

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 9-170V

(E-Filed: September 25, 2013)

* * * * *

SCOTT A. O'BRIEN, and LYNN M. O'BRIEN*
as Parents and Legal Representatives of their *
minor son, DAVIS WILLIAM O'BRIEN *

Petitioners, *

v. *

SECRETARY OF HEALTH *
AND HUMAN SERVICES, *

Respondent. *

* * * * *

Ramon Rodriguez, III, Richmond, VA, for Petitioner

Voris E. Johnson, Washington, DC, for respondent

UNPUBLISHED

Special Master
Hamilton-Fieldman

Varicella Vaccine; Fever Induced
Seizures and Hypoxic Ischemic
Encephalopathy; Respondent's
Concession; Finding of
Entitlement; Damages Decision
Based on Proffer

DECISION AWARDDING DAMAGES¹

On March 23, 2009, Petitioners, Scott and Lynn O'Brien, filed a petition on behalf of their minor child seeking compensation under the National Vaccine Injury Compensation Program ("the Vaccine Program") for a vaccine-related injury.²

¹ 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)), requires that the court post this decision on its website. 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, the undersigned agrees that the identified material fits within the requirements of that provision, the undersigned will delete such material from public access.

² The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-1 to -34 (2006) ("Vaccine Act" or "Act"). All citations in this decision to individual sections of the Act are to 42 U.S.C.A. § 300aa.

Respondent has conceded that Petitioners are entitled to compensation due to Petitioners having established a prima facie case of causation in fact that Davis' varicella vaccination is responsible for his current neurological condition.³

Informed by Respondent's concession that an award of damages is appropriate, the undersigned finds that Petitioners are entitled to compensation under the Vaccine Program.

On September 25, 2013, Respondent filed a Proffer detailing Respondent's recommendations of damages (Proffer). In the Proffer Respondent represented that Petitioners had agreed to all of the terms set forth therein. Based on the record as a whole, the undersigned finds the Proffer reasonable and that Petitioners are entitled to an award as stated in the Proffer. Pursuant to the terms stated in the attached Proffer, the court awards Petitioners:

1. A lump sum payment of **\$1,272.772.80**, representing compensation for lost future earnings (\$642,336.73), pain and suffering (\$232,319.57) and life care expenses for Year One (\$398,116.50), in the form of a check payable to Petitioners as guardians/conservators of Davis William O'Brien, for the benefit of Davis William O'Brien. No payments shall be made until Petitioners provide Respondent with documentation establishing that they have been appointed as the guardians/conservators of Davis William O'Brien's estate. If Petitioners are not authorized by a court of competent jurisdiction to serve as guardians/conservators of the estate of Davis William O'Brien, any such payment shall be made to the party or parties appointed by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of Davis William O'Brien upon submission of written documentation of such appointment to the Secretary;
2. A lump sum payment of **\$27,725.37**, representing compensation for past un-reimbursable expenses, payable to Scott A. O'Brien and Lynn M. O'Brien, Petitioners;

³ In Respondent's Amended Rule 4(c) Report filed January 28, 2010 (ECF No. 14), Respondent only conceded that the varicella vaccine caused Davis' fever. However, Respondent did acknowledge that in Davis' case, the fever caused his atypical febrile seizure with aspiration, and subsequent hypoxic ischemic encephalopathy and those injuries led to Davis' residual neurologic condition of seizures, quadraparesis, and severe developmental delays.

3. A lump sum payment of **\$43,134.67**, representing compensation satisfaction of the State of Georgia Medicaid lien, payable jointly to Petitioners and:

Georgia Department of Community Health
5660 New Northside Drive #750
Atlanta, GA 30328
Attn: Ms. Stephanie Manders
Ref: Davis W. O'Brien, Medicaid ID No. 111680961645

Petitioners agree to endorse this payment to the State of Georgia

4. An amount sufficient to purchase an annuity contract(s), subject to the conditions described in Section II. D. of the attached Proffer, 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 as Appendix A] paid to the life insurance company(ies) from which the annuity(ies) 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(ies), which annuity(ies) shall make payments directly to Petitioners as guardians/conservators of the estate of Davis William O'Brien, only so long as Davis William O'Brien 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 Tab A [attached hereto as 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.

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.⁴

IT IS SO ORDERED.

s/Lisa Hamilton-Fieldman
Lisa Hamilton-Fieldman
Special Master

⁴ Pursuant to Vaccine Rule 11(a), entry of judgment is expedited by the parties' joint filing of notice renouncing the right to seek review.

