**OFFICE OF SPECIAL MASTERS**

**No. 01-0060V**

**(Filed: September 21, 2005)**

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| MICHAEL BROWN<br><br>Petitioner,<br><br>v.<br><br>SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,<br><br>Respondent. | * | To Be Published |

*Clifford J. Shoemaker, Esq.*, Vienna, Virginia, for Petitioner.
*Catharine E. Reeves, Esq.*, United States Department of Justice, Washington, D.C., for Respondent

## DAMAGES RULING[1]

After finding that Petitioner was entitled to compensation for an injury related to a tetanus toxoid vaccination which resulted in an acute inflammatory demyelinating chronic polyneuropathy also known as Guillian-Barré syndrome, the Court conducted a hearing on the issue on 4 April 2005. The Court heard from several fact witnesses including the Petitioner; from Dr. Estelle L. Davis,[2] an expert in employment and vocational rehabilitation testifying on behalf of the Petitioner; and from

[1] Because this ruling contains a reasoned explanation for the special master's action in this case, the special master intends to publish it. Therefore, as provided by Vaccine Rule 18(b), 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, "the entire decision" will be available to the public.

[2] Estelle L. Davis, Ph.D., CRC, holds both a Masters degree in Counseling and a Ph.D. degree in Rehabilitative Counseling from the University of Maryland at College Park. Dr. Davis is a principal in the firm Bussey, Davis & Associates Inc. offering rehabilitation counseling and consulting services and since 1977 has served as a vocational expert for the Social Security Administration.

two well-qualified economists, Dr. Richard J. Lurito[3] for Petitioner and Dr. Patrick F. Kennedy[4] for Respondent. The parties have since proffered extensive post-hearing briefs accompanied by supplemental reports and additional materials from their expert witnesses. The case is now ripe for a decision.

## The Vaccine Act[5]

Compensation provided under the Vaccine Act includes the following:

- Actual unreimbursable expenses past and future, § 15(a)(1);
- "[A]ctual and anticipated loss of earnings determined in accordance with generally recognized actuarial principles and projections," § 15(a)(3)(A);
- Pain, suffering and emotional distress up to $250,000, § 15(a)(4); and
- Reasonable attorneys fees and costs, § 15(e).

As will be discussed below, payment for certain elements above are to be based on "net present value." Moreover, compensation is paid "in a lump sum of which all or a portion may be used as ordered by the special master to purchase an annuity or otherwise be used, with the consent of the petitioner, in a manner determined by the special master to be in the best interests of the petitioner." § 15(f)(4)(A).

## Damages Chart

Prior to the damages hearing, the parties jointly submitted a table outlining the issues in dispute such that the Court could address each point of contention in a thorough and methodical manner. An amended version is available at Appendix A of Petitioner's Closing Brief. This table acted as road map for the hearing and for this ruling. The following six items represent the totality of the compensation to be awarded in this case save attorneys fees and costs which will be addressed in a separate decision. All six items are in dispute.

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[3] Richard J. Lurito, Ph.D., earned his undergraduate degree in Economics from the University of Illinois as well as both a Masters degree and a Ph.D. degree in Economics from Georgetown. Dr. Lurito has taught economics at the collegiate level, served as an economic counselor at the General Services Administration, and for the past several decades has been associated with an economic consulting firm where he prepares and presents testimony before State and Federal regulatory agencies and commissions involving public utilities, gives testimony in cases involving economic loss due to death or injury, and provides economic consultation to various companies.

[4] Patrick F. Kennedy, Ph.D., holds an undergraduate degree in Economics from the University of California, Santa Cruz, and a Ph.D. in Economics from Stanford University. He has served as an economist at the Federal Reserve Board of Governors and, since returning to private practice, is now with the firm Max Barkley where his responsibilities include economic loss evaluations and personal loss evaluations.

[5] The statutory provisions governing the Vaccine Act are found at 42 U.S.C. §§ 300aa-10 to 300aa-34 (1991 & Supp. 2002). For ease of citation, all references will be to the relevant subsection of 42 U.S.C. § 300aa.

1. Actual Past Unreimbursed Vaccine Injury-Related Medical Expenses
2. Past Unreimbursed Medical Expenses Related to High Cholesterol
3. Future Unreimbursable Vaccine Injury-Related Medical Expenses
4. Future Unreimbursable Medical Expenses Related to High Cholesterol
5. Lost Earnings
6. Pain & Suffering

**Past Unreimbursed Vaccine Injury-Related Medical Expenses**

The sum of Petitioner's past unreimbursed medical expenses is $49,914.00. Petitioner contends that, given his reading of "net present value," his expenses should be adjusted to $56,036 in today's dollars.

Respondent counters that Petitioner is only due $47,554 or $49,914 less $2,360 in treatments for high cholesterol. Moreover, Respondent contends that compensation should not be awarded in today's dollars which would be the equivalent of charging the government prejudgment interest.

