

**In the United States Court of Federal Claims**

**OFFICE OF SPECIAL MASTERS**

No. 05-556V

Filed: May 11, 2009

Not for publication

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PATRICK W. MULVANEY, \*  
As Guardian of the Property, of \*  
DANIEL C. MULVANEY, \*

Petitioner, \*

v. \* Damages Decision Based on Proffer

SECRETARY OF THE DEPARTMENT \*  
OF HEALTH AND HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

Anne C. Toale, Sarasota, FL, for petitioner.  
Glenn A. MacLeod, Washington, DC, for respondent.

**MILLMAN, Special Master**

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

On May 5, 2009, respondent filed an Amended Proffer on Award of Compensation. On May 8, 2009, petitioner filed a Notice of Acceptance of respondent’s Amended Proffer. Based upon the record as a whole, the undersigned find that petitioner is entitled to an award as stated in the Amended Proffer. Pursuant to the attached Amended Proffer with Appendix, the undersigned awards petitioner:

\_\_\_\_\_

<sup>1</sup> Because this decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this 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 delete 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 delete such material from public access.

1. A lump sum payment of **\$230,060.54**, representing compensation for Yr 1 life care expenses (**\$30,000.00**) and pain and suffering (**\$200,060.54**), in the form of a check made payable to petitioner, as the court-appointed guardian of the estate of Daniel C. Mulvaney;
2. A lump sum payment of **\$20,436.43**, representing compensation for past un-reimbursable expenses, in the form of a check payable to Patrick W. Mulvaney, petitioner;
3. An amount sufficient to purchase an annuity contract, subject to the conditions described in the attached Amended Proffer.

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.<sup>2</sup>

**IT IS SO ORDERED.**

Dated: May 11, 2009

/s/ Laura D. Millman

Laura D. Millman  
Special Master

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<sup>2</sup> 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.



B. Lost Future Earnings

The parties agree that based upon the evidence of record, Daniel C. Mulvaney is more likely than not to be gainfully employed. Therefore, respondent proffers that Daniel C. Mulvaney should not be awarded lost earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(B). Petitioner agrees.

C. Pain and Suffering

Respondent proffers that Daniel C. Mulvaney should be awarded \$200,060.54 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 his expenditure of past unreimbursable expenses related to Daniel C. Mulvaney's vaccine-related injury. Respondent proffers that petitioner should be awarded past unreimbursable expenses in the amount of \$20,436.43. Petitioner agrees.

E. Medicaid Lien

Petitioner represents that there are no Medicaid liens outstanding against Daniel C. Mulvaney.

**II. Form of the Award**

The parties recommend that the compensation provided to Daniel C. Mulvaney 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 \$230,060.54, representing compensation for Yr 1 life care expenses (\$30,000.00) and pain and suffering (\$200,060.54), in the form of a check payable to petitioner, as the court-appointed guardian of the estate of Daniel C. Mulvaney. No payment shall be made under this paragraph until petitioner provides respondent with a copy of the Court order appointing petitioner as guardian of the estate of Daniel C. Mulvaney. (Petitioner has filed said Order of Appointment as Exhibit 13.)
- B. A lump sum payment of \$20,436.43, representing compensation for past unreimbursable expenses, in the form of a check payable to Patrick W. Mulvaney, petitioner;
- C. 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 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

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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.

subsequent years shall be provided through respondent's purchase of an annuity, which annuity shall make payments directly to Daniel C. Mulvaney, or to the guardian of the estate of Daniel C. Mulvaney, if any, only so long as Daniel C. Mulvaney is alive at the time a particular payment is due. At the Secretary's sole discretion, the periodic payments may be provided to Daniel C. Mulvaney 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 Daniel C. Mulvaney and do not require that the payment be made in one annual installment.

1. Growth Rate

Respondent proffers that, given that all life care items are for projected medical expenses, a five percent (5%) growth rate should be applied to all 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: five percent (5%) compounded annually from the date of judgment.

2. Life-contingent annuity

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

3. Guardianship

No payments under paragraph II. A. herein shall be made until petitioner provides the Secretary with documentation establishing his appointment as guardian of Daniel C. Mulvaney's estate. If petitioner is not authorized by a court of competent jurisdiction to serve as guardian of

the estate of Daniel C. Mulvaney 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 Daniel C. Mulvaney upon submission of written documentation of such appointment to the Secretary. (Petitioner has filed said Order of Appointment as Exhibit 13.)

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

- A. Lump Sum paid to petitioner, as guardian of the property of Daniel C. Mulvaney for the benefit of Daniel C. Mulvaney, for Yr 1 Life Care Expenses and Pain & Suffering: **\$ 230,060.54**
- B. Lump sum paid to petitioner: **\$ 20,436.43**
- C. An amount sufficient to purchase the annuity contract described above in paragraph II. C.

Respectfully submitted,

TONY WEST  
ASSISTANT ATTORNEY GENERAL

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Dated: May 5, 2009

# TAB A

**Appendix A: Items of Compensation for Daniel C. Mulvaney**

ITEMS OF COMPENSATION	G.R	Lump Sum Compensation Year 1	Compensation Years 2-10	Compensation Year 11	Compensation Years 12-18	Compensation Year 19
		2009	2010-2018	2019	2020-2026	2027
OMS Relapses	5%	30,000.00	0.00	81,430.52	0.00	81,430.52
Pain and Suffering		200,060.54				
Past Unreimbursable Expenses		20,436.43				
Annual Totals		250,496.97	-	81,430.52	-	81,430.52

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 of the estate of Daniel C. Mulvaney for the benefit of Daniel C. Mulvaney for Yr 1 life care expenses (\$30,000.00) and pain and suffering (\$200,060.54): \$230,060.54.  
 As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner, Patrick, W. Mulvaney, for past un-reimbursable expenses: \$20,436.43.  
 Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment.  
 Annual amounts shall increase at the rate of 5%, compounded annually from the date of judgment.  
 Actual amounts payable shall be \$132,641.74 in Compensation Yr 2019 and \$195,972.26 in Compensation Yr 2027.