

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 17-841V

(Unpublished)

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TIMOTHY MCCLUSKY,

Petitioner,

v.

SECRETARY OF HEALTH  
AND HUMAN SERVICES,

Respondent.

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Filed: December 7, 2018

Special Master Oler

Decision by Proffer; Damages;  
Influenza (“Flu”) Vaccine; Guillain-Barré  
syndrome (“GBS”).

*Ronald Craig Homer, Conway, Homer, P.C., Boston, MA, for Petitioner.*

*Colleen Clemons Hartley, U.S. Dep’t of Justice, Washington, DC, for Respondent.*

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

On June 21, 2017, Timothy McClusky (“Petitioner”), filed a petition seeking compensation under the National Vaccine Injury Compensation Program.<sup>2</sup> Petitioner alleged that he developed Guillain-Barré syndrome (“GBS”) as a result of an influenza (“flu”) vaccine that he received on August 23, 2016. *See* Petition (“Pet.”) at 1, ECF No. 1.

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<sup>1</sup> Although this ruling is not formally designated for publication, it will be posted nonetheless on the United States Court of Federal Claims website, in accordance with the E-Government Act of 2002, 44 U.S.C. § 3501 (2012). As provided by 42 U.S.C. § 300aa-12(d)(4)(B), however, the parties may object to the ruling’s inclusion of certain kinds of confidential information. Specifically, under Vaccine Rule 18(b), each party has fourteen days within which to request redaction “of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, the whole decision will be available to the public. *Id.*

<sup>2</sup> The Vaccine Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3758, codified as amended at 42 U.S.C. §§ 300aa-10 through 34 (2012) (“Vaccine Act” or “the Act”). Individual section references hereafter will be to § 300aa of the Act (but will omit that statutory prefix).

In his Rule 4(c) Report, filed on May 11, 2018, Respondent recommended that compensation be awarded in this case. *See* Rule 4(c) Report at 1, ECF No. 25. Specifically, Respondent stated that Petitioner's GBS is "consistent with the Vaccine Injury Table for GBS following the seasonal flu vaccination, and that it was caused-in-fact by the flu vaccine he received on August 23, 2016."<sup>3</sup> *Id.* at 4. Respondent further stated that Petitioner "has met the statutory requirements for entitlement to compensation" (*id.* at 4-5 (citing 42 U.S.C. § 300aa-13(a)(1)(B); 42 U.S.C. § 300aa-11(c)(1)(D))), thus concluding that Petitioner has "satisfied all legal prerequisites for compensation under the Act" (*id.* at 5). I subsequently issued a ruling on entitlement on May 17, 2018. ECF No. 26.

On November 29, 2018, Respondent filed a proffer that was mutually agreed-upon with Petitioner, proposing an award of compensation. ECF No. 39. I have reviewed the file, and, based upon that review, I conclude that Respondent's proffer (as attached hereto), is reasonable. I therefore adopt it as my decision in awarding damages on the terms set forth therein.

The proffer awards:

- A lump sum payment of \$204,518.52, in the form of a check payable to Petitioner, Timothy McClusky.

ECF No. 39 at 1-2. This amount represents compensation for all elements of compensation under 42 U.S.C. § 300aa-15(a) to which Petitioner is entitled.

I approve a Vaccine Program award in the requested amount set forth above to be made to Petitioner. 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>4</sup>

**IT IS SO ORDERED.**

**s/ Katherine E. Oler**

Katherine E. Oler  
Special Master

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<sup>3</sup> The Vaccine Injury Table is located at 42 C.F.R. § 100.3.

<sup>4</sup> Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by each filing (either jointly or separately) a notice renouncing their right to seek review.

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TIMOTHY McCLUSKY,	)	
	)	
Petitioner,	)	
	)	No. 17-841V
v.	)	Special Master Oler
	)	ECF
SECRETARY OF HEALTH AND HUMAN	)	
SERVICES,	)	
	)	
Respondent.	)	
	)	

On June 21, 2017, Timothy McClusky (“petitioner”) filed a petition for vaccine injury compensation alleging that he suffered Guillain-Barre Syndrome (“GBS”) as result of a flu vaccine administered on August 23, 2016. On May 11, 2018, respondent conceded that entitlement to compensation was appropriate under the terms of the Vaccine Act. On May 17, 2018, Special Master Oler issued a Ruling on Entitlement finding that petitioner was entitled to compensation. The case is now in damages.

Based upon the evidence of record, respondent proffers that petitioner should be awarded \$204,518.52, consisting of pain and suffering (\$150,000.00), lost earnings (\$50,871.15); and past unreimbursed expenses (\$3,647.37), which represents all elements of compensation to which petitioner would be entitled under 42 U.S.C. § 300aa-15(a). Petitioner agrees.

Respondent recommends that the compensation provided to petitioner be made through a

lump sum payment of \$204,518.52 in the form of a check payable to petitioner.<sup>1</sup> Petitioner agrees.

Petitioner is a competent adult. Evidence of guardianship is not required in this case.

Respectfully submitted,

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Assistant Attorney General

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Torts Branch, Civil Division

CATHARINE E. REEVES  
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/s/ Colleen C. Hartley  
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DATED: November 29, 2018

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<sup>1</sup> Should petitioner die prior to the entry of judgment, respondent reserves the right to move the Court for appropriate relief. In particular, respondent would oppose any award for future medical expenses, future pain and suffering, and future lost wages.