OFFICE OF SPECIAL MASTERS

No. 95-399V

(Filed: January 19, 1999)

* *		
ELIZABETH K. HOLIHAN and GREG S. HOLIHAN, as legal guardians for Patrick G. Holihan,	*	
Petitioners,	*	**TO BE PUBLISHED**
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* *		

Mary Frankhart, Long Beach, California, for petitioners.

Linda Renzi, Department of Justice, Washington, D.C., for respondent.

RULING ON "LOST EARNINGS" ISSUE

HASTINGS, *Special Master*.

This is an action seeking an award under the National Vaccine Injury Compensation Program[(1)] as a result of an injury to petitioners' son, Patrick G. Holihan. On June 20, 1996, respondent filed her "Amended Report," conceding that Patrick's case meets the criteria for a Program award.[(2)] In several Rulings filed since that time, I have addressed issues involved in computing the appropriate *amount* of the award, ruling upon several aspects of petitioners' claim in that regard. In this Ruling, I address the final outstanding issue, concerning petitioners' claim that Patrick is entitled to an award for "lost earnings." After careful consideration, I conclude that petitioners are entitled to an award for lost earnings in the amount of $331,859.03. My reasoning will follow.

I

INTRODUCTION

Under the National Vaccine Injury Compensation Program (hereinafter "the Program"), a petitioner's award consists of the sum of amounts available under several categories of compensation, as provided in § 300aa-15(a). In my prior rulings in this case, I have resolved petitioners' compensation claims in all categories except the "lost earnings" category. In this case, the petitioners assert that as a result of Patrick's encephalopathy, which is presumed to have been caused by a diphtheria/tetanus vaccination that he received in 1994 at two years of age, Patrick will likely earn less as an adult than he would have, absent that encephalopathy. They contend that he is entitled to Program funds to compensate him for that reduction in earnings.

The applicable statutory provision reads as follows:

§ 300aa-15. Compensation

(a) General rule

Compensation awarded under the Program to a petitioner under section 300aa-11 of this title for a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, shall include the following:

* * * * *

(3) * * *

(B) In the case of any person who has sustained a vaccine-related injury before attaining the age of 18 and whose earning capacity is or has been impaired by reason of such person's vaccine-related injury for which compensation is to be awarded and whose vaccine-related injury is of sufficient severity to permit reasonable anticipation that such person is likely to suffer impaired earning capacity at age 18 and beyond, compensation after attaining the age of 18 for loss of earnings determined on the basis of the average gross weekly earnings of workers in the private, non-farm sector, less appropriate taxes and the average cost of a health insurance policy, as determined by the Secretary.

§ 300aa-15(a)(3)(B). Review of this provision indicates that the resolution of this case involves three separate issues. First, there is a *factual* issue concerning impairment--*i.e.*, whether Patrick's earning capacity as an adult likely will be significantly impaired as a result of his above-described encephalopathy. Second, if the answer to the first question is that a significant impairment has occurred, a *legal* question of statutory interpretation then arises--*i.e.*, whether the particular finding of impairment in Patrick gives rise to a "lost earnings" award under the statutory language. Finally, if an award is appropriate, I must determine the proper *amount* of the award.

Accordingly, in the pages to follow I will address first the factual issue, then the legal one, and finally the computational one.

II

FACTUAL ISSUE

As noted above, the initial factual issue to be resolved is whether, based upon the evidentiary record before me, it is "more probable than not"[(3)] that Patrick's earning capacity as an adult will be significantly impaired as a result of his presumably vaccine-caused encephalopathy. In other words, is it likely that he will be able to earn significantly less money than he *would* have been able to earn, absent that

encephalopathy? While this question certainly is not free from doubt, I conclude that it is "more probable than not" that his earning capacity will be significantly impaired. I will explain this conclusion below.

There is much evidence in the record, that, as I will discuss, is *generally* relevant to this issue, such as the evidence regarding the testing of Patrick's intelligence, the evidence concerning his parents' educational and intellectual levels, etc. But, quite obviously, it is not a simple matter for a lay person to evaluate such evidence and to determine therefrom whether Patrick likely will have impaired earning capacity as an adult. Rather, a determination of that type will often turn upon the opinion of an *expert*. Therefore, I conclude that the most crucial piece of evidence on this issue is the opinion of the *only* highly qualified expert to provide a direct opinion on this specific point, Dr. Barbara Moyer.

A. The crucial opinion

Dr. Moyer is a Ph.D neuropsychologist who extensively tested and evaluated Patrick in both 1996 and 1998, and then testified on behalf of the petitioners in the evidentiary hearing held on May 15, 1998.(4) Dr. Moyer explained her view that as a result of his encephalopathy, Patrick suffers from slightly diminished gross motor abilities, greatly impaired fine motor skills, and significant impairments in several *specific* areas of cognitive ability, including auditory learning capacity, certain types of memory function, and speech. She also believes that Patrick's *general* cognitive function is significantly diminished, perhaps by as much as 20 points on a standard "intelligence quotient" ("I.Q.") scale, from what it would have been absent the encephalopathy. (See, *e.g.*, Pet. Ex. S(5), pp. 6-7; Tr. 89-91.) Based upon these impressions, Dr. Moyer then rendered the specific opinion most crucial here, *i.e.*, that because of the impairments noted in the previous two sentences, when he is an adult Patrick's level of employment--and, therefore, his earning capacity--will likely "be below the level of what he may have been able to do had he not sustained" the encephalopathy. (Tr. 86.)

As noted above, that opinion of Dr. Moyer is the *only* expert opinion *directly addressing* the question of Patrick's *future earning capacity* in the record before me. To be sure, respondent also offered the testimony of a Ph.D neuropsychologist, Dr. Paul Lees-Haley. And Dr. Lees-Haley did note a number of ways in which his views concerning Patrick differ from those of Dr. Moyer. For example, Dr. Lees-Haley believes that Dr. Moyer may be exaggerating the extent of some of Patrick's particular impairments, and overestimating what Patrick's general cognitive level might have been absent his encephalopathy. However, Dr. Lees-Haley did *not* directly address the question of whether Patrick's earning capacity as an adult will likely be significantly impaired by his encephalopathy. He did testify that Patrick likely will be employable in some capacity as an adult. (Tr. 142-144.) His response to another question might also be interpreted as indicating the opinion that Patrick will likely be able to earn as much as either the average farm worker or the average non-farm worker.(6) But he *never* directly addressed the issue of whether Patrick's earning capacity, as an adult, will be *less than what it would have been* absent his encephalopathy.(7)

In my view, this state of the record--*i.e.*, the fact that the *only* opinion of a qualified expert directly relevant to this issue supports petitioner's case--would justify a ruling in petitioner's favor on this point, without further discussion. But it also seems appropriate to note that the record contains evidence that provides support to Dr. Moyer's opinion.