Therefore, the Court must first turn its attention to the dispute over the meaning of "net present value," namely, whether past expenses should be adjusted to net present value as per subsection 15(f)(4)(A).

**Should "Net Present Value" apply to past as well as future compensation?**

a. Arguments

The Vaccine Act states that, "payment of compensation under the Program shall be determined on the basis of the *net present value* of the elements of the compensation." § 15(f)(4)(A) (emphasis added).

Both parties agree that future elements of compensation should be reduced to net present value. Reducing future elements of compensation to net present value generally entails awarding a lump sum that, if prudently invested, will provide Petitioner with an amount equivalent to his future damages.

However, Petitioner argues that past elements of compensation should likewise be adjusted to net present value. Respondent counters that such an adjustment is tantamount to awarding prejudgment interest which is impermissible.

b. Statutory Language

As this court has previously stated, when interpreting the meaning of a statute, the controlling principle is the "basic and unexceptional rule" that courts must give effect to the clear meaning of the statute as written. Campbell v. Secretary of HHS, No. 01-688V, 2004 WL 1047393, at *1 (Fed.

Cl. Spec. Mstr. Apr. 22, 2004) (quoting Estate of Cowart, 505 U.S. 469, 476 (1992)). However, as the Federal Circuit has noted:

> When the legislative purpose is incorporated in a complex piece of legislation, such as those establishing a major regulatory or entitlement program, the meaning of any particular phrase or provision cannot be securely known simply by taking the words out of context and treating them as self-evident. This rather straightforward homily is captured in the more pretentious proposition that parts of a statute *in pari materia* must be construed together.

Amendola v. Secretary of HHS, 989 F.2d 1180, 1181 (Fed. Cir. 1993) (emphasis in original).

According to Respondent, the phrase "net present value" applies only to future elements of compensation. That view is supported by numerous excerpts from economic textbooks and various reports. Respondent Exhibit ("R. Ex.") W at Appendix A. A more recent version of one such report describes "present value" in the following manner:

> The equivalent value, at the present time, of a future stream of payments (either income or cost). The present value of a *future stream of payments* may be thought of as the lump-sum amount that, if invested today, together with interest earnings would- be just enough to meet each of the payments as they fell due. Present values are widely used in calculations involving financial transactions over long periods of time to account for the time value of money (interest).

2005 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds, H.R. Doc. No. 109-18, at 200-01 (2005), available at http://www.socialsecurity.gov/OACT/TR/TR05/VI_glossary.html (emphasis added).

In contrast, Petitioner's expert, Dr. Lurito, points to an article which indicates that the function of a discount rate is to create "outputs at different points in time." M. S. Feldstein, The Social Time Preference Rate, in Cost Benefit Analysis 246 (Richard Layard ed., 1972). From this statement, Dr. Lurito posits that "different points" can apply to the past as well as to the future. Petitioner's Reply to Respondent's Post-Hearing Brief ("P. Reply"), Tab 2 at 1. However, the two types of discount rates discussed in the article apply to "future consumption" and "future economic conditions"; hence, little support for Petitioner's position can be drawn from that article. Id., Tab 2 at 3.

While the legislative record is sparse; it appears that Congress likewise intended for the phrase "net present value" to refer only to future elements of compensation:

> The legislation revises this payment schedule to provide that the entire compensation award for prospective cases be made in a single lump sum, with *anticipated future expenses* discounted to their net present value. The Committee intends that the courts set an appropriate discount rate on a case-by-case basis.

H.R.Rep. No. 391, at 697 (1987), reprinted in1987 U.S.C.C.A.N. 2313, 371 (emphasis added); see also Euken v. Secretary of HHS, No. 91-1059V, 1992 WL 132548, at *9 (Cl. Ct. Spec. Mstr. May 28, 1992).

Petitioner argues, however, that the statute arguably could be read to apply the adjustment to net present value to *all* elements of compensation. If the government insists on reducing future elements of compensation by projecting a certain rate into the future, does it not make sense to apply that same rate to past elements of compensation?

This line of reasoning was rejected by Judge Gibson of the Court of Federal Claims, "[W]e nevertheless think it is clear that § 300aa-15(f)(4)(A) applies only to future compensation and not compensation for past expenses." Stotts v. Secretary of HHS, 23 Cl. Ct. 352, 369 n.16 (1991).

Furthermore, according to the Federal Circuit, "Interest may only be recovered in a suit against the government if there has been a clear and express waiver of sovereign immunity by contract or statute, or if interest is part of compensation required by the Constitution." United States Shoe Corp. v. United States, 296 F.3d 1378, 1381 (2002) (citing Library of Congress v. Shaw, 478 U.S. 310, 311 (1986); Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 47 (1928)).

Petitioner argues that the language of the statute, which states that payment shall be based on "the *net present value* of the elements of the compensation," represents an express waiver. § 15(f)(4)(A) (emphasis added).

