

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

TIMOTHY J. and JOANNA L. SARVER *
Parents and Legal Representatives of the *
Estate of Their Daughter, *
ERICA LYNN SARVER, deceased, *
Petitioners, *

No. 07-307V
Special Master Christian J. Moran

v. *

Filed: August 26, 2010

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *
Respondent. *

Stipulation; Measles-Mumps-
Rubella vaccine; encephalopathy;
mental retardation; behavioral
disorder, gross motor delays, death

UNPUBLISHED DECISION¹

David L. Terzian, Esq., Rawls & McNelis P.C., Richmond, VA, for Petitioner;
Glenn A. MacLeod, Esq., U.S. Department of Justice, Washington, D.C., for Respondent.

On August 17, 2010, the parties filed a joint stipulation concerning the petition for compensation filed by parents Timothy and Joanna Sarver, on behalf of their daughter, Erica Sarver ("Erica") on May 17, 2007. In their petition, the Sarvers alleged that the measles-mumps-rubella ("MMR") vaccine, which is contained in the Vaccine Injury Table (the "Table"), 42 C.F.R. §100.3(a), and which Erica received on March 9, 2006, caused Erica to sustain the first symptom or manifestation of the onset of an encephalopathy within the time period set forth in

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of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).

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 clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, the person submitting the information has 14 days to identify and to move to delete such information before the document's disclosure. If the special master agrees that the identified material fits within the categories listed above, the special master shall redact such material from public access. 42 U.S.C. § 300aa-12(d)(4)(B); Vaccine Rule 18(b).

the Table. Erica also developed mental retardation, behavioral disorders, and gross motor delays as a sequelae of her Table Injury. Erica suffered the residual effects or complications of her encephalopathy for more than six months after her vaccination, and died on December 7, 2008, as a result of her vaccine-related injury. The parties state that there is not a preponderance of the evidence demonstrating that Erica Sarver's condition and/or death was due to a factor unrelated to her March 9, 2006 MMR immunization. Consequently, the Sarvers have established that they are entitled to compensation.

For the amount of compensation, the parties agree to the joint stipulation, attached hereto as Appendix A. The undersigned finds said stipulation reasonable and adopts it as the decision of the Court in awarding damages, on the terms set forth therein.

Damages awarded in that stipulation include:

- A. A lump sum payment of \$153,538.15 in the form of a check payable jointly to petitioners, as Parents and Legal Representatives of the Estate of Erica Lynn Sarver, deceased, and**

**State of Iowa
Department of Human Services
Iowa Recovery Unit
1001 Army Post Road
P.O. Box 36446
Des Moines, IA 50315
Attn: Ms. Shannon Wallace,**

representing compensation for satisfaction of the State of Iowa's Medicaid lien resulting from payments made to or on behalf of Erica Sarver; and

- B. A lump sum payment of \$545,000.00 in the form of a check payable to petitioners, as Parents and Legal Representatives of the Estate of Erica Lynn Sarver, deceased, representing compensation for all remaining damages that would be available under 42 U.S.C. §300aa-15(a), and excluding any award for future lost earnings.**

In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk is directed to enter judgment in case 07-307V according to this decision and the attached stipulation.

Any questions may be directed to my law clerk, Jennifer Chapman, at (202) 357-6358.

IT IS SO ORDERED.

S/ Christian J. Moran

Christian J. Moran
Special Master

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

TIMOTHY J. and JOANNA L. SARVER,
Parents and Legal Representatives of the
Estate of Their Daughter,
ERICA LYNN SARVER, deceased,

Petitioners,

v.

**SECRETARY OF HEALTH
AND HUMAN SERVICES,**

Respondent.

No. 07-307V
SPECIAL MASTER
CHRISTIAN J. MORAN

STIPULATION

The parties hereby stipulate to the following matters:

1. Petitioners, as Parents and Legal Representative of the Estate of Erica Lynn Sarver, deceased, ("Erica Sarver"), maintain the petition filed by Timothy J. Sarver and Joanna L. Sarver on behalf of their minor daughter Erica Sarver, for vaccine injury compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 to 34 (the "Vaccine Program"). The petition sought compensation for injuries that petitioners allege are related to Erica's receipt of the Measles-Mumps-Rubella ("MMR") vaccine, which vaccine is contained in the Vaccine Injury Table (the "Table"), 42 C.F.R. § 100.3 (a).
2. Erica Sarver received an MMR immunization on or about March 9, 2006.
3. The vaccine was administered within the United States.
4. Erica sustained the first symptom or manifestation of the onset of an encephalopathy within the time period set forth in the Table. Moreover, she developed mental retardation,

behavioral disorders and gross motor delays as sequelae of her Table injury.

