

OFFICE OF SPECIAL MASTERS

No.

Filed:

*
*
*
*
*
*
*
*
*
*
*
*
*
*
*

Petitioner,

v.

SECRETARY OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

DAMAGES ORDER

[Respondent conceded in the Rule 4 Report filed with this court on, that petitioner is entitled to compensation under the Vaccine Act],[but for the resolution of On, respondent contacted this court to confirm that the petitioner has, by a preponderance of evidence], [OR the language could read, “The court determined that petitioner is entitled to compensation under the Vaccine Act. This case is now ready for the damages phase.”]. This case is now ready for the damages phase. This Order provides guidance and a schedule for resolving the damages portion of this case. Section 1 provides general information; Section II describes necessary supportive materials for the Life Care Plan; and Section III sets the schedule for the damages process. **The parties should carefully read the General Statement below as it discusses modifications to the court’s previous Damages Orders¹; the parties in this case will be responsible for complying with these modifications.**

¹The court modified its Damages Order in September 1997.

I. GENERAL STATEMENT

In Vaccine Act cases, damages issues are typically resolved by a process in which petitioner begins by obtaining a "life care plan" that sets forth petitioner's future needs. The respondent then evaluates that plan and when desired, obtains its own life care plan. The parties then attempt to settle any differences. If they are successful, they file a stipulation. If they have not settled some or all of the issues, the special master typically conducts a hearing to hear evidence and resolve the disputed issues.

The court does note, however, that in a number of cases two other approaches to resolve damages issues have been utilized. **With the court's approval**, the parties may:

- use a single life care planner to determine the injured's needs; or
- use alternative dispute resolution (ADR). ADR is normally sought after the parties' initial settlement attempts have been unsuccessful. The court will assign an independent special master to assist the parties in reaching agreement. The procedures used vary to meet the needs of a particular case. The only requirement is that the process be completed quickly (anticipated time is less than one month) so that if unsuccessful, case resolution will not be delayed.

-- NOTICE TO PETITIONERS' COUNSEL

It is the experience of the special masters that the settlement process has in many Program cases taken far too long - - sometimes two years or more from resolution of the entitlement issue - - to the financial detriment of the injured party. Since the largest item of damages is post judgment care, it is in petitioner's best interest to resolve the damages issue as expeditiously as practicable. Indeed, in Program cases involving vaccinations administered prior to October 1, 1988, a petitioner receives no compensation whatsoever for any expense predating the date of judgment. Even in cases involving vaccinations administered after October 1, 1988, the judgment date is extremely important since prejudgment reimbursement is limited to what was actually expended, while the post judgment award is determined on the basis of what the injured reasonably requires for future care.

In many cases, the primary delay in resolving the damages issue is petitioner's failure to file its Life Care Plan in a timely manner. Aggravating the delay is the discovery that petitioner failed to file the information required by this Order, infra, in support of the compensation requested, such as medical and school records, medical insurance information, and provider information. The next area of delay is counsel allowing the settlement negotiation process to drag on interminably. Settlement should truncate the process, not prolong it. These delays are unnecessary and work a substantial injustice on your client. Counsels' goal must be to supply as quickly as possible all relevant information, as set forth in this Order, and to speedily determine whether a fair settlement

can be negotiated. If a settlement can be reached, petitioner's counsel must work with respondent and the court to conclude the stipulation process as quickly as possible. If settlement appears unlikely, counsel must recognize that fact and schedule a hearing. The special master can then resolve the case.

In short, the damages process moves either quickly or slowly based primarily upon petitioners' counsel's efforts in supplying the required information and in pushing the settlement and/or hearing process. The special masters are prepared to assist the parties in quickly resolving the damages issues through whatever form of intervention the parties recommend.

One way the court has intervened to move the damages process forward has been by modifying the standard Damages Orders. The court has utilized a standard Damages Order for several years now; however, in an effort to determine damages in a more efficient manner, without infringing upon either side's ability to support its case, the court has modified the Damages Order by specifically amending section "III. Schedule" of its Damages Order. In the past, the court has required respondent to request additional information (i.e. IME, personal site visit, etc.) within thirty (30) days after the service date of petitioner's life care plan. However, effective immediately, this thirty (30) day requirement for additional information is eliminated and replaced by the requirement of a status conference, which is to be conducted within forty-five (45) days after the filing of this Damages Order. **The parties are advised to carefully read "III. Schedule" of the attached Damages Order which has been revised to reflect the court's modifications.**