Yet, this section of the statute must be narrowly construed. Martin v. Secretary of HHS, 62 F.3d 1403, 1405 (Fed. Cir. 1995). Put another way:

> [U]nder the doctrine of sovereign immunity . . . (1) ambiguities [in statutory language] must be construed in favor of immunity and (2) if there exist more than one 'plausible' reading or two possible interpretations of 'equal likelihood' . . . the interpretation producing the more limited award must be chosen.

Holihan v. Secretary of HHS, 45 Fed. Cl. 201, 207 (1999) (interpreting §15(a)(3)(B)).

c. Conclusion

Here the Court is faced with an apparent ambiguity in the language of the Act. However, given the weight of the evidence including (1) numerous definitions from economic textbooks and studies; (2) Congressional intent as revealed in the legislative record; and (3) the understanding elucidated by the Court of Federal Claims, this Court concludes that the phrase "net present value" applies *only* to future elements of compensation.

**Compensation for Past Unreimbursable Medical Expenses**

According to the damages chart provided by the parties, Petitioner suffered a total of $49,914 in actual unreimbursable expenses. Respondent contends, however, that expenses concerning treatment for high cholesterol including $1,280 for Lipitor™ medication and $1,080 for related lab work, should be deducted from Petitioner's tally. This Court agrees in part.

Petitioner must prove by a preponderance of the evidence that Petitioner's high cholesterol

is a sequela of the vaccine-related injury. Hellebrand v. Secretary of HHS, 999 F.2d 1565 (Fed. Cir. 1993). The Federal Circuit defined sequela – a medical term of art – as "a pathological sequence or result of an existing disease or disorder." Abbot v. Secretary of HHS, 27 Fed. Cl. 792, 794 (1993), aff'd in part, rev'd in part and remanded, 19 F.3d 39 (Fed. Cir. 1994). To prove this point, a petitioner may proffer evidence such as "expert testimony, fact testimony, or documentation, to convince the special master that, more likely than not, [the alleged injury] was connected to the [vaccine-related injury]." Hossack v. Secretary of HHS, 32 Fed. Cl. 769, 776 (1995).

In support of his claim, Petitioner proffers a lack of family history of cholesterol and a proximate temporal relationship between the onset of high cholesterol and the vaccine-related injury. He also points to the records of Dr. Desai, the treating internist, who noted that "[s]ince the episode of GBS, Mr. Brown has also developed hyperlipidemia which will also require life-long treatment." Pet. Ex. 34.

While Dr. Desai's statement establishes temporal proximity, it does not of itself offer a medical theory or opinion on causation. Petitioner has provided no medical expert testimony on this point; neither has he proffered a plausible medical theory causally connecting his high cholesterol to the vaccine-related injury. Petitioner has not demonstrated that his high cholesterol condition is a sequela of the vaccine-related injury.

Nevertheless, as Dr. Desai is treating Petitioner both for the residual effects of his injury and for high cholesterol issues, the Court declines the task of apportioning costs from lab work and doctor visits. As Respondent's expert opined, "[I]f you were to say that a medical visit or a lab test -- well, first of all, let's say a medical visit, if that was related to a number of items, I don't think that I would make an attempt to apportion out which of those -- you know, you talked about three things in a particular physician's visit, and I think you would still be charging the same rate." Tr. at 215. The Court agrees. Dr. Desai is responsible for monitoring Mr. Brown's continuing health in light of his underlying vaccine-related injury. Such care might well have included cholesterol check ups and lab work even without Mr. Brown's subsequent cholesterol issues.

For the foregoing reasons, Petitioners are awarded $48,634 for past unreimbursable medical expenses**.** This award represents their actual expenses, $49,914, less the cost of Lipitor™ medication, $1,280.

**Future Unreimbursable Vaccine Injury-Related Medical Expenses**

Concerning future unreimbursable expenses there is some debate as to whether Petitioner will have health insurance coverage in the future. Such coverage would greatly reduce an award for future unreimbursable medical expenses. Furthermore, the parties disagree as to the proper method of calculating future medical expenses.

a. Medical Insurance

According to the Vaccine Act, "Payment of compensation under the Program shall not be made for any item or service to the extent that payment has been made, or can reasonably be expected to be made." § 15(g)

Respondent contends that, since Petitioner was employed with health insurance coverage for so many years after his injury, it is reasonable to assume that he will find similar employment that will provide similar health insurance coverage. The Court disagrees.

Petitioner had a relationship and an understanding with the previous employer (and its various incarnations)[6] that cannot be relied upon when looking into the future. He was injured while in their employ and, while he did not move up the ranks as he might have liked, neither was he fired. The employer instead chose the admirable path of accommodation. Eventually, the Petitioner was let go. Now he is unemployed and relying on temporary coverage under the Consolidated Omnibus Budget Reconciliation Act, or COBRA, which will expire in March 2006. It is not reasonable to expect that Petitioner will have secured employment that includes health care benefits by that date.

b. Compensation

As previously stated, expenses related to Petitioner's high cholesterol should not be included in this award. According to the Damages Chart prepared by the parties, absent expenses related to high cholesterol, Petitioner is requesting a lump sum of $845,373. Respondent avers that future medical expenses absent health insurance should equal a lump sum of $707,046. R. Ex. T (equaling $734,944 minus $27,898 in future Lipitor™ costs). The difference in tallies represents a disagreement over the methods used in calculating future medical expenses.

