

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 99-466 V

Filed: June 13, 2011

Not for Publication

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HARVEY GRUBER,

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Petitioner,

\*

\* Damages Decision based on Proffer

v.

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SECRETARY OF THE DEPARTMENT  
OF HEALTH AND HUMAN SERVICES,

\*

\*

\*

Respondent.

\*

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

Michael P. Milmoe, Washington, DC, for respondent.

**MILLMAN, Special Master**

## DECISION AWARDING DAMAGES<sup>1</sup>

On June 13, 2011, respondent filed a Proffer on Award of Compensation, which was accepted by petitioner. 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 petitioner:

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<sup>1</sup> 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. On June 13, 2011, petitioner filed a motion to redact petitioner's name to his initials "due to the personal nature of the medical information that is included in the decision that is an invasion of the Petitioner's privacy." This decision and the attached proffer do not contain the type of personal information that would constitute an unwarranted invasion of privacy. Indeed, neither document contains a mention of petitioner's alleged injury. Petitioner's motion is hereby **DENIED**.

- A. A lump sum payment of **\$1,370,291.00**, representing compensation for life care expenses expected to be incurred during the first year after judgment (\$99,107.80), lost earnings (\$992,379.00), pain and suffering (\$228,936.29), and past unreimbursable expenses (\$49,867.91), in the form of a check made payable to petitioner, Harvey Gruber.
- B. An amount sufficient to purchase an annuity contract, subject to the conditions described in the 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.<sup>2</sup>

**IT IS SO ORDERED.**

Dated: June 13, 2011

/s/ Laura D. Millman

Laura D. Millman

Special Master

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<sup>2</sup> 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**

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HARVEY GRUBER,	)	
	)	
	)	
Petitioner,	)	No. 99-466V
v.	)	Special Master Millman
	)	
SECRETARY OF HEALTH	)	
AND HUMAN SERVICES,	)	
	)	
Respondent.	)	
	)	

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**RESPONDENT'S PROFFER ON AWARD OF COMPENSATION**

**I.      Items of Compensation**

**A.      Life Care Items**

The respondent engaged life care planner Laura Fox, MSN, RN, CLCP, to provide an estimation of Harvey Gruber's future vaccine-injury related needs. For the purposes of this proffer, the term "vaccine related" is as described in the special master's decision dated November 2, 2007. 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 Harvey Gruber, attached hereto as Tab A.<sup>1</sup> Respondent proffers that Harvey Gruber 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.

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<sup>1</sup> 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 Earnings

The parties agree that based upon the evidence of record, Harvey Gruber has suffered a past loss of earnings and will not be gainfully employed in the future. Therefore, respondent proffers that Harvey Gruber 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 Harvey Gruber's lost earnings is \$992,379.00. Petitioner agrees.

C. Pain and Suffering

Respondent proffers that Harvey Gruber should be awarded \$228,936.29 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 Harvey Gruber'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 \$49,867.91. Petitioner agrees.

E. Medicaid Lien

Petitioner represents that there are no outstanding Medicaid liens against him.

**II. Form of the Award**

The parties recommend that the compensation provided to Harvey Gruber 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 \$1,370,291.00, representing compensation for life care expenses expected to be incurred during the first year after judgment (\$99,107.80), lost earnings (\$992,379.00), pain and suffering (\$228,936.29), and past unreimbursable expenses (\$49,867.91), in the form of a check payable to petitioner, Harvey Gruber.

B. 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 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 petitioner, Harvey Gruber, only so long as Harvey Gruber is alive at the time a particular payment is due.

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

<sup>4</sup> 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.

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 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, Harvey Gruber, 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 Harvey Gruber'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**

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|--|-----------------------|
| A. Lump Sum paid to petitioner, Harvey Gruber:   | <b>\$1,370,291.00</b> |
| B. An amount sufficient to purchase the annuity contract described above in section II. B. |                       |

Respectfully submitted,

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Dated: June 13, 2011