The purpose of the conference call is to discuss the requirements of the Damages Order. Particularly, the discussion will focus on the petitioner's duty to provide supporting information for the compensation requested. In addition, however, the respondent's need for additional information will be discussed as well. Thus, the respondent's request for an IME, site visit, additional medical records, or other information, will be examined and a schedule set. In essence, respondent is expected to gather information for its responsive life care plan on a parallel track with petitioner. This should reduce substantially the time involved in moving the case to settlement or trial. The court is aware that respondent faces a handicap in preparing its responsive life care plan before it has received petitioner's detailed request for compensation. However, respondent should be prepared to request as much information as possible at this status conference, and the court will proceed with the understanding that respondent may need to request additional information after receipt of petitioner's life care plan. Lastly, alternative methods of resolving the dispute (e.g. ADR, single life care planner) will be discussed. Hopefully, at the close of this call, all concerned will have a clear picture of how the case will proceed and in what time frame. An open and frank discussion is expected.

For this effort to be successful, the parties must cooperate in identifying informational needs, gathering this supplemental documentation, and coordinating any medical testing or site visits. To that end, the court expects counsel, possibly with their respective life care planners, to discuss the case prior to the conference call with the court and to be prepared to set a schedule for obtaining information so as to facilitate the submission of complete and timely life care plans. This procedure

will place a heavy burden on the parties at the onset of this damages phase, but should result in significant benefits from this early discussion and cooperation.

Additionally, two areas of state law should not be overlooked during the damages phase: Medicaid and legal representation.

1. **Medicaid** -- If the injured vaccinee has been covered by Medicaid at any time since the onset of the vaccine-related injury, the court strongly encourages the petitioner to contact the State Administrator of the Medicaid program to ascertain whether the state currently has or will have an interest in or lien on the compensation awarded by this court to the petitioner. *States have filed liens, after judgment in some Program cases, to recoup past Medicaid payments. If no compensation is provided for past Medicaid expenditures and the state is successful in the litigation, petitioner's award could be substantially reduced in satisfying the lien.* Accordingly, petitioner's counsel should work with respondent's counsel and the state Medicaid office to determine any continued Medicaid coverage and any reimbursement of Medicaid for past expenses. §300aa-15(a)(1)(B).
2. **Representation Issues** -- Under the laws of most states, it is required that the person who is to receive the payments on behalf of the injured person must be formally appointed as guardian or conservator of the injured person. *This is true even in the case of the parents of a minor child. Therefore, petitioner's counsel should determine now whether such an appointment will be necessary in this case.* If the guardianship or conservatorship is required in order to receive the Vaccine award, the cost of establishing the guardianship or conservatorship will ordinarily be reimbursable as part of petitioner's attorney's fees and legal costs.²

The court strongly encourages informal resolution of damages issues. To facilitate the settlement process, the court encourages counsel to arrange for direct communications between damages experts to discuss the injured's condition, the requested needs, and what information or concerns are seen as outstanding.

The court also recognizes that legitimate disagreements will require judicial resolution. **The court's goal is simply to guide the parties as quickly as possible into a position where they**

²See, e.g., Thomas v. Secretary of HHS, No. 92-46V, 1997 WL 74664 (Fed. Cl. Spec. Mstr. Feb. 3, 1997) (conservatorship costs compensable under the "but for" test; i.e., the costs in establishing a conservatorship would not have been incurred "but for" the court's demand that a conservatorship be set up to protect the Program award); Velting v. Secretary of HHS, No. 90-1423V, 1996 WL 937626 (Fed. Cl. Spec. Mstr. Sept. 24, 1996) (compensation for work spent establishing a conservatorship with the local probate court reasonable because the conservatorship was set up for the *sole purpose* of handling the Program award).

either agree to settle or agree to disagree and go to trial. Either avenue ensures timely case resolution and efficient use of resources.

To assist petitioner in preparing a properly supported Life Care Plan, Section II of this Order sets forth below the types of information that is usually necessary to support a damages claim.

II. THE LIFE CARE PLAN

The life care plan shall contain the following information:³

- 1. Background Information.** The plan shall list the sources of information that were used to determine the level of future care for the injured (e.g., conversations with the family, past levels of care, a current medical evaluation, school assessments, and discussions with the treating physicians). The plan shall state specifically petitioner's current types of treatment. If petitioner's request for future care differs from the current types of care, the plan shall explain why the different treatment is necessary. **Petitioner shall file copies of any current medical exam, individualized education plan (IEP), and individualized habilitation plan (IHP).** Depending on the type and extent of compensation being requested, petitioner may file a **video** tape depicting a day in the life of the injured (15-20 minutes of a home-quality video is sufficient). Such videos have proved extremely helpful in resolving damages issues.

