

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

No. [Redacted]V

Filed: September 29, 2010

Reissued Redacted: October 1, 2010

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Baby Doe/90, a minor child, by his  
parents and natural guardians, JOHN  
DOE/90 and JANE DOE/90,

Petitioners,

v.

SECRETARY OF THE DEPARTMENT  
OF HEALTH AND HUMAN SERVICES,

Respondent.

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\* Damages Decision Based on Proffer;  
\* DPT; Seizure Disorder  
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Clifford J. Shoemaker, Esq., Vienna, VA, for petitioner.  
Darryl R. Wishard, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

**DECISION AWARDING DAMAGES<sup>1</sup>**

**Vowell, Special Master:**

On October 26, 1998, John Doe/90 and Jane Doe/90 filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, *et seq.*<sup>2</sup> [the “Vaccine Act” or “Program”] alleging that their son, Baby Doe/90,

<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in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, 116 Stat. 2899, 2913 (Dec. 17, 2002). In accordance with Vaccine Rule 18(b), petitioners have 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

<sup>2</sup> 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).

developed a seizure disorder as a result of a diphtheria, tetanus, and whole cell pertussis vaccine he received on October 31, 1995. Petition at 1-2. On June 18, 2009, [petitioners were determined to be entitled to compensation.]

Petitioners filed their life care plan as Petitioners' Exhibit 103 on March 19, 2010. Respondent then filed her life care plan as Respondent's Exhibit H on June 15, 2010. On September 28, 2010, respondent filed an [155] amended proffer on award of compensation detailing compensation for life care items, lost future earnings, pain and suffering, past unreimbursable expenses, and a Medicaid lien ["Amended Proffer"].<sup>3</sup> On September 28, 2010, petitioners filed [156] notice that they accept respondent's Amended Proffer. Pursuant to the terms stated in the attached Amended Proffer, I **award petitioners:**

1. **A lump sum payment of \$1,479,669.79 in the form of a check payable to petitioners, as the court-appointed guardian(s)/conservator(s) of the estate of Baby Doe/90, for the benefit of Baby Doe/90,** representing compensation for life care expenses expected to be incurred during the first year after judgment (\$495,933.00), lost future earnings (\$770,161.23), and pain and suffering (\$213,575.56). This payment shall not be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of Baby Doe/90's estate;
2. **A lump sum payment of \$54,000.00 in the form of a check payable to John Doe/90 and Jane Doe/90, petitioners,** representing compensation for past unreimbursable expenses;
3. **A lump sum payment of \$368,441.37 in the form a check payable jointly to petitioners and Florida TPL Recovery Unit, P.O. Box 12188, Tallahassee, FL 32317, Attn: CID# 157848,** representing compensation for satisfaction of the State of Florida Medicaid lien;
4. An amount sufficient to purchase an annuity contract, subject to the conditions described in paragraph II.D. of the Amended 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).

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<sup>3</sup> Respondent filed two proffers on September 28, 2010. Both parties reported to my chambers that the Amended Proffer, docket entry 155, is the correct proffer. This decision incorporates the agreement set forth in the Amended Proffer, docket entry 155.

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.<sup>4</sup>

**IT IS SO ORDERED.**

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

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<sup>4</sup> 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

_____	)	
_____ , a minor child, by	)	
his parents and natural guardians, _____	)	
and _____	)	
	)	
Petitioners,	)	No. _____ ECF
v.	)	Special Master Vowell
	)	
SECRETARY OF HEALTH	)	
AND HUMAN SERVICES,	)	
	)	
Respondent.	)	
_____	)	

**RESPONDENT'S AMENDED PROFFER ON AWARD OF COMPENSATION**

**I. Items of Compensation**

A. Life Care Items

The respondent engaged life care planners Laura Fox, MSN, RN, CLCP and Ginger Walton, MSN, FNP, CNCLP, and petitioners engaged life care planner Terry Kennedy Arnold, RN, CDMS, CRRN, CLCP, CNLCP, to provide an estimation of \_\_\_\_\_ 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 \_\_\_\_\_**, attached hereto as Appendix A.<sup>1</sup> Respondent proffers that \_\_\_\_\_ should be awarded all items of compensation set forth in the life care plan and illustrated by the chart attached at Appendix A. Petitioners agree.

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<sup>1</sup>The chart at Appendix 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, [REDACTED] will never be gainfully employed. Therefore, respondent proffers that [REDACTED] should be awarded full lost future earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(B). Respondent proffers that the appropriate award for [REDACTED]'s lost future earnings is \$770,161.23. Petitioners agree.

C. Pain and Suffering

Respondent proffers that [REDACTED] should be awarded \$213,575.56 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). Petitioners agree.