B. The supporting evidence

First, as noted both above and in my Ruling on other issues in this case filed on August 18, 1998, the record contains incontrovertible evidence that Patrick at this time has some significant impairments, which likely have resulted from his encephalopathy. That is, the testing performed by Dr. Moyer, along

with other evidence, demonstrates that Patrick has deficits in both physical skills and in certain *specific* cognitive areas. Physically, his *gross motor* skills seem to have been somewhat affected, so that in areas such as running, ability to catch a ball, and general athletic skills, he is well behind the general skill levels of children his own age. He runs with an unusual gait, and appears to be a relatively clumsy child, with a tendency to fall down frequently. Patrick has even greater deficits in the *fine motor* areas. For example, he suffers from tremors of his left hand at times, and he has considerable trouble manipulating a pencil and with similar activities involving complex finger movements. In the cognitive area, he appears to have particular difficulty with *auditory* learning, as opposed to visual learning. He has special weaknesses in certain types of memory function. He also has significant speech difficulties.

This combination of clear current deficits in both physical and specific cognitive capacities certainly offers support for Dr. Moyer's conclusion that Patrick's adult earning capacity has been significantly impaired. That is, it certainly seems reasonable to predict that a person with poor fine motor skills, difficulties in absorbing information by ear (as opposed to visually), and certain memory weaknesses, is likely to earn less than a person without such problems. (For example, even Dr. Lees-Haley acknowledged that a lower level of fine motor skills would eliminate some employment opportunities for Patrick. See Tr. 127-28.)

Secondly, while the evidence is less clear-cut, there is also evidence supporting the view that Patrick's *general* cognitive capacity is less than it might have been. Dr. Moyer believes that Patrick's *general* cognitive function is significantly diminished, perhaps by as much as 20 points on a standard "intelligence quotient" ("I.Q.") scale, from what it would have been absent the encephalopathy. (See, *e.g.*, Pet. Ex. S, pp. 6-7; Tr. 89-91.) In this regard, Dr. Moyer is supported by the fact that one important measure of Patrick's I.Q., the "Wechsler Pre-School and Primary Scale of Intelligence--Revised" ("WPPSI-R"), indicates that he has a full-scale I.Q. of about 95. (Pet. Ex. W, pp. 1-2.) While this figure is within the "average" range, which runs from 90 to 110, Dr. Moyer finds this figure to be substantially lower than what she would have expected for Patrick, given the fact that his parents appear to have substantially greater I.Q.'s, perhaps in the 115 range.[(8)] (Pet. Ex. S, pp. 6-7; Tr. 89-91.)

To be sure, as to this matter of general cognitive ability, Dr. Lees-Haley has made important points. He notes that in general, genetic factors seem only to account for about *half* of cognitive capacity, and that due to the principle of "regression to the mean" one cannot predict that the children of persons with higher-than-average I.Q.'s will always match the I.Q.'s of their parents; rather, it is more likely that children of high-I.Q. parents will have I.Q.'s above the mean (100) but somewhat less than their parents. (Tr. 128-129.) Dr. Lees-Haley also pointed out that *other* cognitive measures beyond Patrick's overall 1998 "WPPSI-R" score may indicate somewhat stronger intellectual capacity than that 95 I.Q. figure would indicate. (*E.g.*, Tr. 122; Resp. Ex. G, pp. 3-4.)

However, while it may well be, as Dr. Lees-Haley argues, that Dr. Moyer is "over- interpreting the evidence" to some extent in opining that the encephalopathy has diminished Patrick's general cognitive capacity to the extent of a *full 20-point diminution of I.Q.*, nevertheless the record offers support for the view that Patrick's general cognitive capacity is *probably somewhat* diminished from what it would have been absent the encephalopathy. For example, under Dr. Lees-Haley's own above-discussed testimony about "regression to the mean," one would expect that a child of parents with I.Q.'s of 115 would most likely have an I.Q. between 100 and 115, rather than an I.Q. below 100. In addition, Dr. Lees-Haley does not dispute that the medical records in this case do indicate that Patrick likely did suffer brain damage from his encephalopathy. (Tr. 147.) Further, Dr. Lees-Haley indicated that while he found Dr. Moyer's position as to *the extent* of an encephalopathy-caused I.Q. drop to be extreme, as to an assertion that Patrick's I.Q. (absent the injury) would have been "somewhat higher" than it actually is, he stated that he "does not know" whether that is the case, but conceded that such a view would be "consistent with * * * the whole picture." (Tr. 156.)

In short, the record supports the view that Patrick may well have had somewhat greater *general cognitive* ability absent his encephalopathy. It also strongly indicates that he has certain physical and *specific cognitive* impairments as a result of that encephalopathy. Such deficits, obviously, could impair a person's earning capacity. Therefore, the record as a whole certainly offers support to Dr. Moyer's essentially uncontested opinion that Patrick's earning capacity has probably been substantially impaired by his encephalopathy.

Therefore, based upon Dr. Moyer's expert opinion, which is in turn supported by additional evidence of record, I find as fact that Patrick's earning capacity as an adult likely *has* been substantially impaired by his presumably vaccine-caused encephalopathy.(9)

III

STATUTORY INTERPRETATION ISSUE

The next question then, is the *legal* issue of whether, in light of the factual findings stated above, Patrick is entitled to any compensation for "lost earnings." This presents an issue of statutory interpretation. Below, in part A of this section of this Ruling, I will set forth the statutory language, state the issue, summarize the parties' positions, and examine the relevant legislative history and case law. Next, in part B, I will discuss certain principles of statutory construction that are potentially applicable here. Finally, in part C, I will apply the pertinent statutory construction principles to the statutory provision at issue here, and set forth my interpretation of that provision.

A. The statutory language and the parties' positions

As already set forth above (p. 2), the statutory provision at issue here states that Program compensation shall include the following:

(B) In the case of any person who has sustained a vaccine-related injury before attaining the age of 18 and whose earning capacity is or has been impaired by reason of such person's vaccine-related injury for which compensation is to be awarded and whose vaccine-related injury is of sufficient severity to permit reasonable anticipation that such person is likely to suffer impaired earning capacity at age 18 and beyond, compensation after attaining the age of 18 for loss of earnings determined on the basis of the average gross weekly earnings of workers in the private, non-farm sector, less appropriate taxes and the average cost of a health insurance policy, as determined by the Secretary.