While these matters should not devolve into a "graduate seminar on economic forecasting," Monesssen Southwestern Railway Co. v. Morgan, 486 U.S. 330, 341 (1988), nevertheless the divergent methodologies utilized by the parties in calculating net present value for future unreimbursable expenses must be addressed.

To state it over simply, Petitioner predicts how much medical costs will increase by comparing the historical rate in medical costs with the corresponding rate of inflation whereas Respondent runs a historical comparison between medical costs and Treasuries.

In short, the Court accepts Petitioner's argument that a 30-35 year comparison between the increase in inflation versus the increase in medical costs is an appropriate gauge for predicting future medical costs. As Petitioner demonstrates, the increase in medical costs versus inflation has

[6] When injured, Mr. Brown was employed by Highwaymaster which in 2000 became @Track Communications which subsequently in 2002 became Aether Systems which finally in 2004 became Slingshot Acquisition Corporation.

maintained at a steady rate for the past several decades. Pet. Ex. 67 at 1-2. Prescription costs, for example, have consistently tracked out at 1.8% higher than the rate of inflation while physician costs have consistently tracked at 1% above the rate of inflation. Tr. at 147-48.

Respondent's expert, in the alternative, utilized a comparison between interest rates on Treasuries versus medical costs. The Court agrees with Petitioner's critique of this methodology in that such interest rates "have a life of their own" as determined by numerous factors including action by the Federal Reserve. Tr. at 145. In contrast, a comparison of medical care costs with inflation provides a "much more stable picture of . . . reality." Id.

The parties do not disagree as to the initial yearly cost of future medical expenses. As aforementioned, the Court finds Petitioner's annual cost escalations for the various medical care items reasonable. Pet. Ex. 62 at 7-8. It is also the Court's understanding that these figures will track out over Petitioner's anticipated life span which as of 1 January 2006 is 37.12 years.

Recall, damages for future unreimbursable expenses must be reduced to net present value. In other words, the Court must determine what net discount rate to apply such that Petitioner is awarded a lump sum that, if safely invested, will provide him with an amount equivalent to his future damages.

For reasons that will be discussed in much greater detail in the upcoming section on lost future earnings, the Court finds that an after tax discount rate of 5.5% is appropriate. The difference between the cost escalation factors and the discount rate represents the net discount rate. Interestingly enough, though Petitioner's cost escalation calculations are utilized, the resultant net discount rates track closely with those proffered by Respondent. See R. Ex. T.

The Court realizes that the chart below represents calculations based on a decision issuing prior to the present ruling and may need to be adjusted accordingly. For accuracy's sake, the Court anticipates that a decision will follow this ruling within one month and the judgment on that decision four months later.

| Medications: | Annual Cost | Annual Cost Escalation | Net Discount Rate |
|---|---|---|---|
| Prescriptions (without Lipitor™) | $15,011.00 | 5.25% | 0.25% |
| Vitamins | $1,146.00 | 4.5% | 1.0% |
| | | | |
| Physicians: | | | |
| Dr. Desai | $300.00 | 4.5% | 1.0% |
| Dr. Cohen | $700.00 | 4.5% | 1.0% |
| Dr. Tseng | $90.00 | 4.5% | 1.0% |
| | | | |
| Other: | | | |
| Lab Tests | $456.00 | 4.5% | 1.0% |
| Massage Therapy | $3,380.00 | 4.0% | 2.5% |

Petitioner shall provide the Court and opposing counsel with a finalized chart detailing the calculation of this element of the damages award.

**Lost Earnings**

All of the evidence indicates that this vaccine-related injury derailed the meteoric rise of a talented young executive who was being groomed for upper management. While he is still in a position to contribute to the business world, his impact will very likely be less than it might otherwise have been. Though the lifetime earning capacity of this particular individual might well have been far greater, the Vaccine Act requires that lost earnings be calculated in a cautious manner "in accordance with generally recognized actuarial principles and projections." § 15(a)(3)(A).

With the particulars of this case in mind, the Court now turns to the issue of lost earnings.

a. Lost Past Earnings

As previously discussed, actual lost earnings *will not* be adjusted to net present value. That leaves the question of what Mr. Brown's lost earnings from the date of injury to the date of judgment were, if any.

Respondent contends that Petitioner has failed to demonstrated any lost earnings. The argument centers around the fact that Petitioner continued to retain employment following the vaccine related injury and eventually lost his position, not necessarily as a result of the injury, but due to other corporate considerations. The Court finds instead that, despite Petitioner's hardship, he continued to work and persevered through great personal discomfort.