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

SCOTT A. O'BRIEN and LYNN M. O'BRIEN,)	
as parents and legal representatives)	
of their minor son, DAVIS WILLIAM O'BRIEN,)	
)	
Petitioners,)	
)	
v.)	No. 09-170V (ECF)
)	Special Master
SECRETARY OF THE DEPARTMENT OF)	Lisa Hamilton-Fieldman
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, Ginger Walton, MSN, FNP, CNCLP, to provide an estimation of Davis William O'Brien's future needs due to his vaccine-related injury. For the purposes of this proffer, the term "vaccine-related injury" is as described in the respondent's Amended Rule 4(c) Report filed on January 28, 2010. 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 Davis William O'Brien**, attached hereto as Tab A.¹ Respondent proffers that Davis William O'Brien should be awarded all items of compensation set forth in the life care plan and illustrated by the chart attached at Tab A. Petitioners agree.

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, Davis William O'Brien will not be gainfully employed in the future. Therefore, respondent proffers that Davis William O'Brien should be awarded 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 Davis William O'Brien's lost future earnings is \$642,336.73. Petitioners agree.

C. Pain and Suffering

Respondent proffers that Davis William O'Brien should be awarded \$232,319.57 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 Davis William O'Brien's vaccine-related injury. Respondent proffers that petitioners should be awarded past unreimbursable expenses in the amount of \$27,725.37. Petitioners agree.

E. Medicaid Lien

Respondent proffers that Davis William O'Brien should be awarded funds to satisfy the State of Georgia Medicaid lien in the amount of \$43,134.67, which represents full satisfaction of any right of subrogation, assignment, claim, lien, or cause of action the State of Georgia may have against any individual as a result of any Medicaid payments the State of Georgia has made to or on behalf of Davis William O'Brien 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 March 29, 2006, under Title XIX of the Social Security Act.

II. Form of the Award

The parties recommend that the compensation provided to Davis William O'Brien 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 \$1,272,772.80, representing compensation for lost future earnings (\$642,336.73), pain and suffering (\$232,319.57), and life care expenses for Year One (\$398,116.50), in the form of a check payable to petitioners as guardian(s)/conservator(s) of Davis William O'Brien, for the benefit of Davis William O'Brien. No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of Davis William O'Brien's estate. If petitioners are not authorized by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of Davis William O'Brien, any such payment shall be made to the party or parties appointed by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of Davis William O'Brien upon submission of written documentation of such appointment to the Secretary.

B. A lump sum payment of \$27,725.37, representing compensation for past unreimbursable expenses, payable to Scott A. O'Brien and Lynn M. O'Brien, petitioners;

C. A lump sum payment of \$43,134.67, representing compensation for satisfaction of the State of Georgia Medicaid lien, payable jointly to petitioners and:

Georgia Department of Community Health
5660 New Northside Drive # 750
Atlanta, GA 30328
Attn: Ms. Stephanie Manders
Ref: Davis W. O'Brien, Medicaid ID No. 111680961645

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

D. An amount sufficient to purchase the annuity contract(s),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 company(ies)³ from which the annuity(ies) 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(ies), which annuity(ies) shall make payments directly to

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(ies) must have a minimum of \$250,000,000 capital and surplus, exclusive of any mandatory security valuation reserve. The Life Insurance Company(ies) 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 Petitioners authorize the disclosure of certain documents filed by the 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.

petitioners as guardian(s)/conservator(s) of the estate of Davis William O'Brien, only so long as Davis William O'Brien 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 Tab 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 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. Petitioners agree.

2. Life-Contingent Annuity(ies)

Petitioners will continue to receive the annuity payments from the Life Insurance Company(ies) only so long as Davis William O'Brien 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(ies) within twenty (20) days of Davis William O'Brien's death.

3. Guardianship

No payments shall be made until petitioners provide respondent with documentation establishing that they have been appointed as the guardian(s)/conservator(s) of Davis William O'Brien's estate. If petitioners are not authorized by a court of competent jurisdiction to serve as

guardian(s)/conservator(s) of the estate of Davis William O'Brien, any such payment shall be made to the party or parties appointed by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of Davis William O'Brien 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 court-appointed guardian(s)/conservator(s) of Davis William O'Brien's estate: | \$1,272,772.80 |
| B. | Lump sum paid to petitioners: | \$ 27,725.37 |
| C. | Medicaid Lien: | \$ 43,134.67 |
| D. | An amount sufficient to purchase the annuity contract(s) described above in section II. D. | |

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

RUPA BHATTACHARYYA
Director
Torts Branch, Civil Division

VINCENT J. MATANOSKI
Deputy Director
Torts Branch, Civil Division

s/Voris E. Johnson, Jr.
VORIS E. JOHNSON, ESQ.
Assistant Director
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, D.C. 20044-0146
Telephone: (202) 616-4136