D. Past Unreimbursable Expenses

Evidence supplied by petitioners documents their expenditure of past unreimbursable expenses related to [REDACTED]'s vaccine-related injury. Respondent proffers that petitioners should be awarded past unreimbursable expenses in the amount of \$54,000.00. Petitioners agree.

E. Medicaid Lien

Respondent proffers that [REDACTED] should be awarded funds to satisfy the State of Florida Medicaid lien in the amount of \$368,441.37, which represents full satisfaction of any right of subrogation, assignment, claim, lien, or cause of action the State of Florida may have against any individual as a result of any Medicaid payments the State of Florida has made to or on behalf of [REDACTED] from the date of his eligibility for benefits through the date of

judgment in this case as a result of his vaccine-related injury suffered on or about October 31, 1995, under Title XIX of the Social Security Act.

## **II. Form of the Award**

The parties recommend that the compensation provided to [REDACTED] 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 \$1,479,669.79, representing compensation for life care expenses expected to be incurred during the first year after judgment (\$495,933.00), lost future earnings (\$770,161.23) and pain and suffering (\$213,575.56), in the form of a check payable to petitioners, as the court-appointed guardian(s)/conservator(s) of the estate of [REDACTED] for the benefit of [REDACTED]. No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of [REDACTED]'s estate;

B. A lump sum payment of \$54,000.00, representing compensation for past unreimbursable expenses, payable to [REDACTED] and [REDACTED], petitioners;

C. A lump sum payment of \$368,441.37, representing compensation for satisfaction of the State of Florida Medicaid lien, payable jointly to petitioners and

Florida TPL Recovery Unit  
P.O. Box 12188  
Tallahassee, FL 32317  
Attn: CID# 157848

Petitioners agree to endorse this payment to the State of Florida.

D. 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 Appendix A attached hereto, paid to the life insurance company<sup>2</sup> 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 petitioners as guardian(s)/conservator(s) of the estate of \_\_\_\_\_, for the benefit of \_\_\_\_\_, only so long as \_\_\_\_\_ is alive at the time a particular payment is due. At the Secretary's sole discretion, the periodic payments may be provided to petitioners in monthly, quarterly, annual or other installments. The "annual amounts" set forth in the chart at Appendix A describe only the total yearly sum to be paid to petitioners 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 Appendix A that are to be paid through

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<sup>2</sup> 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.

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. Petitioners agree.

2. Life-Contingent Annuity

Petitioners will continue to receive the annuity payments from the Life Insurance Company only so long as \_\_\_\_\_ is alive at the time that a particular payment is due. Petitioners shall provide written notice to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of \_\_\_\_\_'s death.

3. Guardianship

No payments under section II. A. shall be made until petitioners provide the Secretary with documentation establishing their appointment as the guardian(s)/conservator(s) of \_\_\_\_\_'s estate. If petitioners are not authorized by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of \_\_\_\_\_ at the time a payment 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(s)/conservator(s) of the estate of \_\_\_\_\_ upon submission of written documentation of such appointment to the Secretary.

**III. Summary of Recommended Payments Following Judgment**

- |    |  |                |
|----|--|----------------|
| A. | Lump Sum paid to petitioners, as guardian(s)/conservator(s) of the estate of _____; for Yr 1 life care expenses, lost future earnings, and pain and suffering: | \$1,479,669.79 |
| B. | A lump sum paid to petitioners:  | \$ 54,000.00   |
| C. | Reimbursement of the Medicaid lien:  | \$ 368,441.37  |
| D. | An amount sufficient to purchase the annuity contract described above in section II. D.  |                |



Respectfully submitted,

TONY WEST  
Assistant Attorney General

TIMOTHY P. GARREN  
Director  
Torts Branch, Civil Division

MARK W. ROGERS  
Deputy Director  
Torts Branch, Civil Division

CATHARINE E. REEVES  
Assistant Director  
Torts Branch, Civil Division

/s/ Darryl R. Wishard  
DARRYL R. WISHARD  
Trial Attorney  
U.S. Department of Justice  
P.O. Box 146  
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Washington, D.C. 20044-0146  
(202) 616-4357

Dated: September 28, 2010



Appendix A: Items of Compensation for [REDACTED]

