

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 10-169V

Filed: November 19, 2013

Not for Publication

REESE TOWER, a Minor, by His Next Friend, LYNDA CURRAN,

Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

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Damages decision based on stipulation; diphtheria-tetanus-acellular pertussis vaccine; hepatitis B vaccine; inactivated polio vaccine; Haemophilus influenzae type B vaccine; pneumococcal conjugate vaccine; rotavirus vaccine; massive gastrointestinal bleed; necrotizing enterocolitis; developmental delay

Ronald C. Homer, Boston, MA, for petitioner.
Althea W. Davis, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING DAMAGES¹

This petition was initially filed by Stephanie Tower, Reese Tower's mother. On December 17, 2010, Lynda Curran was appointed temporary guardian of the person for Reese Tower. On October 9, 2012, the special master granted petitioner's motion to substitute Lynda Curran as petitioner. On July 19, 2013, petitioner's counsel reported that petitioner was

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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 delete 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 delete such material from public access.

appointed as permanent legal guardian of Reese's estate and person.²

On November 19, 2013, the parties filed the attached stipulation in which they agreed to settle this case and described the settlement terms. Petitioner alleges that Reese suffered massive gastrointestinal bleed and necrotizing enterocolitis that was caused by his March 23, 2007 receipt of diphtheria-tetanus-acellular pertussis ("DTaP"), hepatitis B ("hep B"), inactivated polio ("IPV"), Haemophilus influenzae type B ("Hib"), pneumococcal conjugate ("PCV"), and rotavirus vaccinations. Petitioner further alleges that Reese suffered developmental delay as sequela of his injury and that he experienced residual effects of this injury for more than six months. Respondent denies that DTaP, hep B, IPV, Hib, PCV, and rotavirus vaccines caused Reese's alleged injuries and that his current disabilities are sequelae of his alleged injury. Nonetheless, the parties agreed to resolve this matter informally.

The undersigned finds the terms of the stipulation to be reasonable. The court hereby adopts the parties' said stipulation, attached hereto, and awards compensation in the amount and on the terms set forth therein. Pursuant to the stipulation, the court awards:

- a. a lump sum of **\$219,251.56** (which amount includes \$24,251.56 for first year life care plan expenses and \$195,000.00 for pain and suffering). The award shall be in the form of a check for **\$219,251.56** made payable to petitioner as Guardian/Conservator of the estate of Reese Tower, for the benefit of Reese Tower;
- b. a lump sum of **\$5,758.77** for past unreimbursed expenses. The award shall be in the form of a check for **\$5,758.77** made payable to petitioner;
- c. a lump sum of **\$233,605.18**, representing compensation for satisfaction of the State of California Medicaid lien. The award shall be in the form of a check for **\$233,605.18**, made payable jointly to petitioner and

State of California
Recovery Section, MS 4720
P.O. Box 997425
Sacramento, CA 95899-7425
Telephone: 916-650-0516
Attention: Ms. Rhonda Wyatt.

Petitioner agrees to endorse this check to the State of California, Recovery Section, MS 4720; and

- d. an amount sufficient to purchase the annuity contract described in paragraph 10 of the

² If petitioner is not authorized by a court of competent jurisdiction to serve as guardian/conservator of the estate of Reese Tower at the time of judgment, any and all payments shall be paid to the party or parties appointed by a court of competent jurisdiction to serve as guardian/conservator of the estate of Reese Tower.

attached stipulation.

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.³

IT IS SO ORDERED.

Dated: November 19, 2013

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

³ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party, either separately or jointly, filing a notice renouncing the right to seek review.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS

REESE TOWER, a minor, by his next)	
Friend, LYNDA CURRAN,)	
)	
Petitioner,)	No. 10-169V
)	Special Master Laura D. Millman
v.)	ECF
)	
SECRETARY OF HEALTH)	
AND HUMAN SERVICES,)	
)	
Respondent.)	

STIPULATION

The parties hereby stipulate to the following matters:

1. On behalf of her minor son, Reese Tower, petitioner Stephanie Tower filed a petition for vaccine compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 to 34 (the "Vaccine Program").¹ The petition seeks compensation for injuries allegedly related to Reese's receipt of the diphtheria-tetanus-acellular pertussis ("DTaP"), hepatitis B, inactivated polio ("IPV"), Haemophilus influenzae type B ("Hib), pneumococcal conjugate ("PCV"), and rotavirus vaccinations, which vaccines are contained in the Vaccine Injury Table (the "Table"), 42 C.F.R. § 100.3 (a).

2. Reese received the DTaP, hepatitis B, IPV, Hib, PCV, and rotavirus vaccines on March 23, 2007.

3. The vaccines were administered within the United States.

¹ On December 17, 2010, Lynda Curran was appointed temporary guardian of the person for Reese Tower. On October 9, 2012, the special master granted petitioner's motion to substitute Lynda Curran as petitioner.

4. Petitioner alleges that Reese sustained the first symptom or manifestation of the onset of a massive gastrointestinal bleed and necrotizing enterocolitis on or about March 28, 2007. Petitioner further alleges that he suffered developmental delay as sequela of his injury and that he experienced residual effects from this injury for more than six months.