Furthermore, Petitioner provided persuasive fact witness testimony that, as a direct result of his injury and extended hospitalization, he lost what otherwise would have been a valuable promotion. See Pet. Ex. 59; Tr. at 173. The Court finds that Petitioner was slated for a vice president position and had been performing the substantive duties of that spot following the untimely passing its prior occupant. Instead that position went to an outsider, and Petitioner was demoted to a position with much less responsibility but more flexibility in lieu of his condition.

Petitioner enjoyed a unique relationship with a company that obviously had high expectations for him. They continued his employment throughout four months of hospitalization and later accommodated the diminished capacity that accompanied his physical injuries. Petitioner's continued contribution to the company is demonstrated in his retention throughout several subsequent acquisitions.

Respondent's expert, Dr. Kennedy, testified at hearing that economic loss is had if there is a difference between what Petitioner would have made but for the vaccine-related injury and what he actually made. Tr. at 216. Though economic loss is not as easily identifiable in this case because

Petitioner continued to work, nevertheless, the Court finds that Petitioner would have earned more in the ensuing years but for the injury.

Dr. Estelle Davis, an expert in employment and vocational rehabilitation, testified that, given Petitioner's eminent promotion, but for the vaccine injury he would have realized a 15-25% increase in salary. Furthermore, Dr. Lurito avers that an annual 4% salary growth rate is reasonable to assume. Pet. Ex. 62 at 2; Hearing Transcript ("Tr.") at 158. Respondent's expert agrees. Tr. at 251.

Therefore, Petitioner's award for past lost earnings should be calculated by taking Petitioner's anticipated salary from the year in question (including an additional $5,000 bonus that he would have received but for the injury), adding an additional 20%, then applying the 4% growth rate. The Court believes that the salary figure, including 20% and the additional $5,000 bonus, will track more closely with Respondent's calculation in the chart attached to Exhibit S, Appendix D or $146,600. Therefore, Petitioner's anticipated earnings should start at $146,600 and grow 4% annually from the date of the injury through the end of his estimated work life expectancy. Concerning lost past earnings, those figures should be offset, of course, by an appropriate income tax calculation and by any salary actually earned up to the date of judgment. For accuracy's sake, the Court anticipates that a decision will follow this ruling within one month and the judgment on that decision four months later. Therefore, approximately 20 weeks should be built into the past lost earnings figure.

Petitioner shall provide the Court and opposing counsel with a finalized chart detailing the proposed calculation of this element of the damages award.

b. Future Lost Earnings

As the Supreme Court has noted, "By its very nature the calculation of an award for lost earnings must be a rough approximation. Because the lost stream can never be predicted with complete confidence, any lump sum represents only a 'rough and ready' effort to put plaintiff in the position he would have been if he had not been injured." Jones & Loughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 546 (1983).

The goal of this aspect of damages is to provide Petitioner with a lump sum that if invested, with minimal risk required to protect a consumption stream, will equal an amount equivalent to his lost future earnings.

In the alternative, it is possible to provide for this future income stream in the form of a non life-contingent annuity thereby avoiding the need for complicated computations. In fact, such an annuity is recognized as the best means of determining the net present value. Edgar v. Secretary of HHS, 989 F.2d 473, 477 (Fed. Cir.1993). However, the parties have not proffered such an outcome in the present case but have instead requested that lost future earnings be awarded in a lump sum.

Several factors affect the determination of lost future earnings. In the previous section, the basis for Mr. Brown's projected earning capacity was determined and a 4% growth rate was

accepted. Other factors include Mr. Brown's work-life expectancy and an offset for anticipated future earnings. Finally, the Court must set a discount rate whereby to reduce future lost earnings to net present value.

1. Offset for anticipated future earnings

Dr. Davis, the rehabilitative specialist, has determined that, as a result of his vaccine related injury, Mr. Brown's earning capacity has more likely than not been reduced to between $90,070 to $104,590. Pet. Ex. 61 at 9. Petitioner urges the Court to accept the mid-point of that salary range or $97,330. Respondent argues that if that number is indexed for wage inflation one arrives at a future offset earnings basis of $107,016. R. Ex. S at 7-8 The Court agrees. Starting from the date of judgment it will be assumed that Petitioner is capable of earning $107,016. It is further assumed that the yearly 4% wage growth increase will also apply to this amount.

2. Work-life expectancy

Petitioner's expert, Dr. Lurito, claims that, according to U.S. Dept. of Labor, the work life of a college educated male at 32 years of age is 30.5 years. Pet. Ex. 62 at 1. Dr. Kennedy's estimate, however, exceeds Petitioner's by 2.5 years. R. Ex. S at 9. Therefore, the total work life expectancy for Mr. Brown but for the injury is estimated at 33 years (through January 18, 2031). Id.