³In past cases, the court has dictated that the life care expert's hourly rate should not exceed \$100 per hour, with a total cost, including plan design and subsequent trial testimony, not exceeding \$3,000 on average, and in the most difficult cases, not exceeding \$4,000. As a consequence of these limits, petitioner was forewarned of his/her responsibility to monitor life care expert fees. See Cousins v. Secretary of HHS, No. 90-2052V, 1992 WL 58809 (Cl. Ct. Spec. Mstr. Mar. 9, 1992); see also Crossett v. Secretary of HHS, No. 89-73V (Cl. Ct. Spec. Mstr. Aug. 28, 1990)(unpublished). However, due to the increasing role of the life care planner, not only in their compilation and preparation of the life care plan and its supporting documentation, but also in plan revisions and settlement negotiations, the court recognizes that the specific monetary limitations previously placed on expert fees is no longer reasonable. Nevertheless, the petitioner is still responsible for monitoring life care planner fees. In addition, the court will continue to require that petitioner substantiate the reasonableness of the expert's hourly rate, the number of expert hours expended, and the specific services provided in the case. The court has allowed varied hourly rates for life care planners depending on the level of expertise, the difficulty of the case, and the planner's geographic area of practice. Without specific documentation indicating that the expert's fees are reasonable under the case circumstances, the court may deny unexplained and unreasonable charges in the fee request. See Wilcox v. Secretary of HHS, No. 90-991V, 1997 WL 101572 (Fed. Cl. Spec. Mstr. Feb. 14, 1997).

2. **Residential Services.** If residential services are requested, the following questions should be answered:

- how was the requested level of care determined?
- what facilities providing that level of care are available in the relevant state or region? (names of contact persons and phone numbers for the facilities should be provided if possible).
- which facilities were investigated and how were these facilities identified? If a description of the injured was given to the facility to determine appropriate placement, please provide that description (frequently, disputes over the appropriate facility center on the accuracy of the description of the injured given to the facility).

For each facility considered, the following information should be provided:

- the cost;
- the services included in the cost with a description of the level of these services;
- the reasons for rejecting any facility.

3. **Attendant Care.** If attendant care is requested, provide the following information (or address the following issues):

- why the attendant care is necessary (e.g., respite care versus medical monitoring);
- how the number of hours was determined;
- the reasons for the skill level of attendant requested;
- the cost and how it was determined.

4. **Medical Care.** For requested examinations, medications and medical tests, provide the following information:

- the basis for the request (physician recommendation, current usage, etc.);
- whether the level of need will reduce with age;

- the cost and how it was determined.

5. Therapies. For each type of therapy or counseling requested, provide the following information:

- the frequency;
- the basis for the request (physician recommendation, current usage, etc.);
- whether the therapy is currently being provided;
- whether the therapy is provided by the school district through the Education of Individuals with Disabilities Act, 20 U.S.C. 1400 et seq. (1990) and, if not, why not;
- the cost and how it was determined.

6. Miscellaneous Items. For any miscellaneous items (home modifications, equipment, transportation, etc.) provide the following information:

- the basis for the request;
- the cost and how it was determined.

7. Offsets. Identify and quantify any services currently being rendered by state or local agencies, school districts, private charities, etc. Identify and quantify any sources of financial aid currently or potentially available to offset the requested costs (private insurance, state and federal programs, etc.). It should be noted whether such benefits will be affected by an award under this Program.

8. Method of Payment. Petitioner shall also provide the court and respondent its position on how the award should be paid: through an annuity, lump sum, or some combination thereof. Legitimate arguments have been made in support of each of the above methods of payment, but, in general, the court has found that a combination of lump sum and annuity meets the legitimate interests of both parties. Petitioner shall discuss these issues with the court in a status conference prior to incurring any expert fees (e.g. economist's fees) with respect to this "method of payment" issue.

Extremely important is the issue of the appropriate discount rate for any lump sum and the growth rate for any annuity. Based upon testimony presented in past cases, the court routinely awards discount rates of:

0% - medical items

2% - non-medical items
1% - rough average for all items of care

and growth rates of:

6% - medical items
4% - non-medical items
5% - rough average for all items of care.

