

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 05-581V

Filed: February 12, 2008

Not to be published.¹

KATE MILLER as parent and next friend of
Sara Miller, a minor,

Petitioner,

v.

SECRETARY OF HEALTH AND HUMAN
SERVICES,

Respondent.

Vaccine Act; Proffer; Damages

DECISION²

This is an action seeking an award under the National Childhood Vaccine Injury Compensation Program (see 42 U.S.C. § 300aa-10 *et seq.*), on account of an injury to the petitioner's daughter, Sara Miller. On March 23, 2006, I issued an order determining that petitioner was entitled to compensation in this case. *See also* my order of March 9, 2006.

After discussions between the parties, on February 1, 2008, respondent filed "Respondent's Proffer on Award of Compensation." On February 12, 2008, petitioner's counsel represented telephonically to my staff that petitioner accepts that Proffer as a reasonable measure of the amount of the award in this case.³

¹This document will not be sent to electronic publishers as a formally "published" opinion. However, because this document contains a reasoned explanation for my action in this case, I intend to post this document 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). Therefore, each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, this entire document will be available to the public. *Id.* See also 42 U.S.C. § 300aa-12(d)(4)(B).

²In the absence of a motion for review filed pursuant to RCFC, Appendix B, the clerk is directed to enter judgment in accordance with this Decision.

³Petitioner's counsel of record is Thomas S. Farnish. However, his associate, Stephan E. Andersson, has appeared on behalf of the petitioner during the progress of this case and made the

I have reviewed respondent's Proffer, and find that it describes appropriate compensation in this case pursuant to 42 U.S.C. § 300aa-15(a). I hereby order that compensation be awarded based on the Proffer. Specifically, I order that respondent make lump sum payments and purchase an annuity contract as follows:

1. Lump sums

In the Proffer, the parties have agreed that the petitioner is entitled to immediate compensation totaling \$ 1,390,567.98, based on the following lump sums:

- ! A lump sum in the amount of \$ **1,214,828.47** shall be payable to **Todd B. Miller, Kathleen P. Miller, and KNBT Investment Management & Trust Company as Co-Guardians of the Estate of Sara MacKenzie Miller**, on account of Sara's life care expenses for the first year following judgment (\$364,730.10), past and future pain and suffering (\$ 224,896.41), and lost future earnings (\$625,201.96).
- ! A lump sum payment in the amount of \$ **67,065.64** shall be payable to the petitioner, **Kate Miller**, on account of past unreimburseable expenses related to Sara's injury; and
- ! A lump sum in the amount of \$ **108,673.87** shall be payable to **Kate Miller and the Commonwealth of Pennsylvania** on account of a Medicaid lien. This award shall be in the form of a check, jointly payable to petitioner and:

Commonwealth of Pennsylvania
Department of Public Welfare
Third Party Liability
DGS Annex Complex
116 E. Azalea Drive
Petry Bldg. #17
Harrisburg, PA 17110
Attn: Barbara Aschenbrenner

Petitioner has agreed to endorse this check to the Commonwealth of Pennsylvania.

2. Annuity

The parties agree, and I consider it in Sara's best interest, that the compensation for future unreimbursable expenses beyond the first year post-judgment be paid in the form of an annuity, which shall be purchased as soon as practicable after entry of judgment. Accordingly, pursuant to 42 U.S.C. § 300aa-15(f)(4), I order respondent to purchase, and take ownership of, an annuity

telephonic representation on February 12, 2008.

contract from an insurance company for the benefit of Sara,⁴ pursuant to which the insurance company will agree to make periodic payments to **Todd B. Miller, Kathleen P. Miller, and KNBT Investment Management & Trust Company as Co-Guardians of the Estate of Sara MacKenzie Miller, for the benefit of Sara Miller,**⁵ for the rest of Sara's life,⁶ commencing on the first anniversary of the date of judgment. The amount of the annuity payments in each year will be calculated based on the 9-page summary of "Items of Compensation for Sara Miller," attached to respondent's Proffer, which I have attached to this Decision.

George L. Hastings, Jr.
Special Master

(Attachment)

⁴ The annuity contract shall be purchased from an insurance company that meets the following criteria, adapted from the Proffer; these criteria appear to be based upon the December 1990 draft of the Uniform Periodic Payment of Judgments Act.

- 1) has a minimum of \$250,000,000 of capital and surplus, exclusive of any mandatory security valuation reserve; and
- 2) has 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 Investors 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.

⁵ I note that a guardianship has been established for Sara. *See* Exhibit 13 (Order of Court of Common Pleas of Lehigh County, Pennsylvania, Orphan's Court Division).