§ 300aa-15(a)(3)(B). The issue here, then, is how that language applies to Patrick's case, in light of the factual findings made above. That is, in a situation where a vaccinee with a presumably vaccine-caused injury probably *will* suffer a significantly diminished earning capacity, but *still* will likely be able to earn as much as the "average * * * earnings of workers in the private, non-farm sector," is it appropriate to make any Program award for "lost earnings?"

The petitioners' basic position can be stated relatively simply. They argue that *whenever* a person with a presumably vaccine-caused injury is found to have a significantly diminished future earning capacity, such person is eligible for a Program lost earnings award, *regardless* of whether he or she still may be able to earn as much as the average non-farm wage. Respondent, on the other hand, urges that the statutory subsection should be interpreted as authorizing compensation only when the vaccine-injured person will *not be capable of earning the average non-farm wage*.

This presents an interesting question of statutory interpretation. The meaning of the statutory subsection seems clear, of course, as applied to the situation, relatively common in Program cases, in which an under-age-18 vaccinee is injured severely enough that he will have *no earning capacity at all*. In such situations, he receives the amount specified in the statutory formula, *i.e.*, an amount based upon the average non-farm wage. But as applied to the situation here, where the vaccinee will likely be *somewhat* impaired but still able to earn at least as much as the amount of the statutory formula, the correct application is not quite as clear, as evidenced by the contrasting interpretations of the two parties here.

I note that the *legislative history* is of no significant assistance concerning this question of statutory interpretation.[(10)] There does exist some brief legislative history describing the statutory subsection here in question, but it sheds no light on the question here at issue. See H.R. Rept. No. 99-908, p. 21 (1986 U.S.C.C.A.N. at 6362).[(11)]

Further, I note that there is very limited published case law on this topic. I have found only two published decisions, both of special masters of this Court, that are at all relevant to this issue. One seems to clearly adopt the view advanced by respondent in this case, that if the injured person likely will be able to earn at least the average non-farm wage, then no award for "lost earnings" is appropriate. *Brown v. Secretary of HHS*, No. 88-24V, 1989 WL 250117 at *7 (Cl. Ct. Spec. Mstr. Sept. 13, 1989).[(12)] In the other case, *Wasson v. Secretary of HHS*, No. 90-208V, 1991 WL 20077 (Cl. Ct. Spec. Mstr. Jan. 10, 1991), the special master found that the injured child would likely be employable as an adult, but was impaired enough by the vaccine-related injury that he would likely earn *less* than the average non-farm wage. The master, therefore, awarded for "lost earnings" only the *difference* between the amount that the person could likely earn and the average non-farm wage amount. 1991 WL 20077 at *7. This decision, thus, also seems consistent with respondent's interpretation of the statutory subsection advanced in this case, and apparently inconsistent with the petitioners' interpretation.

Before I discuss the statutory interpretation issue in depth, however, I note that respondent has pointed me to certain principles regarding *statutory construction* that respondent believes to be applicable here. I have also researched one other commonly-cited statutory construction principle, in order to determine whether that doctrine also might have any application here. Accordingly, I will discuss those statutory construction principles in the next section of this Ruling.

B. Statutory construction principles

Respondent has argued that in reaching an interpretation of the statutory provision at issue here, I am bound by the "sovereign immunity" principles of statutory construction, which would mean that I should "strictly" and "narrowly" construe the statute. On the other hand, there also exists a principle of statutory construction that states that a "remedial" statute is generally to be construed in a "liberal" fashion so as to give broad effect to the "remedial" purpose behind the statute. In the following subsections of this Ruling, I will examine each of these principles of statutory construction.

1. The doctrine of "sovereign immunity"

The starting point of the doctrine of "sovereign immunity," a judge-made doctrine which dates from the early days of our country, is that the federal government, as this nation's "sovereign," may not be sued without its consent. *See, e.g., United States v. Horn*, 29 F. 3d 754, 761 (1st Cir. 1994); *M.A. Markenson Co. v. United States*, 996 F. 2d 1177, 1180 (Fed. Cir. 1993). From that initial principle, the federal courts have derived certain principles of *statutory construction* that have been applied in interpreting legislation which is said to have *waived* that immunity with respect to a particular type of suit against the United States. One principle is that a statutory waiver of sovereign immunity must be "definitely and

unequivocally expressed." See, *e.g., United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992); *Horn, supra*, 29 F. 3d at 762. The second is that the statutory language setting forth such a waiver is to be "construed strictly" or "construed narrowly" in favor of the government. *Nordic Village, supra*, 503 U.S. at 34; *Ardestani v. I.N.S.*, 502 U.S. 135, 137 (1991); *Horn, supra*, 29 F. 3d at 762.

In this case, of course, as the respondent does not dispute, the overall statute establishing the Program, to which I will sometimes refer as the "Vaccine Act" (see 42 U.S.C. § 300aa-1 through 34), unquestionably *does* waive the government's immunity from suit, in order to permit monetary awards to persons, such as Patrick in this case, whose circumstances fall within that Act's requirements. The sovereign immunity principles of statutory construction set forth above, however, are still of great significance here, because in this case I am required to determine the meaning of *one particular provision* of the Vaccine Act. Respondent argues that because this particular provision is *part* of the Vaccine Act, which *as a whole* constitutes a waiver of sovereign immunity, in reaching an interpretation I must "narrowly and strictly construe" the statutory language. (Resp. Br. filed 8-28-98, p. 2.)

After reviewing a great number of the cases that have discussed these principles of statutory construction, to which I will sometimes refer collectively as the "sovereign immunity doctrine," I note that over the years the federal courts, including the Supreme Court, appear to have waxed and waned in their level of devotion to the doctrine. In fact, there have been opinions, especially in the middle of this century, in which the courts have indicated that the doctrine was falling into "disfavor." See, *e.g.*, Wright, Miller, and Cooper, *Federal Practice and Procedure*, Vol. 14 (West 1998), § 3654, pp. 317-18, and cases cited therein; *National City Bank of New York v. Republic of China*, 348 U.S. 356, 359-60 (1955); *Kiefer and Kiefer v. Reconstruction Finance Corp*, 306 U.S. 381, 390-91 (1939). Several Supreme Court opinions, indeed, suggested that waivers of sovereign immunity in some circumstances could be construed "liberally" rather than "strictly." See, *e.g., United States v. Shaw*, 309 U.S. 495, 501 (1940); *United States v. Yellow Cab Co.*, 340 U.S. 543, 555 (1951); *F.H.A. v. Burr*, 309 U.S. 242, 245 (1940). In other cases, that same Court stated that "[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 (1949); *Block v. Neal*, 460 U.S. 289, 298 (1983); *Yellow Cab, supra*, 340 U.S. at 554. That Court has also indicated that in construing a statute that waives sovereign immunity, a court must be careful not to "assume the authority to narrow the waiver that Congress intended." *United States v. Kubrick*, 444 U.S. 111, 118 (1979); *Bowen v. City of New York*, 476 U.S. 476, 479 (1986). It has added that, in such statutory construction situations, a federal court should not "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).[(13)]