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
Gastroenterologist	5%	*		2010	2011	2012	2013	2014	2015	2016	2017
Gastroenterologist Mileage	4%	*		17.01	17.01	17.01	17.01	17.01	17.01	17.01	17.01
Nephrologist	5%	*									
Nephrologist Mileage	4%	*		8.51	8.51	8.51	8.51	8.51	8.51	8.51	8.51
Ophthalmologist	5%	*									
Ophthalmologist Mileage	4%	*		5.67	2.84	2.84	2.84	2.84	2.84	2.84	2.84
Immunologist	5%	*									
Immunologist Mileage	4%	*		11.34	11.34	11.34	11.34	11.34	11.34	11.34	11.34
Pediatric Cardiologist	5%	*									
EKG	5%	*									
Heart Holter Monitor	5%	*									
Echo-cardiogram	5%	*									
Cardiologist Mileage	4%	*		5.67	5.67	5.67	5.67	5.67	5.67	5.67	5.67
Allergist	5%	*									
Allergist Mileage	4%	*		5.67	5.67	5.67	5.67	5.67	5.67	5.67	5.67
PT/OT Eval	4%	*		370.00	370.00	370.00	370.00	370.00	370.00	370.00	370.00
PT/OT	4%	*	M	25,920.00	25,920.00	25,920.00	25,920.00	3,240.00	540.00	540.00	540.00
ST Eval	4%	*		185.00	185.00	185.00	185.00				
ST	4%	*	M	3,240.00	3,240.00	3,240.00	3,240.00				
ABA Training: Parents/Caregivers	4%	*		2,885.00							
ABA Behavioral Therapy	4%	*	M	6,500.00	6,500.00	6,500.00	6,500.00	6,500.00	6,500.00	6,500.00	6,500.00
Zonegram	5%	*	M	300.00	300.00	300.00	300.00	300.00			
Diazepam	5%	*	M	120.00	120.00	120.00	120.00	120.00			
Banzel	5%	*	M	600.00	600.00	600.00	600.00	600.00			
Diastat	5%	*	M	550.00	550.00	550.00	550.00	550.00			
Vimpat	5%	*	M	600.00	600.00	600.00	600.00	600.00			
Librax	5%	*	M	600.00	600.00	600.00	600.00	600.00			
Nasonex	5%	*	M	150.00	150.00	150.00	150.00	150.00			
Ambien	5%	*	M	300.00	300.00	300.00	300.00	300.00			
Cherry Syrup for Med. Admin	4%	*	M	95.88	95.88	95.88	95.88	95.88			
Polyethylene Glycol	4%	*	M	120.00	120.00	120.00	120.00	120.00			
Prevacid	4%	*	M	600.00	600.00	600.00	600.00	600.00			





Appendix A: Items of Compensation for [REDACTED]

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Year 1 2010	Compensation Year 2 2011	Compensation Year 3 2012	Compensation Year 4 2013	Compensation Year 5 2014	Compensation Year 6 2015	Compensation Year 7 2016	Compensation Year 8 2017
Planner Folio	4%			41.99	15.00	15.00	15.00	15.00	15.00	15.00	15.00
Case Mngt	4%		M	4,080.00	4,080.00	4,080.00	4,080.00	4,080.00	4,080.00	4,080.00	4,080.00
Home Mods	0%			175,000.00							
Manual WC DME Covers in 2010	4%	*									
WC Maint	4%				200.00	200.00	200.00	200.00			
WC Cushion	4%			215.00				215.00			
WC Pack	4%			34.05	34.05	34.05	34.05	34.05		34.05	
Portable WC Ramp	4%			495.00							
Accessible Van	4%			34,525.00							
Attendant Care: School Days	4%		M	48,608.00	48,608.00	48,608.00	48,608.00	48,608.00	48,608.00	48,608.00	48,608.00
Attendant Care: Non-School Days	4%		M	91,440.00	91,440.00	91,440.00	91,440.00	91,440.00	91,440.00	91,440.00	91,440.00
Attendant Care: Weekends	4%		M	58,272.00	58,272.00	58,272.00	58,272.00	58,272.00	58,272.00	58,272.00	58,272.00
Respite Care	4%		M	13,776.00	13,776.00	13,776.00	13,776.00	13,776.00	13,776.00	13,776.00	13,776.00
Adult Attendant Care	4%		M								
Sheltered Workshop ARC	4%		M								
Lost Future Earnings				770,161.23							
Pain and Suffering				213,575.56							
Past Unreimbursable Expenses				54,000.00							
Medicaid Lien Reimbursement				368,441.37							
Annual Totals				1,902,111.16	267,306.85	267,449.75	267,608.54	242,434.72	256,754.08	254,200.73	255,236.13

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 the court-appointed guardian(s)/ conservators(s) of the estate of [REDACTED], for the benefit of [REDACTED], for lost future earnings (\$770,161.23), pain and suffering (\$213,575.56), and Yr 1 life care expenses (\$495,933.00): \$1,479,669.79.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, [REDACTED] and [REDACTED], for past un-reimbursable expenses: \$54,000.00.

As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioners and the State of Florida, as reimbursement for the state's Medicaid lien: \$368,441.37.

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 in column "G.R." above, 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 12 monthly installments at the discretion of respondent.