⁶The personal representative of the estate of Sara Miller shall provide written notice to the respondent within twenty days of her death.

Appendix A: Items of Compensation for Sara Miller

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Year 1	Compensation Year 2	Compensation Year 3	Compensation Year 4	Compensation Year 5	Compensation Years 6-7	Compensation Year 8	Compensation Year 9
Wheelchair Seating Eval.	4%	*		2008	2009	2010	2011	2012	2013-2014	2015	2016
PT	4%	*	M	960.00	960.00	960.00	960.00	960.00	960.00	960.00	960.00
Pool Therapy	4%	*	M	960.00	960.00	960.00	960.00	960.00	960.00	960.00	960.00
OT	4%	*	M	10,081.20	10,081.20	10,081.20	10,081.20	10,081.20	10,081.20	10,081.20	10,081.20
Manual Wheelchair	4%			5,000.00	1,666.67	1,666.67	1,666.67	1,666.67	1,666.67	1,666.67	1,666.67
Wheelchair Maint.	4%			500.00	500.00	500.00	500.00	500.00	500.00	500.00	500.00
Power Wheelchair & Access.	4%	*						200.00	40.00	40.00	40.00
Power Wheelchair Maintenance	4%			750.00	750.00	750.00	750.00	750.00	750.00	750.00	750.00
Wheelchair Access.	4%			60.00	20.00	20.00	20.00	20.00	20.00	20.00	20.00
Portable Wheelchair Ramp	4%			525.00	35.00	35.00	35.00	35.00	35.00	35.00	35.00
MAFOs	4%	*									
Bilateral Resting Hand Splints	4%	*									
Left Elbow Sleeve	4%	*									
TLSO	4%	*									
Adaptive Chair	0%			1,450.00							
Gait Trainer	4%	*									
Standing Frame	4%	*									
Adaptive Eating Aids	4%			50.00	50.00	50.00	50.00	50.00	50.00	50.00	50.00
Hand Held Shower	4%			50.00	7.14	7.14	7.14	7.14	7.14	7.14	7.14
Roll-in Shower Chair	4%			1,150.00	164.29	164.29	164.29	164.29	164.29	164.29	164.29
Computer	4%			1,610.00	536.67	536.67	536.67	536.67	536.67	536.67	536.67
Special Ed Software	4%			200.00	200.00	200.00	200.00	200.00	200.00	200.00	200.00
Environmental Control Device	4%			9,300.00	1,860.00	1,860.00	1,860.00	1,860.00	1,860.00	1,860.00	1,860.00
Adaptive Tricycle	4%			1,650.00							
Ceiling Lift	4%			10,000.00							
Replacement Lift	4%				428.57	428.57	428.57	428.57	428.57	428.57	428.57
Lift Maintenance	4%			100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00
Batteries	4%			40.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00
Slings	4%			250.00	250.00	250.00	250.00	250.00	250.00	250.00	250.00
Adaptive Recreational Equip.	4%			250.00	250.00	250.00	250.00	250.00	250.00	250.00	250.00
Housing Mods	0%			230,840.00							

ITEMS OF COMPENSATION	G.R.	*	M	Lump Sum Compensation Year 1	Compensation Year 2	Compensation Year 3	Compensation Year 4	Compensation Year 5	Compensation Years 6-7	Compensation Year 8	Compensation Year 9
Lost Future Earnings				2008	2009	2010	2011	2012	2013-2014	2015	2016
Pain and Suffering				224,896.41							
Past Unreimbursable Expenses				67,065.64							
Medicaid Lien				108,673.87							
Annual Totals				1,390,567.98	107,241.04	107,251.04	107,244.37	107,624.37	107,284.37	149,312.62	112,537.90

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 Todd B. Miller, Kathleen P. Miller and KNBT Investment Management & Trust Company, as Co-Guardians for the benefit of Sara Miller, for lost future earnings (\$625,201.96), pain and suffering (\$224,896.41), and Yr 1 life care expenses (\$364,730.10): \$1,214,828.47.
 As soon as practicable after entry of judgment, respondent shall make the following payment to Kate Miller, petitioner, for past un-reimbursable expenses: \$67,065.64.
 As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and the Commonwealth of Pennsylvania, Dept. of Public Welfare, Third Party Liability, DGS Annex Complex, 116 E. Azalea Drive, Pety Bldg. # 17, Harrisburg, PA 17110, Attn: Barbara Aschenbrenner, as reimbursement of the state's Medicaid lien: \$108,673.87.
 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., 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 twelve monthly installments totaling the annual amount indicated.

