

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 07-671V

Filed: September 15, 2011

Not for Publication

TERAH ROMERO and NICHOLAS *
ROMERO, Sr., as Next Friend of *
NICHOLAS ROMERO, Jr., *

Petitioners, *

v. *

SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES, *

Respondent. *

Brian R. Arnold, Dallas, TX, for petitioners.
Lisa A. Watts, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING DAMAGES¹

On September 14, 2011, respondent filed a Proffer on Award of Compensation. On September 15, 2011, petitioners communicated with the undersigned's law clerk that they accept respondent's Proffer. Based on the record as a whole, the special master finds that petitioners are

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.

entitled to the award as stated in the Proffer. Pursuant to the terms stated in the attached Proffer, the court awards petitioners:

- a. A lump sum payment of **\$964,941.44**, representing compensation for lost future earnings (\$660,402.77), pain and suffering (\$207,249.75), and life care expenses for Year One (\$97,288.92). The award shall be in the form of a check payable to petitioners as guardian(s)/conservator(s) of the estate of Nicholas Romero, Jr., for the benefit of Nicholas Romero, Jr.
- b. A lump sum payment of **\$11,365.55**, representing compensation for past unreimbursable expenses, payable to Terah Romero and Nicholas Romero, Sr., petitioners.
- c. A lump sum payment of **\$13,020.81**, representing compensation for satisfaction of the State of Texas Medicaid lien, payable jointly to petitioners and

Texas Medicaid and Health Partnership
TPL/Tort Department
P.O. Box 202948
Austin, TX 78720-2948
Attn: Mr. Marvin Hicks

- d. 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.²

IT IS SO ORDERED.

Dated: September 15, 2011

/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**

TERAH ROMERO and NICHOLAS ROMERO, SR., as Next Friends of NICHOLAS ROMERO, JR.,)	
)	<u>ECF</u>
Petitioners,)	
)	
v.)	No. 07-671V
)	Special Master Millman
SECRETARY OF HEALTH)	
AND HUMAN SERVICES,)	
)	
Respondent.)	
)	

RESPONDENT'S PROFFER ON AWARD OF COMPENSATION

I. Items of Compensation

A. Life Care Items

The parties jointly engaged life care planner Shelly Kinney, RN, MSN, CNCLP, CCM, to provide an estimation of Nicholas Romero, Jr.'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 June 22, 2010. All items of compensation identified in the joint life care plan, filed on June 21, 2011, as Pet. Ex. 27, are supported by the evidence, and are illustrated by the chart entitled Appendix A: Items of Compensation for Nicholas Romero, Jr., attached hereto as Tab A.¹ Respondent proffers that Nicholas Romero, Jr. should be awarded all items of compensation set forth in the joint life care plan and illustrated by the chart attached at Tab A. Petitioners agree.

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, Nicholas Romero, Jr. will never be gainfully employed. Therefore, respondent proffers that Nicholas Romero, Jr. should be awarded full lost future earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(B). Respondent proffers that the appropriate award for Nicholas Romero, Jr.'s lost future earnings is \$660,402.77. Petitioners agree.

C. Pain and Suffering

Respondent proffers that Nicholas Romero, Jr. should be awarded \$207,249.75 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 Nicholas Romero, Jr.'s vaccine-related injury. Respondent proffers that petitioners should be awarded past unreimbursable expenses in the amount of \$11,365.55. Petitioners agree.

E. Medicaid Lien

Respondent proffers that Nicholas Romero, Jr. should be awarded funds to satisfy the State of Texas lien in the amount of \$13,020.81, which represents full satisfaction of any right of subrogation, assignment, claim, lien, or cause of action the State of Texas may have against any individual as a result of any Medicaid payments the State of Texas has made to or on behalf of Nicholas Romero, Jr. 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 September 20, 2004, under Title XIX of the Social Security Act.

