

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 99-608 V

Filed: November 30, 2009

Not for publication

HARILYN ADLER,

*

*

Petitioner,

*

*

v.

*

Damages Decision Based on Proffer

*

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

*

*

*

Respondent.

*

*

Ronald C. Homer, Boston, MA, for petitioner.

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

MILLMAN, Special Master

DECISION AWARDING DAMAGES

On November 23, 2009, respondent filed a Proffer on Award of Compensation. On November 24, 2009, petitioner communicated acceptance of respondent's Proffer via electronic correspondence. Based upon the record as a whole, the special master finds that petitioner is entitled to an award as stated in the Proffer. Pursuant to the attached Proffer, with Appendix, the court awards petitioner:

1. A lump sum payment of **\$565,219.76**, representing life care expenses for Harilyn Adler in Year One (**\$106,195.86**), lost earnings (**\$266,886.16**), pain and suffering (**\$188,716.18**), and past unreimbursable expenses (**\$3,421.56**), in the form of a check payable to petitioner, Harilyn Adler; and
2. An amount sufficient to purchase the annuity contract described in section II. B. of the attached proffer, paid to the life insurance company from which the annuity will be purchased.

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.¹

IT IS SO ORDERED.

November 30, 2009
DATE

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

¹ 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

HARILYN ADLER,)	
)	
Petitioner,)	<u>ECF</u>
)	
v.)	No. 99-608V
)	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 respondent engaged life care planner Suzanne Labansky, MSN, CRRN, CCM, CLCP, MSC, and petitioner engaged life care planner Maureen Clancy, RN, BSN, CLCP, to provide an estimation of Harilyn Adler’s future vaccine-injury related needs. All items of compensation identified in the life care plan are supported by the evidence, and are illustrated by the chart entitled **Items of Compensation for Harilyn Adler**, attached hereto as Tab A.¹ Respondent proffers that Harilyn Adler 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 Earnings

The parties agree that based upon the evidence of record, petitioner has suffered a loss of earnings related to her vaccine injury and that it is unlikely that she will be gainfully employed in the future. Therefore, respondent proffers that Harilyn Adler should be awarded \$266,886.16 in lost earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(A). Petitioner agrees.

C. Pain and Suffering

Respondent proffers that Harilyn Adler should be awarded \$188,716.18 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 her expenditure of past unreimbursable expenses related to her vaccine-related injury. Respondent proffers that petitioner should be awarded past unreimbursable expenses in the amount of \$3,421.56. Petitioner agrees.

E. Medicaid Lien

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

II. Form of the Award

The parties recommend that the compensation provided to Harilyn Adler should be made through a combination of a lump sum payment 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 \$565,219.76, representing life care expenses for Year One (\$106,195.86), lost earnings (\$266,886.16), pain and suffering (\$188,716.18), and past

unreimbursable expenses (\$3,421.56), in the form of a check payable to Harilyn Adler, petitioner;

B. An amount sufficient to purchase an annuity contract, 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 company² from which the annuity will be purchased. 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, Harilyn Adler, only so long as Harilyn Adler 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

² 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.

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 she, Harilyn Adler, is alive at the time that a particular payment is due. Petitioner agrees to make arrangements to ensure that written notice is provided to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of Harilyn Adler'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: **\$ 565,219.76**
- B. An amount sufficient to purchase the annuity contract described above in section II. B.

Respectfully submitted,

TONY WEST
Assistant Attorney General

TIMOTHY P. GARREN
Director
Torts Branch, Civil Division

MARK W. ROGERS
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: November 23, 2009.

Appendix A: Items of Compensation for Harilyn Adler

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
				2009	2010	2011	2012	2013	2014	2015	2016
ECU	4%			10,000.00							
ECU Microphone & Mounting	4%			379.00							
ECU Batteries	4%			164.00		164.00		164.00		164.00	
Adaptive Equip for Kitchen	4%			250.00					250.00		
Adaptive Equip for Grooming	4%			150.00					150.00		
Hospital Sheets	4%									144.00	
Adult Diapers	4%									787.00	787.00
Bed Liners	4%									821.25	821.25
Disposable Gloves	4%									876.00	876.00
Wipes	4%									281.05	281.05
Hand Sanitizer	4%									47.88	47.88
Mobility Assist. Dog Care	4%			930.00	930.00	930.00	930.00	930.00	930.00	930.00	930.00
Mobility Assist. Dog Training	4%										
Home Health Care	4%		M	11,232.00	11,232.00	26,496.00	26,496.00	26,496.00	26,496.00	52,992.00	52,992.00
Handicap Adapted Van	4%									46,500.00	
Home Mods	4%			60,000.00						50,000.00	
Home Maint	4%		M	2,688.00	2,688.00	2,688.00	2,688.00	2,688.00	2,688.00	2,688.00	2,688.00
Lost Earnings				266,886.16							
Pain and Suffering				188,716.18							
Past Unreimbursable Expenses				3,421.56							
Annual Totals				565,219.76	25,714.22	41,662.22	41,560.14	41,669.75	41,984.09	170,591.05	68,491.42

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 (\$106,195.86), lost earnings (\$266,866.16), pain and suffering (\$188,716.18), and past unreimbursable expenses (\$3,421.56): \$565,219.76.