Appendix A: Items of Compensation for Sara Miller

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 10	Compensation Years 11-12	Compensation Year 13	Compensation Year 14	Compensation Year 15	Compensation Year 16	Compensation Year 17	Compensation Years 18-20
				2017	2018-2019	2020	2021	2022	2023	2024	2025-2027
COBRA	6%		M								
Highmark Blue Premiums	6%		M								
Highmark Blue Deductible	6%										
Highmark Blue MOP	6%										
Out-of-Network Provider Deductible	6%			250.00	250.00	250.00	250.00	250.00	250.00	250.00	250.00
Medicare Part B Premium & Deductible	6%		M								
Medigap	6%		M								
Primary Care Doctor	5%	*		10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00
Neurologist	5%	*		25.00	25.00	25.00	25.00	25.00	25.00	25.00	25.00
Physical Medicine Doctor	5%	*		60.00	60.00	60.00	60.00	60.00	60.00	30.00	30.00
Botox Injections after deductible	5%	*		556.00	556.00	556.00	556.00	556.00	556.00	556.00	556.00
Serial Casting after Botox	5%	*									
Orthopedist	5%	*		20.00	20.00						
Scoliosis X-ray	5%	*									
Scoliosis Surgery	5%	*									
Cannitor	5%	*		72.00	72.00	72.00	72.00	72.00	72.00	72.00	72.00
Vitamin Mixture Suspension	5%	*		144.00	144.00	144.00	144.00	144.00	144.00	144.00	144.00
New Drug	5%										
Medicare Part D	5%		M								
Valium	5%	*		12.00	12.00	12.00	12.00	12.00	12.00	12.00	12.00
Aide Care	4%		M	81,212.50	81,212.50	194,910.00	194,910.00	194,910.00	194,910.00	194,910.00	194,910.00
Psychological Counseling	4%	*						180.00			
Case Management	4%		M	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00
Van Conversion	4%			5,253.53	5,253.53	5,253.53	5,253.53	5,253.53	5,253.53	5,253.53	5,253.53
Van Mod Maintenance	4%			1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	1,500.00
Assistive Tech Eval.	4%	*				10.00	3.33	3.33	3.33	3.33	3.33
Hipotherapy	4%		M	1,800.00	1,800.00						
Therapeutic Recreation	4%			750.00	750.00	750.00	750.00	750.00	750.00	750.00	750.00
Vocational Assess.	4%					7,000.00					

Appendix A: Items of Compensation for Sara Miller

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 10 2017	Compensation Years 11-12 2018-2019	Compensation Year 13 2020	Compensation Year 14 2021	Compensation Year 15 2022	Compensation Year 16 2023	Compensation Year 17 2024	Compensation Years 18-20 2025-2027
Lost Future Earnings											
Pain and Suffering											
Past Unreimbursable Expenses											
Medicaid Lien											
Annual Totals				114,187.90	112,537.90	230,755.40	223,748.73	223,928.73	223,748.73	213,867.73	213,857.73

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 Todd B. Miller, Kathleen P. Miller and KNBT Investment Management & Trust Company, as Co-Guardians for the benefit of Sara Miller, for lost future earnings (\$625,201.96), pain and suffering (\$224,896.41), and Yr 1 life care expenses (\$364,730.10): \$1,214,828.47.
 As soon as practicable after entry of judgment, respondent shall make the following payment to Kate Miller, petitioner, for past un-reimbursable expenses: \$67,065.64.
 As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and the Commonwealth of Pennsylvania, Dept. of Public Welfare, Third Party Liability, DGS Annex Complex, 116 E. Azalea Drive, Pety Bldg. # 17, Harrisburg, PA 17110, Attn: Barbara Aschenbrenner, as reimbursement of the state's Medicaid lien: \$108,673.87.
 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., 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 twelve monthly installments totaling the annual amount indicated.