Dr. Davis testified, however, that individuals with disabilities often do not have the same work life capacity as their otherwise healthy counterparts. Therefore, Petitioner proposes that calculations concerning the offset derived from his earning capacity should be adjusted to adequately reflect this reality.

The Court finds this proposal too speculative to incorporate in the damages calculation. The level of Petitioner's disability is not readily clear. Neither is it apparent where he would fall on the charts provided by Dr. Davis. Pet. Ex. 70. Moreover, Dr. Davis's estimate of Petitioner's reduced future earnings capacity takes into account that his physical condition will require certain accommodations. Hence, the Court feels that Petitioner's disability has already been adequately incorporated into the final equation.

3. Net Discount Rate

Perhaps the most contentious issue in this case involves determining the discount rate that should be applied in reducing future damages for lost earnings to today's dollars. This Court will utilize the "real rate of return" or "net discount rate" method espoused by the Supreme Court in Pfeifer, 462 U.S. 548. In this methodology, the parties assume that the relationship between the rate of wage growth and interest rates will remain relatively stable over long periods of time regardless

of fluctuations in inflation.[7] The parties are in agreement that a 4% wage growth rate for Mr. Brown is reasonable. However, the parties disagree as to which investment vehicle(s) are appropriate to use in determining an appropriate interest rate.

Respondent's expert, Dr. Kennedy, looked in part to "the extent to which tax adjusted yields on intermediate term U.S. Treasury Notes have exceeded historical wage growth." R. Ex. W. Dr. Kennedy utilizes a historical average between interest rates and wages in order to ascertain an after tax net discount rate of 1.5%. This is a lower net discount rate than Dr. Kennedy might have applied to an average American worker, given that Mr. Brown's field has outpaced average wage growth. R. Ex. S at 8. Dr. Kennedy is essentially saying that a projected 5.5% interest rate after tax would be appropriate. Tr. at 249.

Dr. Lurito, meanwhile, attempts to calculate a projected interest rate acceptable to a "prudent trustee." To that end, he compiles a mock investment portfolio which includes money market investments, certificates of deposit, municipal bonds, corporate bonds and U.S. Treasuries. According to his calculations, an after tax interest rate of 4.5% is prudent to assume. Given wage growth of 4%, the after tax net discount rate proposed by Petitioner is .5%

Petitioner contends that Dr. Kennedy's "historical" 20-25 year average incorporates time frames where interest rates on Treasuries are much higher than they are today. According to Petitioner, in 1985 one year Treasuries returned roughly 7.81% whereas they now return in the mid 3% range. Likewise, in 1985 ten year Treasuries returned roughly 10.62% whereas now they return in the mid 4% range. Pet. Ex. 69 at 4. The Court has some concern about calculating a net discount rate based on only a 20-25 year average of intermediate term Treasuries, particularly given the substantially reduced ratio between interest on Treasuries and wage growth in the past several years. To Respondent's credit, however, the Office of Special Masters has twice agreed with Dr. Kennedy as to the utilization of intermediate term treasury notes. Watkins v. Secretary of HHS, No. 95-154V, 1999 WL 1990 (Fed. Cl. Spec. Mstr. Mar. 12, 1999); Childers v. Secretary of HHS, No. 96-194V, 1999 WL 218893 (Fed. Cl. Spec. Mstr. Mar. 26, 1999). In both decisions, the special masters raised similar concerns; however, they found that Dr. Kennedy had not relied solely on an examination of

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[7] Dr. Lurito explained the difference between Petitioner's and Respondent's approaches as follows:

> The approach that Dr. Kennedy takes, which is sometimes called a net discount rate approach, which is to try to wash out effects of inflation and simply ask the question what return on investment over and above either wages, or inflation, or medical care costs, is it appropriate to believe that a person can earn.
>
> The other approach, the approach that I have taken, is to separate the issues. The first issue being how fast is it reasonable to believe either wages or medical care costs, or whatever we are concerned about, are likely to rise in the future, and then the second part of the problem is to ask the question what do financial markets today indicate a person can earn by way of rate of return after taxes using an approach which minimizes the risk of investment.

Tr. at 139. The Court finds the distinction unhelpful. Essentially, each expert is comparing the rate of Petitioner's annual wage increase versus the interest rate of a safe investment strategy. The primary difference, then, is what type of investments to use in determining an appropriate interest rate.

intermediate term Treasuries but had also considered various other historical data and decided to give those particular instruments greater weight in the final analysis. Watkins, 1999 WL 1990, at *5; Childers, 1999 WL 218893, at *22. This Court would be much more comfortable with Dr. Kennedy's approach in the present case had he incorporated – as he reportedly did in Childers and Watkins – additional historical data and explained how that data was utilized in reaching his final tally.

