

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

No. 06-477V

Filed: December 1, 2011

ASHLY WHITENER,	*	
	*	
Petitioner,	*	Damages Decision Based on Proffer;
v.	*	Meningococcal; GBS
	*	
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	

Steven D. Goldston, Esq., Dallas, TX, for petitioner.
Lisa A. Watts, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

DECISION AWARDING DAMAGES¹

Vowell, Special Master:

On June 21, 2006, Ashley Whitener filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq.*² [the “Vaccine Act” or “Program”]. She filed an amended petition on June 6, 2007, alleging she developed Guillain-Barre Syndrome (“GBS”) as a result of a meningococcal vaccination she received on December 30, 2004. Amended Petition at 1-2.

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, that satisfies the criteria in § 300aa-12(d)(4)(B). Further, consistent with the rule requirement, a motion for redaction must include a proposed redacted decision. If, upon review, I agree that the identified material fits within the requirements of that provision, I will delete such material from public access.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

On September 2, 2009, an entitlement ruling was issued,³ which found petitioner was entitled to compensation. The parties subsequently filed separate life care plans and a damages hearing was scheduled. In advance of the hearing, the parties were able to resolve the differences in their plans, and on November 30, 2011, respondent filed a proffer on award of compensation detailing compensation for life care items, lost future earnings, pain and suffering, and past unreimbursable expenses. The proffer indicates that petitioner agrees with each aspect of the compensation award.

Pursuant to the terms stated in the attached Proffer, **I award petitioner:**

1. **A lump sum payment of \$1,061,705.70 in the form of a check payable to petitioner, Ashly Whitener,** representing compensation for life care expenses expected to be incurred during the first year after judgment (\$85,191.77), lost earnings (\$713,842.00), pain and suffering (\$229,163.70), and past unreimbursable expenses (\$33,508.23).
2. An amount sufficient to purchase an annuity contract, subject to the conditions described in paragraph II.B. of the Proffer, paid to the life insurance company from which the annuity will be purchased.

These amounts represent compensation for all damages that would be available under § 300aa-15(a).

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance with this decision.⁴

IT IS SO ORDERED.

s/Denise K. Vowell
Denise K. Vowell
Special Master

³ The ruling was issued by Special Master Abell. This case was reassigned to me on March 31, 2010.

⁴ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party filing a notice renouncing the right to seek review.

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

ASHLY WHITENER,)	
)	<u>ECF</u>
Petitioner,)	
v.)	No. 06-477V
)	Special Master
SECRETARY OF HEALTH)	Denise K. Vowell
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 Janet Toney, MA, CLCP, CCM, CDMS, LPCC, to provide an estimation of Ashly Whitener's future vaccine-injury related needs. For the purposes of this proffer, the term "vaccine related" is as described in the Ruling on Entitlement issued September 2, 2009. All items of compensation identified in the life care plan are supported by the evidence, and are illustrated by the chart entitled Appendix A: Items of Compensation for Ashly Whitener, attached hereto as Tab A.¹ Respondent proffers that Ashly Whitener 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 Future Earnings

The parties agree that based upon the evidence of record, Ashly Whitener has suffered a past loss of earnings and will not be gainfully employed in the future. Therefore, respondent proffers that Ashly Whitener should be awarded lost earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(A). Respondent proffers that the appropriate award for Ashly Whitener's lost earnings is \$713,842.00. Petitioner agrees.

C. Pain and Suffering

Respondent proffers that Ashly Whitener should be awarded \$229,163.70 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 Ashly Whitener's 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 \$33,508.23. Petitioner agrees.

E. Medicaid Lien

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

II. Form of the Award

The parties recommend that the compensation provided to Ashly Whitener 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 \$1,061,705.70, representing compensation for life care expenses expected to be incurred during the first year after judgment (\$85,191.77), lost earnings (\$713,842.00), pain and suffering (\$229,163.70), and past unreimbursable expenses (\$33,508.23), in the form of a check payable to petitioner, Ashly Whitener.

B. 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 petitioner, Ashly Whitener, only so long as Ashly Whitener 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

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 Petitioner authorizes the disclosure of certain documents filed by the 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.

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 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, Ashly Whitener, 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 Ashly Whitener'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, Ashly Whitener: | \$1,061,705.70 |
| B. | An amount sufficient to purchase the annuity contract described above in section II. B. | |

Respectfully submitted,

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Acting Director
Torts Branch, Civil Division

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Dated: November 30, 2011