

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 10-715V

Filed: June 26, 2012

WILLIAM J. SCHWIND and JULIE SCHWIND,	)	
on behalf of ADAM CHRISTOPHER	)	
SCHWIND, a minor child,	)	
	)	NOT TO BE PUBLISHED
Petitioners,	)	
	)	Proffer; Damages; Measles-
v.	)	Mumps-Rubella (MMR) vaccine;
	)	encephalitis; fever; vomiting;
SECRETARY OF	)	seizures; regression in speech,
HEALTH AND HUMAN SERVICES,	)	cognitive skills and behavior
	)	
Respondent.	)	

Jay A. Bansal, Law Offices of Jay A. Bansal, Tempe, AZ, for Petitioners.

Darryl R. Wishard, U.S. Dep't of Justice, Washington, D.C., for Respondent.

### DECISION<sup>1</sup>

LORD, Special Master.

On October 20, 2010, Petitioners filed a filed a Petition for compensation under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-10-34. The Petition alleged that their son, Adam, suffered from fever, vomiting, seizures, encephalitis, and regression in speech abilities, cognitive skills and behavior as a result of receiving the measles-mumps-rubella ("MMR") vaccine on October 22, 2007. On January 18, 2011, Respondent filed the Rule 4(c) Report noting that "Adam's condition meets the criteria for an MMR vaccine Table Injury encephalopathy" and recommending compensation be awarded in this case. Resp't's Rep. at 5, ECF No. 11.

On January 20, 2011, the undersigned found Petitioners entitled to compensation. Ruling on Entitlement, ECF No. 12. On May 22, 2012, Petitioners filed their Life Care Plan Cost Projections. Pet'rs' Ex. 20. On June 12, 2012, Respondent filed a Proffer on Award of Compensation ("Proffer"). Proffer, ECF No. 26 (attached hereto as Appendix A). Petitioners' acceptance is set forth within the Proffer. Id.

<sup>1</sup> In accordance with Vaccine Rule 18(b), a petitioner has 14 days to file a proper motion seeking redaction of medical or other information that satisfies the criteria in 42 U.S.C. § 300aa-12(d)(4)(B). Rules of the United States Court of Federal Claims ("RCFC"), Appendix B, Vaccine Rule 18(b). Redactions ordered by the special master, if any, appear in the document as posted on the United States Court of Federal Claims' website.

After a review of the record as a whole, I find the Proffer reasonable and that Petitioners are entitled to an award as detailed in the Proffer and its Tab A chart. The Court is convinced, based on its experience and the information in the record, that this award shall provide reasonable compensation to cover Petitioners' vaccine-related expenses.

## **I. FORM OF THE AWARD**

As stated in the Proffer, “[t]he parties recommend that the compensation provided to Adam Christopher Schwind should be made through a combination of lump sum payments and future annuity payments as described [in the Proffer], and request that the special master’s decision and the Court’s judgment award” compensation as set out in the Proffer. Proffer at 3.

### **A. Lump sums**

The Court awards a lump sum payment of \$205,242.98, representing compensation for pain and suffering (\$194,320.13) and life care expenses for Year One (\$10,922.85), in the form of a check payable to Petitioners as guardian(s)/ conservator(s) of Adam Christopher Schwind, for the benefit of Adam Christopher Schwind.<sup>2</sup>

The Court awards a lump sum payment of \$9,855.81, representing compensation for past unreimbursable expenses, payable to William J. Schwind and Julie Schwind, Petitioners.

### **B. Annuity**

The Court awards an amount sufficient to purchase an annuity contract, subject to the conditions described in the Proffer, that will provide payments for the life care items contained in the life care plan, as illustrated by the chart at Tab A of the Proffer, paid to the life insurance company from which the annuity will be purchased. Compensation for Year Two (beginning on the first anniversary of the date of judgment) and all subsequent years shall be provided through Respondent’s purchase of an annuity, which annuity shall make payments directly to Petitioners as guardian(s)/ conservator(s) of the estate of Adam Christopher Schwind, for the benefit of Adam Christopher Schwind, only so long as Adam Christopher Schwind is alive at the time a particular payment is due. At the Secretary’s sole discretion, the periodic payments may be provided to Petitioners in monthly, quarterly, annual or other installments. The “annual amounts” set forth in the chart at Tab A describe only the total yearly sum to be paid to Petitioners and do not require that the payment be made in one annual installment.