Respondent counters that Dr. Lurito's approach does not take historical data into account when projecting into the future but merely takes a "snapshot" of present day investment realities which are highly volatile. Tr. at 250. That critique also has merit. To Petitioner's credit, however, the resultant discount rate is echoed in the September 11 Victim Compensation Fund of 2001, a statutory program with a mandate comparable to our own, namely, to prevent the airline industry from being sued out of business by providing timely and generous compensation to those wounded or murdered on that fateful day. Air Transportation and Safety Stabilization Act of 2001, Pub. L. No. 107-42, § 401-09,115 Stat. 230, 237-41; Pet. Ex. 68; R. Ex. X**.** In fact, Petitioner's estimate is even more conservative than that of the 9/11 Commission. See Pet. Reply, Tab 1.

Concerning the September 11 Victim Fund, however, Dr. Kennedy observes that unlike Dr. Lurito, who advocated a "prudent trustee" standard, the September 11 Victim Fund actually used the "average yields on mid- to long-term U.S. Treasury securities" to determine an appropriate discount rate. R. Ex. W at 7. A similar methodology was employed by Dr. Kennedy.

To date the Office of Special Masters has adopted a variety of net discount rates between one and three percent including 1%[8]; 1.64%[9]; 2%[10]; 2.25%[11]; and 3 %.[12] However, some of those rates applied to elements of compensation other than future lost wages and are not necessarily applicable to the present case. Childers, 1999 WL 218893, at *25 n.1.

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[8] Watkins v. Secretary of HHS, No. 88-66V, 1990 WL 608695 (Fed. Cl. Spec. Mstr. May 10, 1990); Euken v. Secretary of HHS, No. 90-1059V (Remand Oct. 8, 1992) 1992 WL 309348 (Cl. Ct.), rev'd on other grounds, 34 F.3d 1045 (Fed. Cir. 1994) (concerning pain and suffering); Childers v. Secretary of HHS, No. 96-194V, 1999 WL 218893 (Fed. Cl. Spec. Mstr. Mar. 5, 1999) (concerning pain and suffering).

[9] Johnston v. Secretary of HHS, No. 88-30, 1990 WL 299393 (Cl. Ct. Spec. Mstr. May 21, 1990) (concerning speech therapy, attendant care and social worker visits).

[10] Watkins v. Secretary of HHS, No. 95-154V, 1999 WL 199057 (Fed. Cl. Spec. Mstr. Mar. 12, 1999); Childers v. Secretary of HHS, No. 96-194V, 1999 WL 218893 (Fed. Cl. Spec. Mstr. Mar. 26, 1999).

[11] Shaw v. Secretary of HHS, No. 89-7V, 1989 WL 250126, at *9 (Ct. Cl. Spec. Mstr. Sept. 22, 1989); Davis v. Secretary of HHS, supra, No. 89-64V, 1989 WL 250211, at *5 (Ct. Cl. Spec. Mstr. Dec. 12, 1989); Beck v. Secretary of HHS, No. 88-51V, 1989 WL 250082, at *10 (Cl. Ct. Spec. Mstr. Aug. 17, 1989), rev'd on other point, 924 F.2d 1029 (Fed. Cir.1991).

[12] Youngblood v. Secretary of HHS, No. 91-1442V, 1993 WL 22177 (Fed. Cl. Spec. Mstr. Jan. 13, 1993), aff'd, 28 Fed. Cl. 566 (1993); rev'd, 32 F.3d 552 (Fed. Cir. 1994); Rivera v. Secretary of HHS, No. 91-960V, 1992 WL 198853 (Cl. Ct. Spec. Mstr. July 31, 1992).

The Supreme Court, meanwhile, has stated that a discount rate between 1 and 3% is generally acceptable. "[W]e do not believe a trial court adopting such an approach in a suit ... should be reversed if it adopts a rate between one and three percent and explains its choice." Pfeifer, 462 U.S. at 548-49. Moreover, according to that decision, the net "discount rate should be based on the interest that would be earned on '*the best and safest investments*.'" Pfeifer, 462 U.S. at 537. (1983) (quoting Chesapeake & Ohio R. Co. v. Kelly, 241 U.S. 485, 491 (1916)) (emphasis added).

In the end, Dr. Lurito's reliance on the present day interest rates of various instruments does not seem like a reasonable formula for making future projections. In fact, on several occasions, Dr. Lurito altered his calculations to account for fluctuations in the return rate on the various items in his proposed portfolio. See Pet. Ex. 67 at 3-4. That is not to say that Dr. Lurito's approach is entirely without merit. Were this case dealing with a shorter time period, Dr. Lurito's methodology might be acceptable. As it stands, however, the Court is attempting to discern a net discount rate that will accommodate roughly the next 25 years. While Dr. Lurito's calculations present one picture of what a safe rate of return might look like *today*, they are too mercurial to be relied upon in making a future projection.

