

HOT ISSUES IN DAMAGES

2014 Judicial Conference

Panel Discussion

November 17, 2014

Elements of Compensation

- Payments are made from the Vaccine Injury Compensation Trust Fund:
 - Pain and Suffering
 - Capped at \$250,000
 - Loss of Earnings (but not for a child's estate, Tembenis)
 - Unreimbursed expenses
 - Vaccine-related death
 - one-time lump sum payment of \$250,000
 - Medicaid lien

General Process for Determining Amount of Compensation

- Petitioner presents evidence
 - Documents for past unreimbursed expenses
 - Life care plan for future unreimbursed expenses
 - Vocational information
- Respondent evaluates evidence and counters, if desired
- The parties work to settle differences:
 - If they are successful, they file a stipulation/proffer
 - When the parties cannot resolve all issues, the case may be referred for ADR
 - Special master rarely conducts a hearing to resolve disputed issues
- Parties resolve virtually all damages cases

Form of Vaccine Award

- § 15(f)(4)
- Available methods of payment:
 - Lump Sum at “net present value”
 - Annuity
 - “otherwise used” meaning trusts
 - Combination

Net Present Value

- § 15(f)(4)

Based upon precedent in the Office of Special Masters, the court routinely awards discount rates :

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

Annuity

- An annuity is an available method of payment.
§ 15(f)(4)(A)
- Life contingent annuity. § 15(f)(4)(C)
- The Secretary has purchased multiple annuities in some cases
- Typically used for future unreimbursed expenses
- Eliminates need to determine life expectancy

Trusts

- Factors to consider:
 - Terms of trust document
 - Selecting a trustee
- Other forms of oversight to be considered:
 - Guardianships
 - Conservatorships
- Reversionary Trusts

Pain and Suffering Awards

- “an award not to exceed \$250,000.” § 15(a)(4)
- Graves, 109 Fed. Cl. 579 (2013)

Unreimbursed Future Medical Expenses

- § 15(a)
- § 15(c) “shall be sufficient to enable the compensated person to remain living at home”
- Lerwick, 2013 WL 4403044 (Fed. Cl. Spec. Mstr. Aug. 15 2014), motion for review pending

Secondary Payer

- § 15(g): offset is required for payments made under a state compensation program, under an insurance policy, or under any Federal or State health benefits program other than Medicaid
- § 15(h): all health insurance carriers, prepaid health plans, and benefit providers prohibited from making payment secondary to the payment of compensation under the Vaccine Act
- Any Program award must be reduced by the amount to which petitioner receives

Offset: Under Any State Compensation Program . . . or Federal or State Health Benefits Program

- SSDI: Heinzelman, 681 F.3d 1374 (Fed. Cir. 2012)
- Workers' Compensation

Offset: Private Disability Insurance

- Helman, 2014 WL 3589564 (Fed. Cl. Spec. Mstr. June 24, 2014)
- Enforcement of rulings finding that the Vaccine Act is a secondary payer has been raised as an issue by Petitioner's bar

The Availability of Interim Damages

- In Lerwick, the special master recently made an interim damages award to a petitioner
- The special master held that he possesses the authority to award compensation on an interim basis:
 - Avera and Shaw (interim attorneys' fees)
 - Heinzelman and Tembenis (split judgments)
- As well as the discretion to do so:
 - Entitlement found and appeal unlikely
 - Petitioner elected to accept judgment

Scope of Lerwick's Interim Compensation Award

- Past unreimbursed expenses
- Pain and suffering to statutory maximum
- No award for future lost earnings (Tembenis)
- No award for future medical care (disputed item)
- Outcome is not binding precedent