More recently, however, the Supreme Court has vigorously *reaffirmed and reemphasized* the principles of requiring "unequivocal" expression of an immunity waiver and of "strictly and narrowly construing" such waivers. *See, e.g.*, Wright, Miller, and Cooper, *supra*, § 3654, pp. 18-19, 327, 333; Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 Wis. L. Rev. 771, 780. Specifically, the Supreme Court decisions of the 1990's have resoundingly endorsed these principles. *Nordic Village, supra*, 503 U.S. at 33; *Ardestani, supra*, 502 U.S. at 137; *United States v. Idaho*, 508 U.S. 1, 6-9 (1993); *Lane v. Pena*, 518 U.S. 187, 192 (1996); *U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 615, 619, 626 n.16, 627 (1992); *United States v. Williams*, 514 U.S. 527, 531 (1995). As to the statements regarding "liberal" construction and the like set forth in the cases cited in the previous paragraph, the recent Supreme Court opinions have cautioned that those statements were confined to two particular types of cases and should *not* be applied beyond those cases. That is, the Court explained that in the context of the "sweeping language" of the Federal Tort Claims Act allowing suits against the United States, as well as those statutes which allow certain federally-created agencies to "sue or be sued" as if they were non-governmental entities, the Court had elected to narrowly construe *exceptions* to those broad waivers of

sovereign immunity, and, thus, in effect, to broadly construe the waivers themselves. *Nordic Village, supra*, 503 U.S. at 34. But the Court emphasized that these specific exceptions do *not* mean that waivers of sovereign immunity in *other* types of statutes are to be "liberally construed;" instead, the "traditional principle" that statutes "must be construed strictly in favor of the sovereign" remains the general rule. *Id.*

Moreover, the 1990's Supreme Court decisions cited above have done more than to merely reaffirm the sovereign immunity doctrine in the face of prior indications that the doctrine might have been falling into "disfavor;" those decisions seem clearly to have actually *strengthened and reinforced* the doctrine, making it more rigorous than ever before. As one commentator has put it, those recent decisions have given the sovereign immunity doctrine "some extra teeth." Nagle, *supra*, 1995 Wis. L. Rev. at 796. For example, those decisions have specified that the fact and extent of the waiver must be unequivocally indicated in the language of the *statutory text itself. Nordic Village*, 503 U.S. at 37; *United States v. Idaho*, 508 U.S. at 6; *Lane v. Pena*, 518 U.S. at 192. In other words, if the waiver is not apparent in the statutory text itself, the Court will *not utilize the legislative history* to interpret the text. *Nordic Village*, 503 U.S. at 37; *Lane v. Pena*, 518 U.S. at 192. Further, in one case where the text itself did not contain an unequivocal waiver, the Court declined to find a waiver even though such an interpretation admittedly would have fostered the general purpose behind the statute. *Ardestani*, 502 U.S. at 138. The commentators, as well as at least one Supreme Court justice, have referred to these pronouncements as creating a "clear statement rule" with regard to sovereign immunity waivers. *United States v. Williams*, 514 U.S. 527, 541 (1995) (J. Scalia, concurring); Wright, Miller, and Cooper, *supra*, § 3654, p. 333; Nagle, *supra*, 1995 Wis. L. Rev. at 774. Some commentators have even dubbed it a "super strong clear statement rule." See W. Eskridge and P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992). At the least, these recent decisions firmly entrench the rule that statutory waivers of sovereign immunity must be unequivocally expressed, and that the statutory language of such waivers must be strictly and narrowly construed in favor of the government.

2. The "sovereign immunity" statutory construction principles apply

to the interpretation of the statutory section at issue here.

In light of the above discussion, the question then becomes whether the sovereign immunity statutory construction principles, set forth above, apply to the interpretation of the *particular* statutory subsection at issue here. I conclude that they do.

First of all, because the Vaccine Act authorizes suits and monetary awards against an agency of the United States, it is obvious that the sovereign immunity doctrine must be generally applicable to that Act. Moreover, the United States Court of Appeals for the Federal Circuit, whose legal holdings are binding upon this court, has in fact on two occasions cited the sovereign immunity doctrine as applicable to its interpretation of Vaccine Act provisions. See *Martin v. Secretary of HHS*, 62 Fed. 3d 1403, 1405 (Fed. Cir. 1995); *Schumacher v. Secretary of HHS*, 2 Fed. 3d 1128, 1135 fn.12 (Fed. Cir. 1993). In addition, both the judges and the special masters of the Court of Federal Claims have also applied the sovereign immunity doctrine to Vaccine Act cases on numerous occasions, as illustrated in the decisions to be cited at pp. 13-14, *infra*.

Nevertheless, an argument still can be made that the sovereign immunity doctrine should not be applied to the *particular interpretation question* at issue here. The argument is that the doctrine should only be applied to statutory provisions which impact upon the *initial question of whether there is any waiver* of immunity in the particular case, *i.e.*, whether the petitioner is entitled to a Program award. Under this argument, once it is determined that an award is appropriate, there is no need to apply the doctrine to questions of statutory interpretation that concern merely the *amount* of the award.

This argument has some superficial appeal, but in the final analysis I must reject it. A close reading of the case law, particularly the recent Supreme Court cases that provide the most current definition of the sovereign immunity doctrine, illustrate clearly that these principles of statutory construction apply not only to the determination of *whether a statute waives sovereign immunity at all*, but also to determinations of the *scope of the waiver--i.e.*, whether the waiver is broad enough to encompass the particular relief being sought by the party suing the United States in the suit in question.

Certain *general* statements by the courts illustrate this point. For example, in *Lane v. Pena*, the Court stated that "a waiver of the government's sovereign immunity will be strictly construed, *in terms of its scope*, in favor of the sovereign." 518 U.S. at 192 (emphasis added). In *United States v. Williams*, it was asserted that "the rule requiring clear statement of waivers of sovereign immunity * * * *applies even to determination of the scope of explicit waivers*." 514 U.S. at 541 (J. Scalia, concurring) (emphasis added). Similarly, it has been observed that a statute waiving sovereign immunity "does so *only to the extent* explicitly and unequivocally provided." *Fidelity Constr. Co. v. United States*, 700 F. 2d 1379, 1386 (Fed. Cir. 1993), *cert. denied*, 464 U.S. 826 (1983) (emphasis added).