As aforementioned, the Court would be more comfortable with Dr. Kennedy's recommendation had he incorporated a more historical perspective with his analysis. However, as between the two approaches, that espoused by Dr. Kennedy seems more reasonable. The use of intermediate term Treasuries in calculating the net discount rate has been accepted by the Office of Special Masters. Watkins, 1999 WL 1990; Childers, 1999 WL 218893. And the 1.5% net discount rate advocated by Respondent falls within the range of 1 to 3% suggested by the Supreme Court. Pfeifer, 462 U.S. at 548-49. Finally, the Supreme Court indicates that the net discount rate should be based on interest from the "best and safest concerns." In the Childers case, both Dr. Lurito and Dr. Kennedy apparently agreed that Treasuries represent "the safest investments possible." 1999 WL 218893.

c. Conclusion

As previously determined, Mr. Brown's anticipated earnings but for the vaccine injury start from $146,600 and track out at a 4% annual growth rate from the date of the injury through the end of the estimated 33 year work life expectancy.

As for lost past earnings, an offset should be applied for actual earnings through the date of judgment (approximately 20 weeks after this ruling issues). This element of the award should not be adjusted to present value. An appropriate offset for income tax, of course, should be assessed.

As for future lost earnings, starting from the date of judgment (approximately 20 weeks after this ruling issues) an offset for the projected income stream will apply ($107,016 grown at 4% annually) along with an offset for appropriate income taxes. A net discount rate of 1.5% will be applied to the remainder.

## Pain and Suffering

The Court finds the following undisputed facts of this case relevant to the damage award for pain and suffering: (1) As this Court previously found, Mr. Brown's immune system was incited by the vaccination to *repeatedly* attack his nerve myelin and axons over a period of time in 1998-1999; (2) These attacks caused him considerable, constant pain and required several months hospitalization; (3) As a result of this injury and the resultant pain in his feet and legs, he could not drive for two years; (4) He continues to experience pain on a daily basis for which he takes up to 8 prescription pain pills and over the counter pain medication every day.

As a result of Mr. Brown's testimony and the testimony or affidavits of his doctors, family, coworkers, and friends, this Court finds that the majority of Petitioner's intensive pain and suffering is behind him. Hence, Petitioner is awarded $200,000 for past pain and suffering.

Though Petitioner is considerably better than when originally stricken, the Court finds that he remains in poor health with limited physical capabilities and in constant pain. Therefore, the Court awards $50,000 for future pain and suffering spread over his 37.12 year life expectancy.

As previously discussed, the $200,000 for past damages *will not* be adjusted to present value; however, the $50,000 must be so adjusted. Youngblood v. Secretary of HHS, 32 F.3d 552 (Fed. Cir.1994). Unlike future medical expenses or future lost earnings, however, there is no way to attach an appropriate growth rate to pain and suffering; therefore, determining a net discount rate is necessarily subjective. As aforementioned, other special masters have applied a 1% net discount rate to such awards; moreover, the Supreme Court has indicated that a range from 1 to 3 % is appropriate. Given the nature of this Program, to generously compensate individuals who have been injured by certain vaccines, this Court finds it appropriate to utilize the low end of that range. Therefore, Petitioner is awarded $200,000 for past pain and suffering and $50,000 for future pain and suffering spread over 37.12 years at a net discount rate of 1%.

## Summary

The Court finds that Petitioner is entitled to the following:

1. $48,634 for past unreimbursable medical expenses;

2. A lump sum equal to the annual cost of future unreimbursable medical expenses grown out for 37.12 years via their respective cost escalators and then reduced by their respective net discount rates;

3. A lump sum award calculated by taking $146,600 at 4% growth for 33 years, minus an offset for appropriate income tax(es), an offset for actual earnings prior to the date of judgment, and an offset for anticipated earnings following the date of judgment. A 1.5% net discount rate applies to future lost earnings (post-judgment);

4. $200,000 for past pain and suffering and $50,000 for future pain and suffering spread over 37.12 years at a net discount rate of 1%.

**Within 21 days, Petitioner shall provide the Court and opposing counsel with finalized charts detailing his calculation of the various elements of the damages awards. Respondent should respond within one week thereafter should exception be taken to Petitioner's calculations.**

**Conclusion**

The Court anticipates that this preliminary ruling on the issue of damages will be incorporated by reference into a damages decision within 30 days. That decision will represent the "Final Decision" on this case.

In the interim, the Court encourages the parties to discuss possible alternative resolutions such that Mr. Brown is provided the compensation he needs and deserves without undue delay from a lengthy appeal process. Should the parties reach a reasonable arrangement prior to the date of decision, the Court will accept it in lieu of this ruling.

Given the complexity of the computations in these cases, the parties are encouraged to raise any patent factual or mathematical errors with this ruling *post haste*. Any such comments, questions, emendations or animadversions should be **made in writing and faxed** to opposing counsel and the Court.

**The parties should contact the Court to set up a status conference.** Any issues or queries concerning this ruling may be addressed to my law clerk, David Lee Mundy, Esq., at (202) 357-6351.

**IT IS SO ORDERED.**

**Richard B. Abell**
Special Master