

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 01-308 V

Filed: March 9, 2012

Not for Publication

ERIC BIENIUS,

*

*

Petitioner,

*

Damages Decision Based on Proffer

*

v.

*

*

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

*

*

*

Respondent.

*

*

Clifford J. Shoemaker, Vienna, VA, for petitioner.

Lisa A. Watts, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING DAMAGES¹

On March 9, 2012, respondent filed a Proffer on Award of Compensation. On March 9, 2012, petitioner's counsel contacted the undersigned's law clerk and stated that petitioner accepts respondent's Proffer. Based on the record as a whole, the special master finds that petitioner is entitled to the award as stated in the Proffer. Pursuant to the terms stated in the attached Proffer, the court awards:

¹ Because this decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall redact such material from public access.

- a. A lump sum payment of **\$2,085,336.49**, representing compensation for life care expenses expected to be incurred during the first year after judgment (\$91,201.87), lost earnings (\$1,725,730.08), pain and suffering (\$218,404.54), and past unreimbursable expenses (\$50,000.00). The award shall be in the form of a check payable to petitioner.
- b. A lump sum payment of **\$448.45**, representing compensation for the reimbursement of the State of Ohio Medicaid lien. The award shall be in the form of a check payable jointly to petitioner and

Ohio Department of Job and Family Services
The Ohio Tort Recovery Unit
350 Worthington Road, Suite G
Westerville, OH 43082
Attn: Ms. Kelly Hagan

- c. An amount sufficient to purchase an annuity contract described in paragraph II.C. of the attached proffer.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.²

IT IS SO ORDERED.

Dated: March 9, 2012

s/ Laura D. Millman
Laura D. Millman
Special Master

² Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

ERIC BIENIUS,)	
)	
Petitioner,)	No.: 01-308V
)	Special Master
v.)	Laura D. Millman
)	
SECRETARY OF HEALTH AND)	<u>ECF</u>
HUMAN SERVICES,)	
)	
Respondent.)	
)	

RESPONDENT'S PROFFER ON AWARD OF COMPENSATION

I. Items of Compensation

A. Life Care Items

The respondent engaged life care planner Jacquelyn Morris, RN, BSN, CRRN, CNLCP, to provide an estimation of Eric Bisenius’s future vaccine-injury related needs. For the purposes of this proffer, the term “vaccine related” is as described in the special master’s Ruling on Entitlement issued December 15, 2009. All items of compensation identified in the life care plan are supported by the evidence, and are illustrated by the chart entitled Appendix A: Items of Compensation for Eric Bisenius, attached hereto as Tab A.¹ Respondent proffers that Eric Bisenius should be awarded all items of compensation set forth in the life care plan and illustrated by the chart attached at Tab A. Petitioner agrees.

¹ The chart at Tab A illustrates the annual benefits provided by the life care plan. The annual benefit years run from the date of judgment up to the first anniversary of the date of judgment, and every year thereafter up to the anniversary of the date of judgment.

B. Lost Future Earnings

The parties agree that based upon the evidence of record, Eric Bisenius has suffered a past loss of earnings and will not be gainfully employed in the future. Therefore, respondent proffers that Eric Bisenius should be awarded lost earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(A). Respondent proffers that the appropriate award for Eric Bisenius's lost earnings is \$1,725,730.08. Petitioner agrees.

C. Pain and Suffering

Respondent proffers that Eric Bisenius should be awarded \$218,404.54 in actual and projected pain and suffering. This amount reflects that the award for projected pain and suffering has been reduced to net present value. See 42 U.S.C. § 300aa-15(a)(4). Petitioner agrees.

D. Past Unreimbursable Expenses

Evidence supplied by petitioner documents Eric Bisenius's expenditure of past unreimbursable expenses related to his vaccine-related injury. Respondent proffers that petitioner should be awarded past unreimbursable expenses in the amount of \$50,000.00. Petitioner agrees.