Dated: September 25, 2013

Appendix A: Items of Compensation for Davis O'Brien

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
				2013	2014	2015	2016	2017	2018	2019	2020
Lamictal Level	5%	*									
Swallow Study	5%	*									
Topamax Level	5%	*									
X-rays	5%	*									
Modified Van	4%			45,000.00							
Housing Mods	4%			218,450.00							
Vagal Nerve Stimulator	5%	*									
Lost Future Earnings				642,336.73							
Pain and Suffering				232,319.57							
Past Unreimbursable Expenses				27,725.37							
Medicaid Lien				43,134.67							
Annual Totals				1,343,632.84	127,256.50	135,256.50	127,556.50	127,206.50	114,356.50	114,231.50	114,806.50

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 guardian(s)/conservator(s) of the estate of Davis William O'Brien for Yr 1 LCP expenses (\$398,116.50), lost future earnings (\$642,336.73), and pain and suffering (\$232,319.57): \$1,272,772.80.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, Scott A. O'Brien and Lynn M. O'Brien, for past un-reimbursable expenses: \$27,725.37.

As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioners and the State of Georgia, for reimbursement of the state's Medicaid lien: \$43,134.67.

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 Davis O'Brien

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 9 2021	Compensation Year 10 2022	Compensation Year 11 2023	Compensation Year 12 2024	Compensation Year 13 2025	Compensation Year 14 2026	Compensation Year 15 2027	Compensation Year 16 2028
Lamictal Level	5%	*									
Swallow Study	5%	*									
Topamax Level	5%	*									
X-rays	5%	*									
Modified Van	4%					36,000.00	3,600.00	3,600.00	3,600.00	3,600.00	3,600.00
Housing Mods	4%										
Vagal Nerve Stimulator	5%	*									
Lost Future Earnings											
Pain and Suffering											
Past Unreimbursable Expenses											
Medicaid Lien											
Annual Totals				114,456.50	115,411.50	135,071.50	102,196.50	104,046.50	102,446.50	181,002.70	181,177.70

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 guardian(s)/conservator(s) of the estate of Davis William O'Brien for Yr 1 LCP expenses (\$398,116.50), lost future earnings (\$642,336.73), and pain and suffering (\$232,319.57): \$1,272,772.80.
 As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, Scott A. O'Brien and Lynn M. O'Brien, for past un-reimbursable expenses: \$27,725.37.
 As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioners and the State of Georgia, for reimbursement of the state's Medicaid lien: \$43,134.67.
 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 Davis O'Brien

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 17 2029	Compensation Year 18 2030	Compensation Year 19 2031	Compensation Year 20 2032	Compensation Year 21 2033	Compensation Year 22 2034	Compensation Year 23 2035	Compensation Year 24 2036
Lamictal Level	5%	*									
Swallow Study	5%	*									
Topamax Level	5%	*									
X-rays	5%	*									
Modified Van	4%			3,600.00	3,600.00	3,600.00	3,600.00	3,600.00	3,600.00	3,600.00	3,600.00
Housing Mods	4%										
Vagal Nerve Stimulator	5%	*									
Lost Future Earnings											
Pain and Suffering											
Past Unreimbursable Expenses											
Medicaid Lien											
Annual Totals				181,427.70	180,952.70	180,802.70	180,544.37	180,719.37	180,344.37	180,819.37	180,344.37

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 guardian(s)/conservator(s) of the estate of Davis William O'Brien for Yr 1 LCP expenses (\$398,116.50), lost future earnings (\$642,336.73), and pain and suffering (\$232,319.57): \$1,272,772.80.
 As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, Scott A. O'Brien and Lynn M. O'Brien, for past un-reimbursable expenses: \$27,725.37.
 As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioners and the State of Georgia, for reimbursement of the state's Medicaid lien: \$43,134.67.
 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 Davis O'Brien

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 25	Compensation Year 26	Compensation Year 27	Compensation Year 28	Compensation Year 29	Compensation Year 30	Compensation Years 31-Life
				2037	2038	2039	2040	2041	2042	2043-Life
Lamictal Level	5%	*								
Swallow Study	5%	*								
Topamax Level	5%	*								
X-rays	5%	*								
Modified Van	4%			3,600.00	3,600.00	3,600.00	3,600.00	3,600.00	3,600.00	3,600.00
Housing Mods	4%									
Vagal Nerve Stimulator	5%	*								
Lost Future Earnings										
Pain and Suffering										
Past Unreimbursable Expenses										
Medicaid Lien										
Annual Totals				180,569.37	180,594.37	180,569.37	180,344.37	180,889.93	180,414.93	182,412.97

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 guardian(s)/conservator(s) of the estate of Davis William O'Brien for Yr 1 LCP expenses (\$398,116.50), lost future earnings (\$642,336.73), and pain and suffering (\$232,319.57): \$1,272,772.80.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, Scott A. O'Brien and Lynn M. O'Brien, for past un-reimbursable expenses: \$27,725.37.

As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioners and the State of Georgia, for reimbursement of the state's Medicaid lien: \$43,134.67.

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.