II. Form of the Award

The parties recommend that the compensation provided to Nicholas Romero, Jr. 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 \$964,941.44, representing compensation for lost future earnings (\$660,402.77), pain and suffering (\$207,249.75), and life care expenses for Year One (\$97,288.92), in the form of a check payable to petitioners as guardian(s)/conservator(s) of the estate of Nicholas Romero, Jr., for the benefit of Nicholas Romero, Jr. No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of Nicholas Romero, Jr.'s estate;

B. A lump sum payment of \$11,365.55, representing compensation for past unreimbursable expenses, payable to Terah Romero and Nicholas Romero, Sr., petitioners;

C. A lump sum payment of \$13,020.81, representing compensation for satisfaction of the State of Texas Medicaid lien, payable jointly to petitioners and

Texas Medicaid and Health Partnership
TPL/Tort Department
P.O. Box 202948
Austin, TX 78720-2948
Attn: Mr. Marvin Hicks

Petitioners agree to endorse this payment to the State.

D. 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 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 petitioners as guardian(s)/conservator(s) of the estate of Nicholas Romero, Jr., for the benefit of Nicholas Romero, Jr., only so long as Nicholas Romero, Jr. 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.

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 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 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.

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.

2. Life-contingent annuity

Petitioners will continue to receive the annuity payments from the Life Insurance Company only so long as Nicholas Romero, Jr. 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 Nicholas Romero, Jr.'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 Nicholas Romero, Jr.'s estate. If petitioners are not authorized by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of Nicholas Romero, Jr., any such payment shall be made to the party or parties appointed by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of Nicholas Romero, Jr. 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 Nicholas Romero, Jr.'s estate:	\$ 964,941.44
B.	Lump sum paid to petitioners:	\$ 11,365.55
C.	Reimbursement for Medicaid lien:	\$ 13,020.81
D.	An amount sufficient to purchase the annuity contract described above in section II. D.	

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

GLENN A. MACLEOD
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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: September 14, 2011.

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Year 1	Compensation Year 2	Compensation Year 3	Compensation Years 4-5	Compensation Year 6	Compensation Year 7	Compensation Year 8	Compensation Year 9
				2011	2012	2013	2014-2015	2016	2017	2018	2019
United Healthcare Ded. and MOP	5%			1,750.00	1,750.00	1,750.00	1,750.00	1,750.00	1,750.00	1,750.00	1,750.00
United Healthcare Dependent Premium	5%		M								
MEDCO RX Drug Plan Ded. & MOP	5%		M	1,750.00	1,750.00	1,750.00	1,750.00	1,750.00	1,750.00	1,750.00	1,750.00
THIRP Premium	5%		M								
THIRP Ded., Rx Ded. & MOP	5%										
Medicare Part B Premium	5%		M								
Medicare Part B Deductible	5%										
Medigap	5%		M								
Medicare Part D	5%		M								
Neurologist	5%	*									
Dental Care	5%			3,400.00	3,400.00	3,400.00	3,400.00				
Primary Care Physician	5%	*									
Develop. Pediatrician	5%	*									
Emergency Care	5%	*									
Ambulance Transport	5%	*									
Surgery to Replace VNS	5%	*									
CMP	5%	*									
EEG	5%	*									
Levitiracetam	5%	*									
Lyrica	5%	*									
Abilify Solution	5%	*									
Clonazepam	5%	*									
Vimpat	5%	*									
Pediasure/ Ensure	4%		M	2,040.00	2,040.00	2,040.00	960.00	960.00	960.00	960.00	960.00
Vit B6	4%			30.00	30.00	30.00	30.00				
ST, OT, Behavioral Therapy & PT	4%	*									
Cognitive Behavioral Therapy	4%			2,235.00	2,160.00	2,160.00	2,160.00	2,160.00	2,160.00	2,160.00	2,160.00
Additional PT, OT, ST	4%	*									
Feeding Program	4%			13,500.00							
Lodging during Feeding Program	4%			315.00							
Case Mngr	4%			750.00	750.00						
Camp	4%			750.00	750.00	750.00	750.00	750.00	750.00	750.00	750.00
Therapeutic Toys	4%			50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00
Adapted Swing	4%			450.00							
Frame or Mount for Swing	4%			600.00							