E. Medicaid Lien

Respondent proffers that Eric Bisenius should be awarded funds to satisfy the State of Ohio lien in the amount of \$448.45, which represents full satisfaction of any right of subrogation, assignment, claim, lien, or cause of action the State of Ohio may have against any individual as a result of any Medicaid payments the State of Ohio has made to or on behalf of Eric Bisenius from the date of his eligibility for benefits through the date of judgment in this case as a result of

his vaccine-related injury suffered on or about May 18, 1998, under Title XIX of the Social Security Act.

II. Form of the Award

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

A. A lump sum payment of \$2,085,336.49, representing compensation for life care expenses expected to be incurred during the first year after judgment (\$91,201.87), lost earnings (\$1,725,730.08), pain and suffering (\$218,404.54), and past unreimbursable expenses (\$50,000.00), in the form of a check payable to petitioner, Eric Bisenius.

B. A lump sum payment of \$448.45, representing compensation for the reimbursement of the State of Ohio Medicaid lien, payable jointly to petitioner, and

Ohio Department of Job and Family Services
The Ohio Tort Recovery Unit
350 Worthington Road, Suite G
Westerville, OH 43082
Attn: Ms. Kelly Hagan

Petitioner agrees to endorse this payment to the state.

C. An amount sufficient to purchase an annuity contract,² 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 company³ from

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

³ The Life Insurance Company must have a minimum of \$250,000,000 capital and
(continued...)

which the annuity will be purchased.⁴ 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 petitioner, Eric Bisenius, only so long as Eric Bisenius is alive at the time a particular payment is due. At the Secretary's sole discretion, the periodic payments may be provided to petitioner in monthly, quarterly, annual or other installments. The "annual amounts" set forth in the chart at Tab A describe only the total yearly sum to be paid to petitioner and do not require that the payment be made in one annual installment.

1. Growth Rate

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

³ (...continued)

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

⁴ Petitioner authorizes the disclosure of certain documents filed by the petitioner in this case consistent with the Privacy Act and the routine uses described in the National Vaccine Injury Compensation Program System of Records, No. 09-15-0056.

judgment for non-medical items, and five percent (5%) compounded annually from the date of judgment for medical items. Petitioner agrees.

2. Life-contingent annuity

Petitioner will continue to receive the annuity payments from the Life Insurance Company only so long as he, Eric Bisenius, 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 Eric Bisenius's death.

3. Guardianship

Petitioner is a competent adult. Evidence of guardianship is not required in this case.

III. Summary of Recommended Payments Following Judgment

- | | | |
|----|---|-----------------------|
| A. | Lump Sum paid to petitioner, Eric Bisenius: | \$2,085,336.49 |
| B. | Reimbursement for Medicaid lien: | \$ 448.45 |
| C. | An amount sufficient to purchase the annuity contract described above in section II. C. | |

Respectfully submitted,

TONY WEST
Assistant Attorney General

MARK W. ROGERS
Acting Director
Torts Branch, Civil Division

VINCENT J. MATANOSKI
Acting Deputy Director
Torts Branch, Civil Division

MICHAEL P. MILMOE
Senior Trial Counsel
Torts Branch, Civil Division

s/Lisa A. Watts
LISA A. WATTS
Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, D.C. 20044-0146
Telephone: (202) 616-4099

Dated: March 9, 2012.

