

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 10-268V

Filed: September 25, 2012

Not for Publication

BLAKE AND LEAH WILCOX,
as legal representatives of
ALEXANDER WILCOX,

Petitioners,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

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Damages Decision Based on
Stipulation; Hepatitis B Vaccine;
Diphtheria-Tetanus-Acellular
Pertussis Vaccine; Haemophilus
Influenzae Type B Vaccine;
Pneumococcal Conjugate Vaccine;
Transverse Myelitis; Attorneys'
Fees and Costs Based on
Stipulation

Jason P. Osteen, Kansas City, MO, for petitioner.
Ann D. Martin, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING DAMAGES AND ATTORNEYS' FEES AND COSTS¹

On September 24, 2012, the parties filed the attached stipulation in which they agreed to settle this case and described the settlement terms. Petitioners allege that Alexander Wilcox suffered from transverse myelitis ("TM") following his receipt of the Hepatitis B, diphtheria-tetanus-acellular pertussis, pneumococcal conjugate, and haemophilus influenza type b vaccines. Respondent denies that Alexander's TM, or any other injury, was caused in fact by his Hepatitis

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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

B, diphtheria-tetanus-acellular pertussis, pneumococcal conjugate, and haemophilus influenza type b vaccines. Nonetheless, the parties agreed to resolve this matter informally.

The court finds the terms to be reasonable, hereby adopts the parties' stipulation, and awards compensation in the amount and on the terms set forth therein. Pursuant to the stipulation, the court awards an amount neither less nor greater than **\$155,063.00** to purchase the annuity contract described in paragraph 10 of the attached Stipulation, paid to the life insurance company from which the annuity will be purchased.

The parties have also agreed on an appropriate amount for attorneys' fees and costs in this case. In accordance with the General Order #9 requirement, petitioners state that they did not incur any costs to pursue their petition.

Petitioners request \$13,792.97 in attorneys' fees and costs to which respondent does not object. The undersigned finds this amount to be reasonable. Accordingly, the court awards **\$13,792.97**, representing reimbursement for attorneys' fees and costs. The award shall be in the form of a check made payable jointly to petitioners and petitioners' attorney, Jason P. Osteen, in the amount of **\$13,792.97**.

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 25, 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.

4. Petitioners allege that on May 2, 2007, Alexander suffered the onset of transverse myelitis, which was caused in fact by the vaccines he received on April 5, 2007. Petitioners further allege that Alexander suffered the residual effects of this injury for more than six months.

5. Petitioners represent that there has been no prior award or settlement of a civil action for damages on behalf of Alexander as a result of his condition.

6. Respondent denies that the Hep B, DTaP, pneumococcal conjugate, and/or Hib vaccines that Alexander received on April 5, 2007, or any other vaccines, caused Alexander's transverse myelitis, or any other injury. Respondent further denies that Alexander experienced the residual effects of a vaccine-related injury for more than six months.

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 petitioners have 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. An amount neither less nor greater than \$155,063.00 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"); and

b. A lump sum of \$13,792.97 in the form of a check payable jointly to petitioners and petitioners' attorney, Jason P. Osteen, for attorneys' fees and costs available under 42 U.S.C. § 300aa-15(e), and, in compliance with General Order #9, no out-of-pocket expenses were incurred by petitioners in proceeding on the petition.

This amount represents compensation for all damages that would be available under 42 U.S.C. § 300aa-15(a), and reasonable attorneys' fees and costs under 42 U.S.C. § 300aa-15(e).

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 Alexander's benefit, pursuant to which the Life Insurance Company will agree to make three lump sum payments to Alexander for all damages that would be available under 42 U.S.C. § 300aa-15(a), as follows:

- a. A lump sum payment on May 28, 2027, in the amount of \$67,483.00; and
- b. A lump sum payment on May 28, 2036, in the amount of \$134,965.00; and
- c. A lump sum payment on May 28, 2046, in the amount of \$134,965.00.

The purchase price of the annuity shall be neither less nor greater than \$155,063.00. In the event that the cost of the annuity payments set forth above varies from \$155,063.00 at the time of funding, the final annuity payment on May 28, 2046, shall be adjusted to ensure that the total cost of the annuity is neither less nor greater than \$155,063.00. Should Alexander predecease the remittance of the certain lump sum payments set forth above, the payments shall be made to his estate. Written notice to the Secretary of Health and Human Services and to the Life Insurance Company shall be provided within twenty (20) days of Alexander'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 that they do not guarantee or insure the future annuity payment. 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 the future annuity payment.

12. Petitioners and their attorney represent that compensation to be provided pursuant to this Stipulation is not for any items or services for which the Program is not primarily liable under 42 U.S.C. § 300aa-15(g), to the extent that payment has been made or can reasonably be expected to be made under any 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 by entities that provide health services on a pre-paid basis.

13. Payments made pursuant to paragraph 8 of this Stipulation will be made in accordance with 42 U.S.C. § 300aa-15(i), subject to the availability of sufficient statutory funds.

14. The parties and their attorneys further agree and stipulate that the money provided pursuant to this Stipulation as part of the annuity contract will be used solely for the benefit of Alexander 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).

15. In return for the payments described in paragraphs 8, petitioners, in their individual capacities and as legal representatives of Alexander, on their own behalf, and on behalf of Alexander, and his heirs, executors, administrators, successors or assigns, do 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 Alexander resulting from, or alleged to have resulted from, the Heb B vaccine, the DTaP vaccine, the pneumococcal conjugate vaccine, and/or the Hib vaccine that Alexander received on April 5, 2007, as alleged by petitioners in a petition for vaccine compensation filed on or about April 28, 2010, in the United States Court of Federal Claims as petition No. 10-268V.

16. If Alexander 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.

17. 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.

18. 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. 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

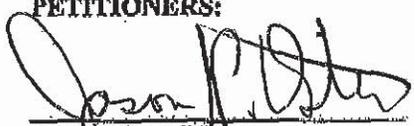
Respectfully submitted,

PETITIONERS:

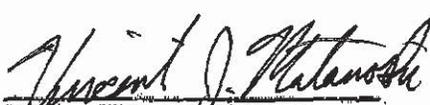

BLAKE WILCOX


LEAH WILCOX

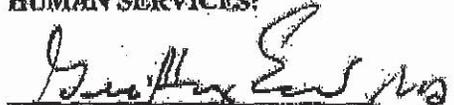
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Dated: September 24, 2012