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<sup>2</sup> No payments shall be made until Petitioners provide Respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of Adam Christopher Schwind’s estate.

## **II. CONCLUSION**

The undersigned recognizes the good efforts of all involved in this matter. Based on the foregoing, the Court hereby **ADOPTS** Respondent's Proffer in its entirety, attached hereto as Appendix A, and awards compensation in the amount and upon the terms set forth therein. **Specifically, Petitioners are awarded:**

- a. a lump sum payment of \$205,242.98 in the form of a check payable to Petitioners as guardian(s)/conservator(s) of Adam Christopher Schwind's estate; and**
- b. a lump sum payment of \$9,855.81 in the form of a check payable jointly to Petitioners William J. Schwind and Julie Schwind; and**
- c. Petitioners are also awarded an amount sufficient to purchase an annuity contract described in section II. C. of Respondent's Proffer on Award of Compensation.**

In the absence of a motion for review filed pursuant to RCFC, Appendix B, the Clerk is directed to enter judgment accordingly.<sup>3</sup>

**IT IS SO ORDERED.**

s/ Dee Lord  
Dee Lord  
Special Master

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<sup>3</sup> Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.



compensation set forth in the life care plan and illustrated by the chart attached at Tab A.

Petitioners agree.

B. Lost Future Earnings

The parties agree that based upon the evidence of record, Adam Christopher Schwind will more likely than not be gainfully employed in the future. Therefore, respondent proffers that Adam Christopher Schwind should not be awarded lost future earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(B). Petitioners agree.

C. Pain and Suffering

Respondent proffers that Adam Christopher Schwind should be awarded \$194,320.13 in actual and projected pain and suffering. This amount reflects that the award for projected pain and suffering has been reduced to net present value. See 42 U.S.C. § 300aa-15(a)(4). Petitioners agree.

D. Past Unreimbursable Expenses

Evidence supplied by petitioners documents their expenditure of past unreimbursable expenses related to Adam Christopher Schwind's vaccine related injury. Respondent proffers that petitioners should be awarded past unreimbursable expenses in the amount of \$9,855.81.

Petitioners agree.

E. Medicaid Lien

Petitioners represent that there are no Medicaid liens outstanding against Adam Christopher Schwind.

**II. Form of the Award**

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

A. A lump sum payment of \$205,242.98, representing compensation for pain and suffering (\$194,320.13) and life care expenses for Year One (\$10,922.85), in the form of a check payable to petitioners as guardian(s)/conservator(s) of Adam Christopher Schwind, for the benefit of Adam Christopher Schwind. No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of Adam Christopher Schwind's estate;

B. A lump sum payment of \$9,855.81, representing compensation for past unreimbursable expenses, payable to William J. Schwind and Julie Schwind, petitioners;

C. An amount sufficient to purchase an annuity contract,<sup>2</sup> subject to the conditions described below, that will provide payments for the life care items contained in the life care plan, as illustrated by the chart at Tab A attached hereto, paid to the life insurance company<sup>3</sup> from

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<sup>2</sup> In respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

<sup>3</sup> The Life Insurance Company must have a minimum of \$250,000,000 capital and surplus, exclusive of any mandatory security valuation reserve. The Life Insurance Company must have one of the following ratings from two of the following rating organizations:

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

which the annuity will be purchased.<sup>4</sup> Compensation for Year Two (beginning on the first anniversary of the date of judgment) and all subsequent years shall be provided through respondent's purchase of an annuity, which annuity shall make payments directly to petitioners as guardian(s)/conservator(s) of the estate of Adam Christopher Schwind, for the benefit of Adam Christopher Schwind, only so long as Adam Christopher Schwind is alive at the time a particular payment is due. At the Secretary's sole discretion, the periodic payments may be provided to petitioners in monthly, quarterly, annual or other installments. The "annual amounts" set forth in the chart at Tab A describe only the total yearly sum to be paid to petitioners and do not require that the payment be made in one annual installment.

1. Growth Rate

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

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<sup>3</sup> (...continued)

AAA;

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

<sup>4</sup> Petitioners authorize the disclosure of certain documents filed by the petitioners in this case consistent with the Privacy Act and the routine uses described in the National Vaccine Injury Compensation Program System of Records, No. 09-15-0056.

2. Life-contingent annuity

Petitioners will continue to receive the annuity payments from the Life Insurance Company only so long as Adam Christopher Schwind is alive at the time that a particular payment is due. Written notice shall be provided to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of Adam Christopher Schwind's death.