5. Erica Sarver suffered the residual effects or complications of her encephalopathy for more than six months after her vaccination, and died on December 7, 2008, as a result of her vaccine-related injury.

6. There is not a preponderance of the evidence demonstrating that Erica Sarver's condition and/or death was due to a factor unrelated to her March 9, 2006 MMR immunization.

7. Petitioners represent that there has been no prior award or settlement of a civil action for damages on behalf of Erica Sarver as a result of her injury and death.

8. Accordingly, Erica Sarver is entitled to compensation under the terms of the Vaccine Program. The special master issued an interim ruling that petitioners are not entitled to receive an award of compensation for Erica Sarver's future lost earnings. See Sarver v. Sec'y of HHS, No. 07-307V, slip op. (Fed. Cl. Spec. Mstr. Nov. 16, 2009). Petitioners, by signing this stipulation, reserve the right to seek review of the special master's November 16, 2009, decision as may be contained in, or as part of, the special master's final damages decision. Therefore, a final decision should be entered awarding the compensation described in paragraph 9 of this Stipulation.

9. As soon as practicable after an entry of judgment reflecting a decision consistent with the terms of this Stipulation and the court's previous ruling on lost earnings, 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. a lump sum of \$153,538.15 in the form of a check payable jointly to petitioners, as Parents and Legal Representative of the Estate of Erica Lynn Sarver, deceased,

and

State of Iowa
Department of Human Services
Iowa Recovery Unit
1001 Army Post Road
P.O. Box 36446
Des Moines, IA 50315
Attn: Ms. Shannon Wallace,

representing compensation for satisfaction of the State of Iowa's Medicaid lien resulting from payments made to or on behalf of Erica Sarver; and

- b. a lump sum of \$545,000.00 in the form of a check payable to petitioners, as Parents and Legal Representative of the Estate of Erica Lynn Sarver, deceased, representing compensation for all remaining damages that would be available under 42 U.S.C. §300aa-15(a), and excluding any award for future lost earnings.

10. As soon as practicable after the entry of judgment on entitlement in this case, and after petitioners have 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.

11. Petitioners and their 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.

12. Payments made pursuant to paragraph 9 and any amounts awarded pursuant to paragraph 10 of this Stipulation will be made in accordance with 42 U.S.C. § 300aa-15(i), subject to the availability of sufficient statutory funds.

13. In return for the payments described in paragraphs 9 and 10, petitioners, in their individual capacity, and as Personal Representatives of the Estate of Erica Lynn Sarver, deceased, and on behalf of Erica Sarver's 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 other 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. § 300 aa-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 Erica Sarver resulting from, or alleged to have resulted from, the MMR vaccination administered on or about March 9, 2006, as alleged by petitioners in a petition for vaccine compensation filed on or about May 17, 2007, in the United States Court of Federal Claims as petition No. 07-307V.

14. 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.

15. This Stipulation expresses a full and complete negotiated settlement of any and all other liability and damages claimed under the National Childhood Vaccine Injury Act of 1986, as amended, except as otherwise noted in paragraph 10 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.

16. Petitioners hereby authorize the respondent to disclose documents filed by 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.

17. As expressed in paragraphs 4, 5, and 6, supra, the Secretary of Health and Human Services conceded that Erica suffered an encephalopathy, certain injuries as sequelae of that encephalopathy, and death as a result of those injuries, all in accordance with the terms and appropriate time frame of the Vaccine Injury Table, 42 U.S.C. § 300aa-14(a). Nevertheless, neither the United States nor the Secretary of Health and Human Services admits that the MMR vaccine was the actual cause-in-fact of Erica's illnesses and death.

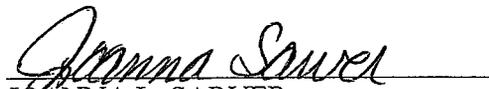
18. All rights and obligations of petitioners hereunder shall apply equally to their heirs, executors, administrators, successors, and/or assigns.

END OF STIPULATION

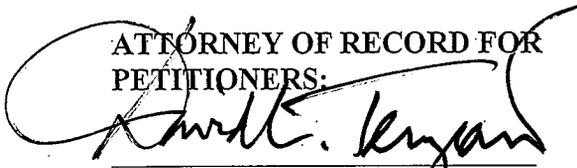
Respectfully submitted,

PETITIONERS:

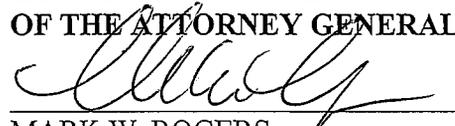

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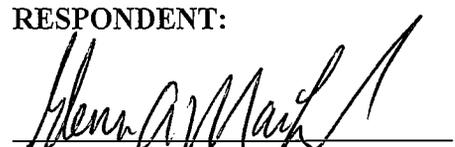
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Dated: 8/17/10