Further, a look at the *specifics* of the sovereign immunity decisions illuminates the issue even more clearly. That is, many of the decisions have involved statutes which indisputably did waive sovereign immunity to at least some extent, and the questions of statutory interpretation in such cases involved the *extent* or *scope* of the waiver. In such cases, the sovereign immunity statutory construction principles, particularly the maxim that the statutory language must be construed "narrowly" and "strictly" in favor of the sovereign, were in fact applied to the statutory interpretation questions at issue.

Many of the cases, for example, involved situations where the statute in question clearly authorized *some* type of relief against the United States, but it was unclear whether the statute also authorized an award of *monetary relief* against the government. Those cases have uniformly ruled that the statutes had to be interpreted as *not* authorizing monetary awards. For example, in *Nordic Village*, it was unquestioned that Section 106(c) of the Bankruptcy Code waived the government's immunity against suits for *declaratory and injunctive relief*, but it was ambiguous whether that section also waived the immunity against suits for *monetary relief*; the Court held that it did *not* do the latter. 503 U.S. at 35. In *United States v. Idaho*, it was clear that the statutory provision in question allowed the United States to be joined as a defendant in certain types of adjudications with regard to water rights, but the Supreme Court held that such provision did *not* also subject the U.S. to liability for certain *fees* involved in such cases. 508 U.S. at 5-9. Similarly, in *Lane v. Pena*, it was clear that the statute in question allowed the court to order the government to admit the plaintiff to a federally-operated military school, but the court held that the statute did *not* also authorize an award of *monetary damages* for the *delay* in the plaintiff's admission. 518 U.S. at 192. See also *Broughton Lumber Co. v. Yeutter*, 939 F. 2d 1547, 1550-55 (Fed. Cir. 1991), another case in which it was held that a statute authorized certain relief against the government, but did not extend to *monetary* relief.

Even more instructive are those cases in which the courts have acknowledged that a statute did unquestionably permit *monetary awards* against the United States (as does the Vaccine Act here at issue), but invoked the doctrine of sovereign immunity to interpret such statutes *narrowly* in determining the *extent* of the available awards. For example, in *Dept. of Energy v. Ohio*, the Supreme Court held that the statute in question did permit certain "coercive fines" against the government agency, in order to deter *future* pollution, but did not authorize "punitive fines" to punish the agency for *past* polluting activities. 503 U.S. at 616-627. Similarly, a number of other cases have interpreted statutes which clearly did authorize awards of *attorneys' fees* against the United States. Those cases all utilized the sovereign immunity doctrine to rule that, as to the *extent* of such awards, the statutes must be interpreted *narrowly* in the government's favor. *See Library of Congress v. Shaw*, 478 U.S., 310, 318-319 (1986); *Levernier*

Construction v. United States, 947 F. 2d 497, 502-503 (Fed. Cir. 1991); *In re North*, 11 F. 3d 1075, 1079 (D.C. Cir. 1993); *Masonry Masters, Inc. v. Nelson*, 105 F. 3d 708, 712-713 (D.C. Cir. 1997).

The doctrine of sovereign immunity has also been applied to other types of issues of statutory interpretation as to the *scope* of a waiver, in situations where there again was no doubt that *some* type of waiver did exist. For example, in *In re United States*, 877 F. 2d 1568 (Fed. Cir. 1989), in a suit by a contractor against the United States in which it was unquestioned that a waiver of sovereign immunity permitted the suit itself, the question was whether the United States Claims Court had authority to conduct a trial in a foreign country. In interpreting the statutory scheme, the court invoked the sovereign immunity doctrine in finding that the court had no such authority. *Id.* at 1573. Similarly, in *KLK v. United States Department of Interior*, 35 F. 3d 454 (9th Cir. 1994), there was no dispute that the statute in question involved a waiver of sovereign immunity permitting an award of monetary damages against the government. The question was whether the plaintiff was entitled to a *jury* trial in the suit, and the court invoked sovereign immunity principles in ruling that the statute did not so entitle the plaintiff. *Id.* at 456.

Finally, the published decisions of judges and special masters of this court with respect to the *Vaccine Act itself* add weight to the conclusion that the sovereign immunity statutory construction principles are applicable to the interpretation issue in this case. To be sure, most of the decisions in which the sovereign immunity doctrine has been invoked, in the course of an interpretation of a Vaccine Act provision, have related to those portions of the Act that determine whether a petitioner is *initially qualified* to seek an award--*i.e.*, the Vaccine Act's statute of limitations provisions[(14)] and its jurisdictional "gate-keeping" provisions contained at § 300aa-11(a).[(15)] But other decisions have applied the doctrine in interpreting a wide variety of *non-jurisdictional* statutory provisions.

For example, several decisions applied the doctrine in deciding the legal question of whether a petitioner who elected to reject the court's Vaccine Act judgment "on the merits" pursuant to § 300aa-21 could still obtain an award of attorneys' fees. See *Ashe-Cline v. Secretary*, 30 Fed. Cl. 40 (1993); *Munn v. Secretary of HHS*, 28 Fed. Cl. 490 (1993); *Mains v. Secretary of HHS*, No. 90-992V, 1993 WL 69724 (Fed. Cl. Spec. Mstr. Feb. 26, 1993); *Wodicker v. Secretary of HHS*, No. 92-64V, 1993 WL 64280 (Fed. Cl. Spec. Mstr. Feb. 23, 1993). Several decisions invoked the doctrine in interpreting the statutory requirement that the injured party have "received" a statutorily-prescribed vaccine. *Rooks v. Secretary of HHS*, 35 Fed. Cl. 1 (1996); *Rooks v. Secretary of HHS*, No. 93-689V, 1995 WL 522769 (Fed. Cl. Spec. Mstr. Aug. 22, 1995); *Van Houter v. Secretary of HHS*, No. 90-1444V, 1991 WL 239056 (Cl. Ct. Spec. Mstr. Oct. 30, 1991). One judge utilized the doctrine in determining that only a *judge* of the Court of Federal Claims, rather than a special master, has authority to entertain a motion for relief from a Vaccine Act judgment. *Patton v. Secretary of HHS*, 28 Fed. Cl. 532 (1993), *aff'd*, 25 F. 3d 1021 (Fed. Cir. 1993). Another judge invoked the doctrine in determining whether a petitioner was entitled to attorneys' fees after the petition was dismissed upon statute of limitations grounds. *Jessup v. Secretary of HHS*, 26 Cl. Ct. 350 (1992). In *Grice v. Secretary of HHS*, 36 Fed. Cl. 114, 120 (1996), the doctrine was deemed applicable to the legal question of whether a petitioner, having voluntarily withdrawn his petition at the expiration of the statutory time period for decision, was nevertheless entitled to attorneys' fees. And another judge invoked the doctrine in determining the proper application of the Vaccine Act's special provision for compensation of non-vaccinees who have acquired polio from polio vaccinees. *Staples v. Secretary of HHS*, 30 Fed. Cl. 348 (1994).