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 Harilyn Adler

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
				2017	2018	2019	2020	2021	2022	2023	2024
Walking Cane & Tips	4%										
Walker	4%			34.80					34.80		
Walker Tips	4%			7.53	7.53	7.53	7.53	7.53	7.53	7.53	7.53
Carryall Bag	4%				27.12			27.12			27.12
Scooter	4%										
Scooter Arm Tote	4%										
Scooter Batteries	4%										
Scooter Maint	4%										
Scooter Carrier	4%										
Scooter Cover	4%										
Power WC	4%	*									
WC Carrying Pack	4%						28.00				
WC Battery	4%			184.00	184.00	184.00	184.00	184.00	184.00	184.00	184.00
WC Maint	4%			120.00	120.00	120.00	120.00	120.00	120.00	120.00	120.00
Manual WC	4%					279.00					279.00
Manual WC Carry Pack	4%					42.00					42.00
UPEASY Uplift Seat	4%	*									
Beasey Transfer Board	4%						209.00				
Reacher	4%					36.34					36.34
Over the Bed Table	4%						212.00				
Jay Cushion	4%						409.00				
Jay Cushion Covers	4%			144.00		144.00		144.00		144.00	
Portable Ramp	4%										149.00
Manual Hoyer Lift	4%	*									
Slings	4%			204.00	204.00	204.00	204.00	204.00	204.00	204.00	204.00
Hospital Bed	4%	*									
Hospital Bed Maint	4%			150.00	150.00	150.00	150.00	150.00	150.00	150.00	150.00
Alternating Pressure Mattress	4%						1,895.00				
Toilet Seat	4%									229.95	32.85
Bedside Commode	4%									31.59	4.51
Bedpan	4%						56.00				
Hand Held Shower	4%									44.95	6.42
Shower Chair	4%									70.00	10.00

Appendix A: Items of Compensation for Harilyn Adler

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
				2017	2018	2019	2020	2021	2022	2023	2024
ECU	4%					10,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00
ECU Microphone & Mounting	4%					379.00	37.90	37.90	37.90	37.90	37.90
ECU Batteries	4%			164.00		164.00		164.00		164.00	
Adaptive Equip for Kitchen	4%					250.00					250.00
Adaptive Equip for Grooming	4%					150.00					150.00
Hospital Sheets	4%			144.00		144.00		144.00		144.00	
Adult Diapers	4%			787.00	787.00	787.00	787.00	787.00	787.00	787.00	787.00
Bed Liners	4%			821.25	821.25	821.25	821.25	821.25	821.25	821.25	821.25
Disposable Gloves	4%			876.00	876.00	876.00	876.00	876.00	876.00	876.00	876.00
Wipes	4%			281.05	281.05	281.05	281.05	281.05	281.05	281.05	281.05
Hand Sanitizer	4%			47.88	47.88	47.88	47.88	47.88	47.88	47.88	47.88
Mobility Assist. Dog Care	4%			930.00	930.00	930.00	930.00	930.00	930.00	930.00	930.00
Mobility Assist. Dog Training	4%								7,000.00		
Home Health Care	4%		M	52,992.00	52,992.00	79,488.00	79,488.00	79,488.00	105,984.00	105,984.00	105,984.00
Handicap Adapted Van	4%										
Home Mods	4%										
Home Maint	4%		M								
Lost Earnings											
Pain and Suffering											
Past Unreimbursable Expenses											
Annual Totals				68,751.73	68,292.05	106,349.27	98,607.83	96,277.95	129,329.63	123,123.32	123,762.07

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 (\$106,195.86), lost earnings (\$266,866.16), pain and suffering (\$188,716.18), and past unreimbursable expenses (\$3,421.56): \$565,219.76.