If the parties do not take issue with these rates, expert testimony will not be necessary. Also it must be noted that while these rates have been found by the court in past cases, the parties are free to negotiate different rates as part of any settlement or stipulation.

9. **Trusts.** Petitioner should be aware that the court is more and more frequently seeing awards structured in the form of trusts. Respondent actively advocates the use of trusts in many cases. While the court is concerned with the oversight and management of large dollar awards, the court sees trusts as beneficial in some, but not all cases. Other forms of oversight should be considered, including guardianships and conservatorships. The court generally defers to the parties' joint agreement on such issues, as long as it is shown that the method selected is in the best interests of the injured party, is not unduly burdensome, and is cost effective. To prevent the issue of trust formation, or other form of award oversight, from causing undue delay in the damages portion of the case, **the parties shall alert the court as early in the damages process as possible** of either or both parties' intention to utilize a trust or other form of oversight.

III. SCHEDULE

The parties shall comply with the following schedule to complete the damages portion of this case:

- A. **MANDATORY CONFERENCE CALL:** Within **forty-five (45) days** following the filing of this Order, by **[DATE]**, petitioner shall schedule a conference call in this case. Petitioner shall confer with respondent and then contact the court by **[DATE]** to suggest three possible dates and times for the initial status conference to be held in this case. Petitioner shall contact my law clerk, Jennifer Wright-Brown, at (202) 504-2183 to schedule this call.

- **PURPOSE OF THE CALL:**

1. Petitioner may use this conference call to ask the court any questions about the damages phase of the proceedings.
 2. The court expects petitioner and respondent to work *simultaneously* on preparing life care plans. Respondent should not wait for petitioner to file a life care plan before beginning work on her life care plan. Therefore, if respondent believes additional information will be necessary for completing her life care plan (i.e., IME, personal site visit,⁴ updated records, etc.), respondent shall be prepared to discuss these requests at the status conference. **Failure to request the information at the status conference may result, absent substantial justification, in denial of any such future request.**
- B. PETITIONER'S LIFE CARE PLAN:** Petitioner shall file a life care plan or a status report detailing his/her efforts to obtain a life care plan within **ninety (90) days**, by no later than **[DATE]**. If a status report is filed, then additional status reports shall be filed **every thirty (30) days thereafter** until the life care plan is filed. If the LCP is not filed within six months after the date of this Order, petitioner shall schedule a status conference with the court to explain fully the delay in producing the LCP.
- C. RESPONDENT'S LIFE CARE PLAN:** Respondent shall file its response within **forty-five (45) days** after the service date of petitioner's plan (unless otherwise modified by the court). Such response shall include, in addition to or as part of the narrative explaining projected levels of care, a **comparative chart** of the parties' respective requests.
- D. JOINT STATUS REPORT:** Petitioner shall file a joint status report within **sixty (60) days** after the service date of respondent's plan. The report shall detail the parties' settlement efforts to date.
- E. DAMAGES HEARING:** While continuing settlement negotiations, petitioner shall confer with respondent and contact the court with three proposed dates and times for a status conference to be conducted within **forty-five (45) days** after the filing date of the joint status report. At the status conference, the parties shall be prepared to discuss:

⁴Petitioner should be aware that respondent, in preparing its response, may need to conduct an on-site evaluation of the injured or to contact the injured's providers cited in the life care plan. In either case, respondent's counsel is strongly encouraged to provide prior notice to and make appropriate arrangements with petitioner's counsel. If any questions or disputes arise, the court should be notified immediately.

- the issues to be resolved at the hearing;
- a proposed hearing date to occur no later than ninety (90) days after the status conference;
- the proposed hearing site; and
- the witnesses that each party plans to call at the hearing and whether any of the witnesses will testify telephonically.

IV. CONCLUSION

This Order is meant to be a framework for resolving damages issues. Any and all provisions of the Order are subject to modification pursuant to a Motion, preferably made jointly, supported by a reasonably detailed explanation. However, the court sees this schedule as a reasonable time frame within which the parties can settle their case or to focus their case for trial. **Absent extraordinary circumstances** brought to the court's attention in a timely manner, the parties are expected to adhere to this schedule.

If either party has any questions about this Order, the court's procedures or any other aspect of the damages process, that party should contact my law clerk, Jennifer Wright, at (202) 504-2183 to arrange for a status conference to discuss those questions.

IT IS SO ORDERED.

Gary J. Golkiewicz
Chief Special Master