The above-cited cases, then, would seem to support the proposition that the sovereign immunity doctrine is applicable to *any* issue of statutory interpretation under the Vaccine Act. But in addition, there are six more published Vaccine Act decisions which are of even greater importance here, since they all involve situations, like the instant case, in which a petitioner did qualify for a Program award, but a statutory interpretation question arose in the course of determining *the proper amount* of the award. In all six decisions, the judge or special master cited the doctrine of sovereign immunity as applicable in making

the statutory interpretation. Specifically, *Mikulich v. Secretary of HHS*, 18 Cl. Ct. 253 (1989), and *Brown v. Secretary of HHS*, 18 Cl. Ct. 834 (1989), *rev'd*, 920 F. 2d 918 (Fed. Cir. 1990), both involved the proper interpretation of the special limitation on damages under § 300aa-15(b) with respect to vaccinees injured before the effective date of the Vaccine Act. *Edgar v. Secretary of HHS*, 29 Fed. Cl. 339 (1993), addressed the question of whether a petitioner was entitled to post-judgment interest in addition to other elements of the award. In *Hulsey v. Secretary of HHS*, 19 Cl. Ct. 331 (1990), the judge explored the meaning of one particular element of damages, *i.e.*, compensation for "case management services." And the other two decisions grappled with statutory interpretation questions concerning the interplay between the respective statutory compensation provisions related to "vaccine-related injuries" and "vaccine-related deaths." *Sheehan v. Secretary of HHS*, 19 Cl. Ct. 320 (1990); *Andrews v. Secretary of HHS*, No. 90-2126V, 1995 WL 262264 (Fed. Cl. Spec. Mstr. April 20, 1995). These decisions, then, directly support my conclusion here, *i.e.*, that even when it is undisputed that a petitioner is *entitled* to a Program award, the sovereign immunity principles of strict statutory construction still are properly applicable to any statutory interpretation questions concerning the *amount* of the award.

Finally, I note that I am well aware of the statement in the legislative history indicating that Vaccine Act awards are to be made with "generosity." H.R. Rept. No. 99-908, p. 3 (1986 U.S.C.C.A.N. at 6344). Moreover, it seems clear that the *general spirit* behind enactment of the Act was one of generosity to persons who have suffered very unfortunate injuries.[(16)] Therefore, I candidly acknowledge that my own initial intuitive inclination was to resist the idea that, in the case of a person who clearly *does* qualify for a Program award, the sovereign immunity doctrine nevertheless requires a narrow interpretation of any statutory provision relevant to the *amount* of such award. However, my study of the sovereign immunity decisions cited above has convinced me otherwise. First, as noted above, the Supreme Court has mandated that a court should *not* utilize legislative history in order to interpret the scope of a waiver of sovereign immunity when the scope is not clear from the statutory text itself. *Nordic Village*, 503 U.S. at 37; *Lane v. Pena*, 518 U.S. at 192. Further, in one case where the statutory text itself did not contain an unequivocal waiver, the Supreme Court declined to find a waiver even though such an interpretation admittedly would have fostered the general purpose behind the statute. *Ardestani*, 502 U.S. at 138. Finally, the cases cited above at pp. 12-14, especially the Supreme Court decisions in *Nordic Village, United States v. Idaho, Lane v. Pena, Dept. of Energy v. Ohio*, and *Library of Congress v. Shaw, supra*, simply make it quite apparent that the sovereign immunity doctrine *does* apply even to statutory interpretation questions that concern only the *amount* of an award against the government.

3. The principle of "liberal" construction of "remedial" legislation

Another principle of statutory construction, however, must also be considered. That is, a number of federal courts have stated that "remedial" or "welfare" legislation should be given a "broad construction" or a "liberal interpretation" in order to further the "remedial," "beneficient," or "humanitarian" purposes behind the statute. *See, e.g.*, *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 562 (1987); *Urie v. Thompson*, 337 U.S. 163, 180 (1949); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Cosmopolitan Shipping Co. v. McCallister*, 337 U.S. 783, 788 (1949); *United States v. Zacks*, 375 U.S. 59, 67 (1963); *Jefferson County Pharmaceutical Ass'n. v. Abbott Laboratories*, 460 U.S. 150, 159 (1983); *Connecticut Light & Power Co. v. Secretary of the U.S. Dept. of Labor*, 85 F.3d 89, 94 (2d Cir. 1996); *Bechtel Construction Co. v. Sec. of Labor*, 50 F. 3d 926, 932 (11th Cir. 1995); *Caro-Galvan v. Curtis Richardson*, 993 F.2d 1500, 1505 (11th Cir. 1993). Thus, the question arises whether the Vaccine Act should be viewed as legislation that is "remedial" in nature, and therefore should be "liberally" construed so as to give a wider application to the remedial purposes behind the statute.[(17)] The cases that I have identified mentioning this "remedial legislation" rule do not provide any precise definition of what legislation should be considered to be "remedial" in nature. However, the cases all seem to refer to statutes that are designed to benefit or protect classes of persons who have been harmed or disadvantaged in some fashion. In that light, it seems reasonable to

conclude that the Vaccine Act, which is designed to benefit persons injured by vaccinations, does constitute a "remedial" statute. *See, e.g., McGowan v. Secretary of HHS*, 31 Fed. Cl. 734, 740 (1994). Does it follow, therefore, that the provisions of that Act are to be "liberally" or "broadly" interpreted? I conclude that it does not. Rather, my analysis of the case law is that with respect to statutes which are *both* "remedial" in nature *and* also waive the federal government's immunity from suit, it is the sovereign immunity doctrine which "trumps" the competing principle of statutory construction, so that *strict and narrow construction* remains the controlling principle with respect to such statutes.

The most straightforward reason for this conclusion, with respect to the Vaccine Act, is simply that binding precedent mandates it. That is, as noted above, the Federal Circuit has clearly stated that the doctrine of sovereign immunity *does* apply in interpreting Vaccine Act provisions. *Martin v. Secretary of HHS, supra*, 62 Fed. 3d at 1405; *Schumacher v. Secretary of HHS, supra*, 2 Fed. 3d at 1135, fn. 12. That court, whose pronouncements concerning legal issues are binding upon this court, has *not* indicated that the operation of the sovereign immunity doctrine is negated or mitigated because the Vaccine Act is remedial in nature. Accordingly, the precedent of *Martin* and *Schumacher* would seem to leave me no choice but to apply the sovereign immunity principle of strict and narrow construction to the Vaccine Act provision here in question, without regard to the fact that the Act may be "remedial" in nature.