Appendix A: Items of Compensation for Eric Bisenius

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Year 1	Compensation Year 2	Compensation Year 3	Compensation Year 4	Compensation Year 5	Compensation Year 6	Compensation Year 7	Compensation Year 8
				2012	2013	2014	2015	2016	2017	2018	2019
Aug Comm Device Eval	4%			510.00			510.00			510.00	
Mileage: Aug Comm Eval	4%			26.68			26.68			26.68	
Massage Therapy	4%		M	990.00	990.00	990.00	990.00	990.00	990.00	990.00	990.00
Mileage: Massage Therapy	4%			20.70	20.70	20.70	20.70	20.70	20.70	20.70	20.70
Aquatic Exercise Fees	4%		M	568.98	523.98	523.98	523.98	523.98	523.98	523.98	523.98
Mileage: YMCA	4%			10.05	10.05	10.05	10.05	10.05	10.05	10.05	10.05
AFOs	4%	*									
Mileage: AFOs	4%			24.20	24.20	24.20	24.20	24.20	24.20	24.20	24.20
Long Handled Sponge	4%			26.64	26.64	26.64	26.64	26.64	26.64	26.64	26.64
Shower/ Bath Chair	4%			149.99							
Hand Held Shower	4%			44.43							
Portable Grab Bars	4%			247.99							
Adaptive Access.	4%			770.00				100.00	33.33	33.33	33.33
Adapted Computer Access	4%			1,206.97					496.27		
Dragon Naturally Speaking	4%			199.99					199.99		
Personal Emerg. Resp. System	4%			319.44	319.44	319.44	319.44	319.44	319.44	319.44	319.44
Power Scooter	4%	*		450.00							
Scooter Maint	4%	*			99.99	99.99	99.99	99.99	99.99	99.99	99.99
Household Cleaning	4%		M	1,950.00	1,950.00	1,950.00	1,950.00	1,950.00	1,950.00	1,950.00	1,950.00
Chore Services	4%		M	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00
Personal Care Assistant	4%		M	25,752.00	25,752.00	25,752.00	25,752.00	25,752.00	25,752.00	25,752.00	38,628.00
Skilled Nursing Care	4%	*	M								
Exterior Ramping	4%			1,627.00							
Accessible Bath	0%			15,000.00							
Kitchen & Other Household Mods	0%			9,399.00							
Lift Maint & Batteries	4%										
Widened Doorways	0%			3,400.00							
Van Adapt.	4%			15,000.00							15,000.00
Lost Future Earnings				1,725,730.08							
Pain and Suffering				218,404.54							
Past Unreimbursable Expenses				50,000.00							
Medicaid Lien				448.45							

Appendix A: Items of Compensation for Eric Bisenius

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Year 1	Compensation Year 2	Compensation Year 3	Compensation Year 4	Compensation Year 5	Compensation Year 6	Compensation Year 7	Compensation Year 8
				2012	2013	2014	2015	2016	2017	2018	2019
Annual Totals				2,085,784.94	40,320.76	40,193.91	43,373.49	43,106.56	43,928.15	43,982.82	71,527.89

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

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

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner for Yr 1 life care expenses (\$91,201.87), lost earnings (\$1,725,730.08), pain and suffering (\$218,404.54), and past unreimbursable expenses (\$50,000.00): \$2,085,336.49.

As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and the State of Ohio, as reimbursement of the state's Medicaid lien: \$448.45.

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

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

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

Items denoted with an "M" payable in twelve monthly installments totaling the annual amount indicated.

Appendix A: Items of Compensation for Eric Bisenius

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 9	Compensation Year 10	Compensation Year 11	Compensation Year 12	Compensation Year 13	Compensation Year 14	Compensation Year 15	Compensation Year 16
				2020	2021	2022	2023	2024	2025	2026	2027
Annual Totals				56,743.89	57,517.17	58,078.57	57,415.89	58,202.82	70,771.89	86,047.89	74,242.08

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

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

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner for Yr 1 life care expenses (\$91,201.87), lost earnings (\$1,725,730.08), pain and suffering (\$218,404.54), and past unreimbursable expenses (\$50,000.00): \$2,085,336.49.

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

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

Items denoted with an "M" payable in twelve monthly installments totaling the annual amount indicated.

Appendix A: Items of Compensation for Eric Bisenius

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 17	Compensation Year 18	Compensation Year 19	Compensation Year 20	Compensation Year 21	Compensation Year 22	Compensation Years 23-25	Compensation Year 26
				2028	2029	2030	2031	2032	2033	2034-2036	2037
Annual Totals				71,852.36	61,954.17	119,813.09	118,968.57	62,919.25	77,734.19	67,273.28	71,965.38

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

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

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner for Yr 1 life care expenses (\$91,201.87), lost earnings (\$1,725,730.08), pain and suffering (\$218,404.54), and past unreimbursable expenses (\$50,000.00): \$2,085,336.49.

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

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

Items denoted with an "M" payable in twelve monthly installments totaling the annual amount indicated.

