Claims Paying Ability Rating: AA-, AA, AA+ or AAA.

*See Proffer at 3, n.1.*

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment in Ms. Gutstadt's favor in complete conformity with this decision. Under Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review. Then, under Vaccine Rule 12(a), Ms. Gutstadt may expedite payment by filing an election to accept the judgment

The clerk of court shall send Ms. Gutstadt's copy of this decision to Ms. Gutstadt by overnight express delivery.

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John F. Edwards  
Special Master