In addition, I note that the same result flows from an analysis of the non-Program case law, especially the recent Supreme Court precedent. First, I note that in all of the cases cited above at p. 15 concerning "remedial legislation," as in all of the Supreme Court opinions and nearly all of the other federal cases that I have found that also describe the same rule of "liberal construction," the statute that was being interpreted pertained to relief against *private entities*, rather than against the federal government.[(18)] So those cases provide no authority for the proposition that it is correct to use the "remedial legislation" principle to construe liberally a statute that authorizes relief against the *United States*. More importantly, the recent Supreme Court precedent seems to point strongly to the conclusion that the "remedial legislation" principle has *no* application to statutes affording relief against the *government*. For example, in *Lane v. Pena*, that court was interpreting the Rehabilitation Act of 1973, an act protecting the handicapped which certainly does seem to be an example of "remedial legislation." 518 U.S. at 188. Yet the Court applied the sovereign immunity "strict construction" rule, and mentioned nothing about the remedial nature of the statute being a reason to mitigate the application of that rule. *Id.* at 192. Another example is *Library of Congress v. Shaw*, *supra*, in which the Supreme Court was interpreting a provision of the Civil Rights Act of 1964, which allows victims of racial discrimination to obtain redress, and, thus, also seems to fit the description of "remedial legislation." 478 U.S. at 311. Again, the Court applied the "strict construction" principle as part of the sovereign immunity doctrine. *Id.* at 317.[(19)] Thus, the Supreme Court, at least in its recent decisions, seems clearly to have taken the view that when a statute waives the federal government's immunity from suit, such a statute, *even when "remedial" in nature*, must be strictly construed in the government's favor.

To be sure, I have identified two appellate court decisions in which it is asserted that a "remedial" statute affording relief against the United States should be interpreted "liberally." See *Thurston v. United States*, 179 F. 2d 514, 515 (9th Cir. 1950); *In re Town and Country Home Nursing Services, Inc.*, 963 F. 2d 1146, 1151 (9th Cir. 1991). In addition, the court in *McMahon v. United States*, 186 F. 2d 227, 229 (3rd Cir. 1950), *aff'd*, 342 U.S. 25, 26 (1951), suggested that in the case of a statute that is *both* "remedial" *and* consitutes a waiver of sovereign immunity, the two competing statutory construction principles would in effect cancel each other out, so that the court would construe the statutory language "without throwing any weights on either side of the scale." 186 F. 2d at 229.[(20)] I conclude, however, that these three appellate court decisions were simply overruled by the recent Supreme Court decisions in *Lane v. Pena* and *Library of Congress v. Shaw*, cited above, which establish a contrary rule.

In short, the recent Supreme Court precedent seems to indicate the same rule apparently imposed by the

Federal Circuit in the cases of *Martin* and *Schumacher, supra*. That is, even though the Vaccine Act may be remedial in nature, its provisions still must be "strictly construed" in keeping with the doctrine of sovereign immunity.(21)

4. Summary of statutory construction principles to be applied here

For the reasons set forth above, I have concluded that the sovereign immunity statutory construction principles *are* properly applicable to the statutory interpretation question at issue here. This means that I must "constru[e] ambiguities in favor of immunity." *Lane v. Pena*, 518 U.S. at 192; *United States v. Williams*, 514 U.S. at 531; see also *Robb v. United States*, 80 F. 3d 884, 887 (4th Cir. 1996) ("all ambiguities are resolved in the favor of the sovereign"); *Levernier Construction*, 947 F. 2d at 503 (the statutory provision is to be given the "most restrictive" interpretation). It means that if there exist more than one "plausible" reading of the statutory provision at issue (*Nordic Village*, 503 U.S. at 36-37), or two possible interpretations of "equal likelihood" (*Department of Energy v. Ohio*, 503 U.S. at 626 fn.16), then I must choose the interpretation that produces the more limited award.

C. Resolution of the interpretational issue here

After careful consideration, I conclude that even under the application of the sovereign immunity doctrine discussed above, the petitioners' interpretation is by far the more straightforward interpretation of the statutory subsection at issue here, and is therefore the interpretation that more likely represents the Congressional intent. I will explain the reasons for this conclusion below.

Under the interpretation that I find persuasive, to which I will refer as "petitioners' interpretation,"(22) § 300aa-15(a)(3)(B) is analyzed by dividing it into three parts, as illustrated below.

In the case of any person who has sustained a vaccine-related injury before attaining the age of 18 and whose earning capacity is or has been impaired by reason of such person's vaccine-related injury for which compensation is to be awarded and whose vaccine-related injury is of sufficient severity to permit reasonable anticipation that such person is likely to suffer impaired earning capacity at age 18 and beyond, compensation after attaining the age of 18 for loss of earnings *determined on the basis of the average gross weekly earnings of workers in the private, non-farm sector, less appropriate taxes and the average cost of a health insurance policy, as determined by the Secretary.*

The first part, in bold-face above, encompasses all of the subsection through the word "beyond;" the second part, shaded above, consists of the words "compensation after attaining the age of 18 for loss of earnings;" and the third part consists of the remainder of the subsection, italicized above. Under this interpretation, the first question is whether the vaccine-injured person fulfills the requirements of the *first* part of the subsection; if so, then such person qualifies for the *second* part--*i.e.*, "compensation after attaining the age of 18 for loss of earnings;" and then, the *amount* of that compensation would be determined by resort to the *third* part of the subsection. In other words, under this interpretation, the factfinder *first* determines whether the vaccinee, injured prior to age 18, has sustained impaired earning capacity, and whether that impairment is "of sufficient severity to permit reasonable anticipation that such person is likely to suffer impaired earning capacity at age 18 and beyond." If that determination is made in the vaccinee's favor, the vaccinee is entitled to "compensation for loss of earnings" after age 18. Then, the only question left would be the *amount* of compensation, which would be determined by reference to the third part of the subsection, *i.e.*, "on the basis of the average gross weekly earnings of workers in the private, non-farm sector * * *."

This "petitioners' interpretation" seems to me to be perfectly straightforward and logical. That is, it seems

quite logical to organize a statutory provision in such a three-part fashion, in which the first part sets forth *qualifying criteria*, the second part states that qualifying individuals are *entitled to compensation* upon reaching a certain age, and then the third part provides a *formula for calculating the amount* of compensation.

And, of course, under this interpretation, Patrick *would* qualify for a "lost earnings" award, since his case does fulfill all of the requirements of the first part of the statutory subsection. That is, under the facts as I have found them, Patrick *did* "sustain a vaccine-related injury before attaining the age of 18," *and* his "earning capacity is or has been impaired by reason of [his] vaccine-related injury," *and* his "vaccine-related injury is of sufficient severity to permit reasonable anticipation that [he] is likely to suffer impaired earning capacity at age 18 and beyond." Therefore, he qualifies for compensation after age 18 for lost earnings, to be determined on the basis of the statutory formula--*i.e.*, the average non-farm wage.