Appendix A: Items of Compensation for [REDACTED]

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 9 2018	Compensation Year 10 2019	Compensation Year 11 2020	Compensation Year 12 2021	Compensation Year 13 2022	Compensation Year 14 2023	Compensation Year 15 2024	Compensation Year 16 2025
Planner Folio	4%			15.00	15.00	15.00	15.00	15.00	15.00	15.00	15.00
Case Mngt	4%	M		4,080.00	4,080.00	4,080.00	4,080.00	4,080.00	4,080.00	4,080.00	4,080.00
Home Mods	0%										
Manual WC DME Covers in 2010	4%	*									
WC Maint	4%										
WC Cushion	4%				215.00						215.00
WC Pack	4%			34.05		34.05		34.05		34.05	
Portable WC Ramp	4%				495.00						
Accessible Van	4%				29,726.00						
Attendant Care: School Days	4%		M								
Attendant Care: Non-School Days	4%		M								
Attendant Care: Weekends	4%		M								
Respite Care	4%		M	37,392.00	37,392.00	37,392.00	37,392.00	37,392.00	37,392.00	37,392.00	37,392.00
Adult Attendant Care	4%		M	235,440.00	235,440.00	235,440.00	235,440.00	235,440.00	235,440.00	235,440.00	235,440.00
Sheltered Workshop ARC	4%		M	6,192.00	6,192.00	6,192.00	6,192.00	6,192.00	6,192.00	6,192.00	6,192.00
Lost Future Earnings											
Pain and Suffering											
Past Unreimbursable Expenses											
Medicaid Lien Reimbursement											
Annual Totals				329,237.01	321,405.83	358,224.07	321,504.14	323,110.70	321,143.47	323,166.36	324,443.10

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 the court-appointed guardian(s)/ conservators(s) of the estate of [REDACTED], for the benefit of [REDACTED], for lost future earnings (\$770,161.23), pain and suffering (\$213,575.56), and Yr 1 life care expenses (\$495,933.00): \$1,479,669.79.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, [REDACTED] and [REDACTED]; for past un-reimbursable expenses: \$54,000.00.

As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioners and the State of Florida, as reimbursement for the state's Medicaid lien: \$368,441.37.

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 in column "G.R." above, 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 12 monthly installments at the discretion of respondent.









Appendix A: Items of Compensation for [REDACTED]

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 17 2016	Compensation Year 18 2017	Compensation Year 19 2018	Compensation Year 20 2019	Compensation Year 21 2020	Compensation Year 22 2021	Compensation Years 23-50 2022-2059	Compensation Years 51-Life 2060-Life
Planner Folio	4%			15.00	15.00	15.00	15.00	15.00	15.00	15.00	15.00
Case Mngt	4%	M		4,080.00	4,080.00	4,080.00	4,080.00	4,080.00	4,080.00	4,080.00	4,080.00
Home Mods	0%										
Manual WC DME Covers in 2010	4%	*									
WC Maint	4%										
WC Cushion	4%							215.00	43.00	43.00	43.00
WC Pack	4%			34.05	34.05	34.05	34.05	34.05	17.03	17.03	17.03
Portable WC Ramp	4%							495.00	49.50	49.50	49.50
Accessible Van	4%							29,726.00	2,972.60	2,972.60	2,972.60
Attendant Care: School Days	4%		M								
Attendant Care: Non-School Days	4%		M								
Attendant Care: Weekends	4%		M								
Respite Care	4%		M	37,392.00	37,392.00	37,392.00	37,392.00	37,392.00	37,392.00	37,392.00	37,392.00
Adult Attendant Care	4%		M	235,440.00	235,440.00	235,440.00	235,440.00	235,440.00	235,440.00	235,440.00	235,440.00
Sheltered Workshop ARC	4%		M	6,192.00	6,192.00	6,192.00	6,192.00	6,192.00	6,192.00	6,192.00	6,192.00
Lost Future Earnings											
Pain and Suffering											
Past Unreimbursable Expenses											
Medicaid Lien Reimbursement											
Annual Totals				322,376.34	321,543.47	321,588.06	321,143.47	359,753.37	327,399.94	325,930.25	324,409.85

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 the court-appointed guardian(s)/ conservator(s) of the estate of [REDACTED], for the benefit of [REDACTED], for lost future earnings (\$770,161.23), pain and suffering (\$213,575.56), and Yr 1 life care expenses (\$495,933.00): \$1,479,669.79.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, [REDACTED] and [REDACTED], for past un-reimbursable expenses: \$54,000.00.

As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioners and the State of Florida, as reimbursement for the state's Medicaid lien: \$368,441.37.

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 in column "G.R." above, 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 12 monthly installments at the discretion of respondent.