3. Guardianship

No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of Adam Christopher Schwind's estate. If petitioners are not authorized by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of Adam Christopher Schwind, any such payment shall be made to the party or parties appointed by a court of competent jurisdiction to serve as guardian/conservator of the estate of Adam Christopher Schwind upon submission of written documentation of such appointment to the Secretary.

**III. Summary of Recommended Payments Following Judgment**

A.	Lump Sum paid to petitioners as guardian(s)/conservator(s) of Adam Christopher Schwind's estate:	<b>\$ 205,242.98</b>
B.	Lump sum paid to petitioners:	<b>\$ 9,855.81</b>
C.	An amount sufficient to purchase the annuity contract described above in section II. C.	

Respectfully submitted,

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Dated: June 12, 2012

## Appendix A: Items of Compensation for Adam Christopher Schwind

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Year 1	Compensation Years 2-3	Compensation Year 4	Compensation Year 5	Compensation Year 6	Compensation Year 7	Compensation Year 8	Compensation Years 9-10
				2012	2013-2014	2015	2016	2017	2018	2019	2020-2021
Rx Co-pays	5%			422.04	422.04	422.04	422.04	422.04	422.04	422.04	422.04
Neurologist	5%	*		60.00	60.00	60.00	60.00	60.00	60.00	60.00	60.00
EEG	5%	*		25.81	25.81	25.81	25.81	25.81	25.81	25.81	25.81
Blood Work	5%	*		60.00	60.00	60.00	60.00	60.00	60.00	60.00	60.00
Neuro-psychology	4%	*				30.00				30.00	
ST	4%	*		6,480.00	6,480.00	3,240.00	810.00	810.00	810.00	810.00	810.00
Tutoring	4%		M	1,440.00	2,880.00	2,880.00	18,400.00	18,400.00	18,400.00	18,400.00	18,400.00
Educational Advocate	4%			750.00	750.00	750.00	750.00	750.00	750.00	750.00	750.00
Counseling	4%	*		360.00	360.00	360.00	480.00	480.00	480.00	480.00	480.00
Computer	4%			1,200.00				1,200.00			
Educational Software	4%			125.00	125.00	125.00	125.00	125.00	125.00	125.00	125.00
Pain and Suffering				194,320.13							
Past Unreimbursable Expenses				9,855.81							
Annual Totals				215,098.79	11,162.85	7,952.85	21,132.85	22,332.85	21,132.85	21,162.85	21,132.85

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

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

As soon as practicable after entry of judgment, respondent shall make the following payment to the court-appointed guardian(s)/conservators(s) of the estate of Adam Christopher Schwind, for the benefit of Adam Christopher Schwind, for pain and suffering (\$194,320.13), and Yr 1 life care expenses (\$10,922.85): \$205,242.98.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, William J. Schwind and Julie Schwind, for past un-reimbursable expenses: \$9,855.81.

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

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

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

Items denoted with an "M" payable in 12 monthly installments at the discretion of respondent.

## Appendix A: Items of Compensation for Adam Christopher Schwind

ITEMS OF COMPENSATION	G.R.	*	M	Compensation	Compensation	Compensation	Compensation
				Years 11-14 2022-2025	Years 15-18 2026-2029	Years 19-56 2030-2067	Years 57-Life 2068-Life
Rx Co-pays	5%			422.04	422.04	422.04	1,663.08
Neurologist	5%	*		30.00	30.00	30.00	37.80
EEG	5%	*		25.81	25.81	25.81	25.81
Blood Work	5%	*		60.00	60.00	60.00	
Neuro-psychology	4%	*					
ST	4%	*					
Tutoring	4%		M				
Educational Advocate	4%						
Counseling	4%	*		480.00	480.00		
Computer	4%						
Educational Software	4%			125.00			
Pain and Suffering							
Past Unreimbursable Expenses							
Annual Totals				1,142.85	1,017.85	537.85	1,726.69

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

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

As soon as practicable after entry of judgment, respondent shall make the following payment to the court-appointed guardian(s)/conservators(s) of the estate of Adam Christopher Schwind, for the benefit of Adam Christopher Schwind, for pain and suffering (\$194,320.13), and Yr 1 life care expenses (\$10,922.85): \$205,242.98.

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

Items denoted with an "M" payable in 12 monthly installments at the discretion of respondent.