Appendix A: Items of Compensation for Sara Miller

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 21 2028	Compensation Year 22 2029	Compensation Years 23-30 2030-2037	Compensation Years 31-59 2038-2066	Compensation Years 60-Life 2067-Life
COBRA	6%		M	5,826.24	5,826.24			
Highmark Blue Premiums	6%		M			4,041.00		
Highmark Blue Deductible	6%					750.00		
Highmark Blue MOP	6%					3,000.00		
Out-of-Network Provider Deductible	6%			250.00	250.00			
Medicare Part B Premium & Deductible	6%		M				1,156.80	1,156.80
Medigap	6%		M				1,888.80	2,468.40
Primary Care Doctor	5%	*		10.00	10.00			
Neurologist	5%	*		25.00	25.00			
Physical Medicine Doctor	5%	*		30.00	30.00			
Botox Injections after deductible	5%	*		556.00	556.00			
Serial Casting after Botox	5%	*						
Orthopedist	5%	*						
Scoliosis X-ray	5%	*						
Scoliosis Surgery	5%	*						
Carnitor	5%	*		72.00	72.00	80.00		
Vitamin Mixture Suspension	5%	*		144.00	144.00	920.00		
New Drug	5%							
Medicare Part D	5%		M				2,340.00	2,340.00
Valium	5%	*		12.00	12.00	20.00		
Aide Care	4%		M	194,910.00	194,910.00	194,910.00	194,910.00	194,910.00
Psychological Counseling	4%	*						
Case Management	4%		M	2,000.00	2,000.00	2,000.00	2,000.00	2,000.00
Van Conversion	4%			5,253.53	5,253.53	5,253.53	5,253.53	5,253.53
Van Mod Maintenance	4%			1,500.00	1,500.00	1,500.00	1,500.00	1,500.00
Assistive Tech Eval.	4%	*		3.33	3.33			
Hipotherapy	4%		M					
Therapeutic Recreation	4%			750.00	750.00	750.00	750.00	750.00
Vocational Assess.	4%							

Appendix A: Items of Compensation for Sara Miller

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 21 2028	Compensation Year 22 2029	Compensation Years 23-30 2030-2037	Compensation Years 31-59 2038-2066	Compensation Years 60-Life 2067-Life
Wheelchair Seating Eval.	4%	*			10.00			
PT	4%	*	M	180.00	180.00	1,688.40		
Pool Therapy	4%	*	M	180.00	180.00	5,054.40		
OT	4%	*	M	1,780.20	1,780.20	1,660.20		
Manual Wheelchair	4%			1,000.00	1,000.00	1,000.00	1,000.00	1,000.00
Wheelchair Maint.	4%			500.00	500.00	500.00	500.00	500.00
Power Wheelchair & Access.	4%	*		40.00	40.00	40.00		
Power Wheelchair Maintenance	4%			750.00	750.00	750.00	750.00	750.00
Wheelchair Access.	4%			20.00	20.00	20.00	20.00	20.00
Portable Wheelchair Ramp	4%			35.00	35.00	35.00	35.00	35.00
MAFOs	4%	*						
Bilateral Resting Hand Splints	4%	*						
Left Elbow Sleeve	4%	*						
TLSO	4%	*						
Adaptive Chair	0%							
Gait Trainer	4%	*						
Standing Frame	4%	*						
Adaptive Eating Aids	4%			50.00	50.00	50.00	50.00	50.00
Hand Held Shower	4%			7.14	7.14	7.14	7.14	7.14
Roll-in Shower Chair	4%			164.29	164.29	164.29	164.29	164.29
Computer	4%			536.67	536.67	536.67	536.67	536.67
Special Ed Software	4%							
Environmental Control Device	4%			1,860.00	1,860.00	1,860.00	1,860.00	1,860.00
Adaptive Tricycle	4%							
Ceiling Lift	4%							
Replacement Lift	4%			428.57	428.57	428.57	428.57	428.57
Lift Maintenance	4%			100.00	100.00	100.00	100.00	100.00
Batteries	4%			10.00	10.00	10.00	10.00	10.00
Slings	4%			250.00	250.00	250.00	250.00	250.00
Adaptive Recreational Equip.	4%			250.00	250.00	250.00	250.00	250.00
Housing Mods	0%							

Appendix A: Items of Compensation for Sara Miller

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 21 2028	Compensation Year 22 2029	Compensation Years 23-30 2030-2037	Compensation Years 31-59 2038-2066	Compensation Years 60-Life 2067-Life
Lost Future Earnings								
Pain and Suffering								
Past Unreimbursable Expenses								
Medicaid Lien								
Annual Totals				219,483.97	219,493.97	227,629.20	215,760.80	216,340.40

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 Todd B. Miller, Kathleen P. Miller and KNBT Investment Management & Trust Company, as Co-Guardians for the benefit of Sara Miller, for lost future earnings (\$625,201.96), pain and suffering (\$224,896.41), and Yr 1 life care expenses (\$364,730.10): \$1,214,828.47. As soon as practicable after entry of judgment, respondent shall make the following payment to Kate Miller, petitioner, for past un-reimbursable expenses: \$67,065.64. As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and the Commonwealth of Pennsylvania, Dept. of Public Welfare, Third Party Liability, DGS Annex Complex, 116 E. Azalea Drive, Pety Bldg. # 17, Harrisburg, PA 17110, Attn: Barbara Aschenbrenner, as reimbursement of the state's Medicaid lien: \$108,673.87. 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., 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 twelve monthly installments totaling the annual amount indicated.