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 Harilyn Adler

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 17	Compensation Year 18	Compensation Year 19	Compensation Years 20-Life
				2025	2026	2027	2028-Life
Medicare Part B	5%						
Medigap	5%		M	2,259.00	2,259.00	2,259.00	2,259.00
Medicare Part D	5%						
AARP Medicare Rx	5%			5,637.80	5,637.80	5,637.80	5,637.80
Primary Care Physician	5%	*					
Neurologist	5%	*					
Ophthal-mologist	5%	*					
Pain Mngt	5%	*					
Gastro-enterologist	5%	*					
Urology Eval	5%	*					
Podiatrist	5%	*					
ER	5%	*					
Hospital-ization	5%	*					
Outpatient Rehab	5%	*					
CBC	5%	*					
Metabolic Panel	5%	*					
Liver Function Test	5%	*					
Urinalysis	5%	*					
MRI	5%	*					
X-rays	5%	*					
Tramadol HCL	5%	*					
Amantadine	5%	*					
Copaxone	5%	*					
Citrucel	4%			180.00	180.00	180.00	180.00
Glycerin Supp	4%			23.42	23.42	23.42	23.42
PT	4%	*		300.00	300.00	300.00	300.00
OT	4%	*					
ST	4%	*		220.00	220.00	220.00	220.00
YMCA	4%		M	516.00			
RN Case Mngr	4%		M	1,068.00	1,068.00	1,068.00	1,068.00
Adv PT	4%			1,140.00	1,140.00	1,140.00	1,140.00
Nutritional Eval	4%	*					
Self Counseling	4%	*					

Appendix A: Items of Compensation for Harilyn Adler

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 17	Compensation Year 18	Compensation Year 19	Compensation Years 20-Life
				2025	2026	2027	2028-Life
Walking Cane & Tips	4%						
Walker	4%					34.80	6.96
Walker Tips	4%			7.53	7.53	7.53	7.53
Carryall Bag	4%					27.12	9.04
Scooter	4%						
Scooter Arm Tote	4%						
Scooter Batteries	4%						
Scooter Maint	4%						
Scooter Carrier	4%						
Scooter Cover	4%						
Power WC	4%	*					
WC Carrying Pack	4%			28.00	5.60	5.60	5.60
WC Battery	4%			184.00	184.00	184.00	184.00
WC Maint	4%			120.00	120.00	120.00	120.00
Manual WC	4%			55.80	55.80	55.80	55.80
Manual WC Carry Pack	4%			8.40	8.40	8.40	8.40
UPEASY Uplift Seat	4%	*					
Beasey Transfer Board	4%			209.00	41.80	41.80	41.80
Reacher	4%			7.27	7.27	7.27	7.27
Over the Bed Table	4%			212.00	42.40	42.40	42.40
Jay Cushion	4%			409.00	81.80	81.80	81.80
Jay Cushion Covers	4%			144.00		144.00	72.00
Portable Ramp	4%			9.93	9.93	9.93	9.93
Manual Hoyer Lift	4%	*					
Slings	4%			204.00	204.00	204.00	204.00
Hospital Bed	4%	*					
Hospital Bed Maint	4%			150.00	150.00	150.00	150.00
Alternating Pressure Mattress	4%			1,895.00	379.00	379.00	379.00
Toilet Seat	4%			32.85	32.85	32.85	32.85
Bedside Commode	4%			4.51	4.51	4.51	4.51
Bedpan	4%			56.00	11.20	11.20	11.20
Hand Held Shower	4%			6.42	6.42	6.42	6.42
Shower Chair	4%			10.00	10.00	10.00	10.00

Appendix A: Items of Compensation for Harilyn Adler

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 17 2025	Compensation Year 18 2026	Compensation Year 19 2027	Compensation Years 20-Life 2028-Life
ECU	4%			1,000.00	1,000.00	1,000.00	1,000.00
ECU Microphone & Mounting	4%			37.90	37.90	37.90	37.90
ECU Batteries	4%			164.00		164.00	82.00
Adaptive Equip for Kitchen	4%			50.00	50.00	50.00	50.00
Adaptive Equip for Grooming	4%			30.00	30.00	30.00	30.00
Hospital Sheets	4%			144.00		144.00	72.00
Adult Diapers	4%			787.00	787.00	787.00	787.00
Bed Liners	4%			821.25	821.25	821.25	821.25
Disposable Gloves	4%			876.00	876.00	876.00	876.00
Wipes	4%			281.05	281.05	281.05	281.05
Hand Sanitizer	4%			47.88	47.88	47.88	47.88
Mobility Assist. Dog Care	4%			930.00			
Mobility Assist. Dog Training	4%						
Home Health Care	4%		M	105,984.00	158,976.00	158,976.00	158,976.00
Handicap Adapted Van	4%			37,200.00	3,720.00	3,720.00	3,720.00
Home Mods	4%						
Home Maint	4%		M				
Lost Earnings							
Pain and Suffering							
Past Unreimbursable Expenses							
Annual Totals				163,451.01	178,817.81	179,331.73	179,059.81

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 (\$106,195.86), lost earnings (\$266,866.16), pain and suffering (\$188,716.18), and past unreimbursable expenses (\$3,421.56): \$565,219.76.

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.