Appendix A: Items of Compensation for Eric Bisenius

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Years 27-28 2038-2039	Compensation Year 29 2040	Compensation Years 30-Life 2041-Life
COBRA Premium	5%		M			
COBRA Deductible & MOP	5%					
AETNA Premium	5%		M			
AETNA MOP	5%					
Medicare Part A Deductible	5%	*				
Medicare Part B Premium	5%		M		1,198.80	1,198.80
Medicare Part B Deductible	5%	*				
Medigap F	5%		M		3,006.00	3,006.00
Physical Medicine & Rehab	5%	*		305.00		
Mileage: Phys. Med. & Rehab	4%			24.20	24.20	24.20
Psychiatry	5%	*				
Mileage: Psychiatry	4%					
Individual Counseling	4%	*				
Mileage: Individ. Counseling	4%					
ER	5%	*		737.90		
Ankle Fusion Bilateral	5%	*				
Orthopedics	5%	*				
Mileage: Orthopedics	4%					
Care Mngt	4%			1,080.00	540.00	540.00
Multivitamin	4%			669.17	669.17	669.17
Vit C	4%			33.69	33.69	33.69
Medication Organizer	4%			3.42	3.42	3.42
TENS Unit	4%	*				
Supplies TENS Unit	4%	*		173.76		
OT Eval	4%	*		165.00		
Mileage: OT Eval	4%			1.15	1.15	1.15
OT	4%	*		1,836.00		
Mileage: OT	4%			10.35	10.35	10.35
PT Eval	4%	*		168.00		
Mileage: PT Eval	4%					
PT	4%	*		2,400.00		
Mileage: PT	4%					

Appendix A: Items of Compensation for Eric Bisenius

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Years 27-28 2038-2039	Compensation Year 29 2040	Compensation Years 30-Life 2041-Life
Aug Comm Device Eval	4%			170.00	170.00	170.00
Mileage: Aug Comm Eval	4%			8.89	8.89	8.89
Massage Therapy	4%		M	990.00	990.00	990.00
Mileage: Massage Therapy	4%			20.70	20.70	20.70
Aquatic Exercise Fees	4%		M	460.08	460.08	460.08
Mileage: YMCA	4%			10.05	10.05	10.05
AFOs	4%	*				
Mileage: AFOs	4%			24.20	24.20	24.20
Long Handled Sponge	4%			26.64	26.64	26.64
Shower/ Bath Chair	4%			15.00	15.00	15.00
Hand Held Shower	4%			4.44	4.44	4.44
Portable Grab Bars	4%					
Adaptive Access.	4%			33.33	33.33	33.33
Adapted Computer Access	4%			99.25	99.25	99.25
Dragon Naturally Speaking	4%			40.00	40.00	40.00
Personal Emerg. Resp. System	4%			319.44	319.44	319.44
Power Scooter	4%	*				
Scooter Maint	4%	*		99.99		
Household Cleaning	4%		M	1,950.00	1,950.00	1,950.00
Chore Services	4%		M	1,500.00	1,500.00	1,500.00
Personal Care Assistant	4%		M	51,504.00	51,504.00	57,942.00
Skilled Nursing Care	4%	*	M			
Exterior Ramping	4%			108.47	108.47	108.47
Accessible Bath	0%					
Kitchen & Other Household Mods	0%					
Lift Maint & Batteries	4%			74.40	74.40	74.40
Widened Doorways	0%					
Van Adapt.	4%			2,142.86	2,142.86	2,142.86
Lost Future Earnings						
Pain and Suffering						
Past Unreimbursable Expenses						
Medicaid Lien						

Appendix A: Items of Compensation for Eric Bisenius

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Years 27-28	Compensation Year 29	Compensation Years 30-Life
				2038-2039	2040	2041-Life
Annual Totals				67,209.38	64,988.53	71,426.53

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

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

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner for Yr 1 life care expenses (\$91,201.87), lost earnings (\$1,725,730.08), pain and suffering (\$218,404.54), and past unreimbursable expenses (\$50,000.00): \$2,085,336.49.

As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and the State of Ohio, as reimbursement of the state's Medicaid lien: \$448.45.

Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment. Annual amounts shall increase at the rates indicated above in column G.R., compounded annually from the date of judgment.

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

Items denoted with an "M" payable in twelve monthly installments totaling the annual amount indicated.