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Year 1	Compensation Year 2	Compensation Year 3	Compensation Years 4-5	Compensation Year 6	Compensation Year 7	Compensation Year 8	Compensation Year 9
				2011	2012	2013	2014-2015	2016	2017	2018	2019
Small Trampoline	4%			100.00				100.00			
Home Mods	4%			20,000.00							
Medical Alert Tag	4%			25.00	8.33	8.33	8.33	8.33	8.33	8.33	8.33
Seizure Monitor	4%			330.00						330.00	
Adaptive Equip for Eating	4%			80.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00
Comm.. Device (Provided by State)	4%										
Warranty for Comm Device	4%			2,025.00				2,025.00			
Service Dog	4%			715.88	715.88	715.88	715.88	715.88	715.88	715.88	715.88
Transportation: Neurology	4%			164.16	164.16	164.16	164.16	164.16	164.16	164.16	164.16
Transportation: Primary Care	4%			20.52	20.52	20.52	20.52	20.52	20.52	20.52	20.52
Transportation: Dev Peds	4%			15.20	15.20	15.20	15.20	15.20	15.20	15.20	15.20
Transportation: Pharmacy	4%			72.96	72.96	72.96	72.96				
Transportation: Therapies	4%		M	1,744.20	1,744.20	1,744.20	1,744.20	1,744.20	1,744.20	1,744.20	1,744.20
Transportation: Baylor	4%			144.00							
Home Health Aide	4%		M	31,008.00	31,008.00	31,008.00	31,008.00	31,008.00	31,008.00	31,008.00	31,008.00
Home Health Aide	4%		M	7,752.00	7,752.00	7,752.00	7,752.00	7,752.00	7,752.00	7,752.00	7,752.00
Home Health Aide	4%		M	5,472.00	5,472.00	5,472.00	5,472.00	5,472.00	5,472.00	5,472.00	5,472.00
Facility Care	4%		M								
Lost Future Earnings				660,402.77							
Pain and Suffering				207,249.75							
Past Unreimbursable Expenses				11,365.55							
Medicaid Lien				13,020.81							
Annual Totals				989,327.80	59,703.25	58,953.25	57,873.25	56,495.29	54,370.29	54,700.29	54,370.29

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 Nicholas Romero, Jr. for the benefit of Nicholas Romero, Jr., for lost future earnings (\$660,402.77), pain and suffering (\$207,249.75), and Yr 1 life care expenses (\$97,288.92): \$964,941.44.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, Terah Romero and Nicholas Romero, Sr., for past un-reimbursable expenses: \$11,365.55.

As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioners and the State of Texas, as reimbursement of the state's Medicaid lien: \$13,020.81.

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.

[illegible]

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 10	Compensation Year 11	Compensation Years 12-14	Compensation Year 15	Compensation Year 16	Compensation Years 17-20	Compensation Year 21	Compensation Years 22-39
				2020	2021	2022-2024	2025	2026	2027-2030	2031	2032-2049
Small Trampoline	4%				100.00						
Home Mods	4%										
Medical Alert Tag	4%			8.33	8.33	8.33	8.33	8.33	8.33	8.33	8.33
Seizure Monitor	4%										
Adaptive Equip for Eating	4%			50.00	50.00	50.00	50.00				
Comm.. Device (Provided by State)	4%										
Warranty for Comm Device	4%				2,025.00			2,025.00		2,025.00	405.00
Service Dog	4%			715.88	715.88	715.88	715.88				
Transportation: Neurology	4%			164.16	164.16	164.16	164.16				
Transportation: Primary Care	4%			20.52	20.52	20.52	20.52				
Transportation: Dev Peds	4%			15.20	15.20	15.20	15.20				
Transportation: Pharmacy	4%										
Transportation: Therapies	4%		M	1,744.20	1,744.20	1,744.20	1,744.20				
Transportation: Baylor	4%										
Home Health Aide	4%		M	31,008.00	31,008.00	31,008.00	31,008.00				
Home Health Aide	4%		M	7,752.00	7,752.00	7,752.00	7,752.00				
Home Health Aide	4%		M	5,472.00	5,472.00	5,472.00	5,472.00				
Facility Care	4%		M					83,884.30	83,884.30	83,884.30	83,884.30
Lost Future Earnings											
Pain and Suffering											
Past Unreimbursable Expenses											
Medicaid Lien											
Annual Totals				54,450.35	56,575.35	54,450.35	55,950.35	92,383.63	89,158.63	91,183.63	89,563.63