5. Petitioner represents that there has been no prior award or settlement of a civil action for damages on Reese's behalf as a result of his condition.

6. Respondent denies that the DTaP, hep B, IPV, Hib, PCV, and rotavirus vaccines caused Reese's alleged injuries and denies that his current disabilities are sequelae of his alleged injury.

7. Maintaining their above-stated positions, the parties nevertheless now agree that the issues between them shall be settled and that a decision should be entered awarding the compensation described in paragraph 8 of this Stipulation.

8. As soon as practicable after an entry of judgment reflecting a decision consistent with the terms of this Stipulation, and after petitioner has filed an election to receive compensation pursuant to 42 U.S.C. § 300aa-21(a)(1), the Secretary of Health and Human Services will issue the following vaccine compensation payments:

- a. A lump sum of \$219,251.56 (which amount includes \$24,251.56 for first year life care plan expenses and \$195,000.00 for pain and suffering) in the form of a check payable to petitioner as Guardian/Conservator of the estate of Reese Tower, for the benefit of Reese Tower;
- b. A lump sum of \$5,758.77, for past unreimbursed expenses, in the form of a check payable to petitioner;
- c. A lump sum of \$233,605.18, representing compensation for satisfaction of the State of California Medicaid lien, in the form of a check payable jointly to petitioner and

State of California
Recovery Section, MS 4720

P.O. Box 997425
Sacramento, CA 95899-7425
Telephone: 916-650-0516
Attention: Ms. Rhonda Wyatt

Petitioner agrees to endorse this payment to the State of California, Recovery Section, MS-4620; and

- d. An amount sufficient to purchase the annuity contract described in paragraph 10 below, paid to the life insurance company from which the annuity will be purchased (the "Life Insurance Company").

The above amounts represent compensation for all damages that would be available under 42 U.S.C. § 300aa-15(a).

9. 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.

10. The Secretary of Health and Human Services agrees to purchase an annuity contract from the Life Insurance Company for the benefit of Reese Tower, pursuant to which the Life Insurance Company will agree to make payments periodically to petitioner for the following items of compensation:

- a. For future unreimbursed medical insurance premiums, deductibles, and maximum out of pocket expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$9,083.92 to be paid up to the anniversary of the date of judgment in year 2017, all amounts increasing at the rate of five percent (5%),

compounded annually from the date of judgment;

- b. For future unreimbursed medication expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$391.89 to be paid up to the anniversary of the date of judgment in year 2016, then on the anniversary of the date of judgment in year 2016, an annual amount of \$31.89 to be paid up to the anniversary of the date of judgment in year 2017, all amounts increasing at the rate of four percent (4%), compounded annually from the date of judgment;
- c. For future unreimbursed speech therapy expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$3,250.00 to be paid up to the anniversary of the date of judgment in year 2017, this amount increasing at the rate of four percent (4%), compounded annually from the date of judgment;
- d. For future unreimbursed equipment expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$4,166.26 to be paid up to the anniversary of the date of judgment in year 2016, this amount increasing at the rate of four percent (4%), compounded annually from the date of judgment;
- e. For future unreimbursed transportation expenses, beginning on the first anniversary of the date of judgment, an annual amount of \$95.70 to be paid up to the anniversary of the date of judgment in year 2015, then on the anniversary of the date of judgment in year 2015, an annual amount of \$143.55 to be paid up to the anniversary of the date of judgment in year 2016, then on the anniversary of the date of judgment in year 2016, an annual amount of \$95.70 to be paid up to the anniversary of the date of judgment in year 2017, all amounts increasing at the rate of four percent (4%), compounded annually from the date of judgment; and
- f. For all future unreimbursed life care plan expenses (medical care, diagnostic testing, medications, equipment, transportation, etc.) for the years 2017 to life, on the anniversary of the date of judgment in year 2017, a single lump sum amount of \$13,081.45. This amount is not subject to compounding.

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 above describe only the total yearly sum to be paid to petitioner and do not require that the payment be made in one annual installment. Petitioner will continue to receive the annuity payments from the Life Insurance Company only so long as Reese is alive at the time a particular payment is due.

Petitioner shall provide written notice to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of Reese Tower's death.

11. The annuity contract will be owned solely and exclusively by the Secretary of Health and Human Services and will be purchased as soon as practicable following the entry of a judgment in conformity with this Stipulation. The parties stipulate and agree that the Secretary of Health and Human Services and the United States of America are not responsible for the payment of any sums other than the amounts set forth in paragraph 8 herein and the amounts awarded pursuant to paragraph 12 herein, and that they do not guarantee or insure any of the future annuity payments. Upon the purchase of the annuity contract, the Secretary of Health and Human Services and the United States of America are released from any and all obligations with respect to future annuity payments.

12. As soon as practicable after the entry of judgment on entitlement in this case, and after petitioner has filed both a proper and timely election to receive compensation pursuant to 42 U.S.C. § 300aa-21(a)(1), and an application, the parties will submit to further proceedings before the special master to award reasonable attorneys' fees and costs incurred in proceeding upon this petition.