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 Nicholas Romero, Jr. for the benefit of Nicholas Romero, Jr., for lost future earnings (\$660,402.77), pain and suffering (\$207,249.75), and Yr 1 life care expenses (\$97,288.92): \$964,941.44.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, Terah Romero and Nicholas Romero, Sr., for past un-reimbursable expenses: \$11,365.55.

As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioners and the State of Texas, as reimbursement of the state's Medicaid lien: \$13,020.81.

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.

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Years 40-41 2050-2051	Compensation Years 42-58 2052-2068	Compensation Years 59-Life 2069-Life
United Healthcare Ded. and MOP	5%					
United Healthcare Dependent Premium	5%		M			
MEDCO RX Drug Plan Ded. & MOP	5%		M			
THIRP Premium	5%		M	9,408.00		
THIRP Ded., Rx Ded. & MOP	5%			4,200.00		
Medicare Part B Premium	5%		M		1,384.80	1,384.80
Medicare Part B Deductible	5%				162.00	
Medigap	5%		M		2,033.04	1,679.04
Medicare Part D	5%		M		4,292.59	4,292.59
Neurologist	5%	*				
Dental Care	5%					
Primary Care Physician	5%	*				
Develop. Pediatrician	5%	*				
Emergency Care	5%	*				
Ambulance Transport	5%	*				
Surgery to Replace VNS	5%	*				
CMP	5%	*				
EEG	5%	*				
Levitiracetam	5%	*		275.00		
Lyrica	5%	*		300.00		
Abilify Solution	5%	*		300.00		
Clonazepam	5%	*		120.00		
Vimpat	5%	*		300.00		
Pediasure/ Ensure	4%		M			
Vit B6	4%					
ST, OT, Behavioral Therapy & PT	4%	*				
Cognitive Behavioral Therapy	4%					
Additional PT, OT, ST	4%	*				
Feeding Program	4%					
Lodging during Feeding Program	4%					
Case Mngr	4%			300.00	300.00	300.00
Camp	4%					
Therapeutic Toys	4%					
Adapted Swing	4%					
Frame or Mount for Swing	4%					

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Years 40-41 2050-2051	Compensation Years 42-58 2052-2068	Compensation Years 59-Life 2069-Life
Small Trampoline	4%					
Home Mods	4%					
Medical Alert Tag	4%			8.33	8.33	8.33
Seizure Monitor	4%					
Adaptive Equip for Eating	4%					
Comm.. Device (Provided by State)	4%					
Warranty for Comm Device	4%			405.00	405.00	405.00
Service Dog	4%					
Transportation: Neurology	4%					
Transportation: Primary Care	4%					
Transportation: Dev Peds	4%					
Transportation: Pharmacy	4%					
Transportation: Therapies	4%		M			
Transportation: Baylor	4%					
Home Health Aide	4%		M			
Home Health Aide	4%		M			
Home Health Aide	4%		M			
Facility Care	4%		M	83,884.30	83,884.30	83,884.30
Lost Future Earnings						
Pain and Suffering						
Past Unreimbursable Expenses						
Medicaid Lien						
Annual Totals				99,500.63	92,470.06	91,954.06

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 Nicholas Romero, Jr. for the benefit of Nicholas Romero, Jr., for lost future earnings (\$660,402.77), pain and suffering (\$207,249.75), and Yr 1 life care expenses (\$97,288.92): \$964,941.44.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, Terah Romero and Nicholas Romero, Sr., for past un-reimbursable expenses: \$11,365.55.

As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioners and the State of Texas, as reimbursement of the state's Medicaid lien: \$13,020.81.

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.