13. Petitioner and her attorney represent that they have identified to respondent all known sources of payment for items or services for which the Program is not primarily liable under 42 U.S.C. § 300aa-15(g), including State compensation programs, insurance policies, Federal or State health benefits programs (other than Title XIX of the Social Security Act (42 U.S.C. § 1396 et seq.)), or entities that provide health services on a pre-paid basis.

14. Payments made pursuant to paragraph 8 and any amounts awarded pursuant to

paragraph 12 of this Stipulation will be made in accordance with 42 U.S.C. § 300aa-15(i), subject to the availability of sufficient statutory funds.

15. The parties and their attorneys further agree and stipulate that, except for any award for attorney's fees and litigation costs and past unreimbursable expenses, the money provided pursuant to this Stipulation, either immediately or as part of the annuity contract, will be used solely for the benefit of Reese Tower, as contemplated by a strict construction of 42 U.S.C. § 300aa-15(a) and (d), and subject to the conditions of 42 U.S.C. § 300aa-15(g) and (h).

16. Petitioner represents that she presently is, or within 90 days of the date of judgment will become, duly authorized to serve as guardian of Reese Tower's estate under the laws of the State of California. No payments pursuant to this Stipulation shall be made until petitioner provides the Secretary with documentation establishing her appointment a guardian/conservator of Reese's estate. If petitioner is not authorized by a court of competent jurisdiction to serve as guardian/conservator of the estate of Reese Tower at the time a payment pursuant to this Stipulation is to be made, any such payment shall be paid to the party or parties appointed by a court of competent jurisdiction to serve as guardian/conservator of the estate of Reese Tower upon submission of written documentation of such appointment to the Secretary.

17. In return for the payments described in paragraphs 8 and 12 petitioner, in her capacity, and as legal representative of Reese Tower, on behalf of herself, Reese, and his heirs, executors, administrators, successors or assigns, does forever irrevocably and unconditionally release, acquit and discharge the United States and the Secretary of Health and Human Services from any and all actions or causes of action (including agreements, judgments, claims, damages, loss of services, expenses and all demands of whatever kind or nature) that have been brought,

could have been brought, or could be timely brought in the Court of Federal Claims, under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 et seq., on account of, or in any way growing out of, any and all known or unknown, suspected or unsuspected personal injuries to or death of Reese Tower resulting from, or alleged to have resulted from DTaP, hepatitis B, IPV, Hib, PCV, and rotavirus vaccines administered on March 23, 2007, as alleged by petitioner in a petition for vaccine compensation filed on or about March 18, 2010, in the United States Court of Federal Claims as petition No. 10-169V.

18. If Reese Tower should die prior to entry of judgment, this agreement shall be voidable upon proper notice to the Court on behalf of either or both of the parties.

19. If the special master fails to issue a decision in complete conformity with the terms of this Stipulation or if the Court of Federal Claims fails to enter judgment in conformity with a decision that is in complete conformity with the terms of this Stipulation, then the parties' settlement and this Stipulation shall be voidable at the sole discretion of either party.

20. This Stipulation expresses a full and complete negotiated settlement of liability and damages claimed under the National Childhood Vaccine Injury Act of 1986, as amended, except at otherwise noted in paragraph 12 above. There is absolutely no agreement on the part of the parties hereto to make any payment or to do any act or thing other than is herein expressly stated and clearly agreed to. The parties further agree and understand that the award described in this Stipulation may reflect a compromise of the parties' respective positions as to liability and/or amount of damages, and further, that a change in the nature of the injury or condition or in the items of compensation sought, is not grounds to modify or revise this agreement.

21. Petitioner hereby authorizes respondent to disclose documents filed by 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.

22. This Stipulation shall not be construed as an admission by the United States or the Secretary of Health and Human Services that the DTaP, hepatitis B, IPV, Hib, PCV, and rotavirus vaccines caused Reese's massive gastrointestinal bleed and necrotizing enterocolitis or any other injury or his current disabilities.

23. All rights and obligations of petitioner hereunder shall apply equally to petitioner's heirs, executors, administrators, successors, and/or assigns, as legal representatives of Reese Tower.

END OF STIPULATION

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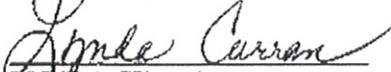
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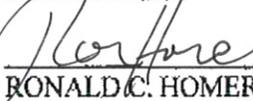
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Respectfully submitted,

PETITIONER:

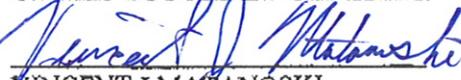

LYNDA CURRAN

**ATTORNEY OF RECORD FOR
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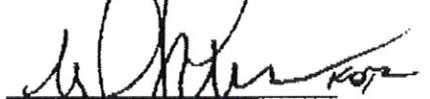

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by Joseph M. Pepper
Rule 83.1(c)(2)

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Dated: 19 November 2013