In opposition to the petitioners' interpretation, respondent suggests an alternative interpretation. As noted above, respondent urges that the subsection should be interpreted as authorizing compensation only when the vaccine-injured person will *not be capable of earning* the average non-farm wage. Unfortunately, however, respondent's brief on this issue (see "Response" filed on August 28, 1998), does not clearly set forth *exactly how* respondent derives her interpretation from the words of the statute. Respondent merely states her interpretation in a summary fashion, without making any attempt whatsoever to *explain* how that interpretation derives from the *actual words* of the subsection. Much of respondent's argument consists of either restatement of basic principles of statutory interpretation (*e.g.*, Response at pp. 2-4), or recitation of other points that are unarguable, but not helpful in resolving the issue to be decided here. Most of the remainder of respondent's argument consists of refutation of portions of petitioners' argument, and, again, many of respondent's isolated individual points seem correct. For example, petitioners were certainly incorrect in suggesting that I should interpret the statutory language "liberally" in their favor (see Response at p. 4), or in arguing that Congress could not have intended to treat 17-year-old vaccinees differently from 18-year-olds for "lost earnings" purposes (see Response at pp. 8-9).[(23)] However, I can find no portion of respondent's brief that even attempts to refute the *central thrust* of petitioner's argument, which is that the language of the statute, read literally, seems to afford "compensation after attaining the age of 18 for lost earnings" to *any vaccinee whose case fulfills the first part* of the statutory subsection, up to the word "beyond." Moreover, respondent also wholly fails to suggest how any of the *specific words* of the statute can be interpreted to deny an award to an individual whose earning capacity is significantly impaired to some degree, simply because that person is not likely *so severely* impaired that he cannot earn even the average non-farm wage.

Thus, respondent having failed to explain *exactly how* her interpretation might be derived from the statutory language, I am left to study the statutory language myself to determine whether there is any way that such language can reasonably be read to arrive at respondent's interpretation. After such study, my best guess is that respondent may be basing her interpretation *solely* upon the *third* portion of the subsection, the portion italicized at p. 18 above. That is, respondent may be suggesting that to award compensation "determined on the basis of the [average non-farm wage]" *implies* that "lost earnings" compensation should be awarded only to persons who likely will be *incapable of earning* the average non-farm wage. Under this interpretation, *any* person whose earning capacity was somewhat impaired would *nominally* be entitled to "compensation after attaining the age of 18 for loss of earnings," pursuant to the first two portions of the statutory subsection, but then the *amount* of compensation would vary; those who could likely earn nothing as adults would get compensation equal to the full amount of the average non-farm wage, but those who likely *could* earn the average non-farm wage would get "compensation" of *zero*.[(24)]

If this is respondent's interpretation, it seems to me to be an unlikely one. It seems unlikely that Congress would enact a statutory provision that would nominally, in its first two parts, afford compensation to a

certain class of persons, but then afford "zero compensation" to part of that class. This seems like an extremely *indirect* way for Congress to accomplish a supposedly-intended result, when a much more straightforward mechanism could have been used. That is, if that result was intended, Congress could have altered the portion that currently reads--

and whose vaccine-related injury is of sufficient severity to permit reasonable anticipation that such person *is likely to suffer impaired earning capacity* at age 18 and beyond

to instead read as follows:

and whose vaccine-related injury is of sufficiently severity to permit reasonable anticipation that such person *will be unable to earn as much as the average non-farm wage* at age 18 and beyond * * *.

Such a wording of the statute would have *directly* accomplished the result that, respondent seems to argue, Congress actually intended. But, of course, Congress did not word the statute in that way.

Another reason that petitioners' interpretation seems more likely than that of respondent is that it would result in a scheme that would be simpler to administer. Under respondent's interpretation, apparently, if a vaccinee could likely earn *something*, but *less* than the average non-farm wage, it would be necessary to estimate that person's likely earnings and then subtract such amount from the average non-farm wage. Under the interpretation that I adopt here, however, anyone who qualifies will automatically get the *full* amount of the average non-farm wage. This result seems more consistent with the intent behind the statute, which obviously was to *simplify* computation of "lost earnings" awards, and to eliminate the need to attempt the nearly impossible task of quantifying a child's future earnings.

Thus, my conclusion is that, as compared to respondent's interpretation, petitioners' interpretation flows much more straightforwardly from the statutory text. I find petitioners' interpretation to be clearly the more likely interpretation of the two. But that conclusion does *not* end my inquiry. Rather, under the sovereign immunity doctrine as set forth above, it does not seem to be enough to conclude simply that one interpretation seems *more likely* than the other. Instead, the case law indicates that in situations where the statute is "ambiguous" and is susceptible to more than one "plausible" interpretation, a court is not free to adopt the interpretation that it finds more likely, but is bound to adopt the interpretation more favorable to the government. The question in this case, then, becomes whether the statutory subsection is "ambiguous" and the respondent's interpretation thereof is a "plausible" one. While that question is perhaps a closer one, I conclude that the subsection cannot be considered an "ambiguous" one, and that the respondent's interpretation cannot be considered a "plausible" one.

The chief reason for this conclusion is that, as noted above, in my view the petitioners' interpretation flows so straightforwardly from the plain words of the statutory subsection. As I have stated, it seems quite logical to organize a statutory provision in a three-part fashion in which the first part sets forth *qualifying criteria*, the second part states that qualifying individuals are *entitled to compensation* upon reaching a certain age, and then the third part provides a formula for calculating the *amount* of compensation. Moreover, there is no particular word or phrase in the statutory subsection that seems "ambiguous" in itself, *i.e.*, that could be interpreted in two different ways to produce two different meanings for the statutory provision as a whole. Respondent has not pointed to any particular word or phrase as "ambiguous," and I find none.

Moreover, respondent has simply been unable, as I have noted, to articulate how her proffered interpretation can be derived from the actual words of the statute. And, as also detailed above, the only possible reading of the statute that I can imagine in respondent's favor depends on assuming a very contorted statutory construct in which Congress nominally awarded "compensation" to an entire class of

persons, only to then *define* "compensation" in such a way as to afford "zero compensation" to part of that class. While I do not doubt that respondent is acting in good faith in advancing this interpretation, I simply cannot find that the suggested interpretation amounts to a "plausible" one.

To be sure, I acknowledge that the *compensation scheme* that respondent urges is certainly a rational scheme that Congress *might* have chosen. Respondent seems to make a "policy argument," for example, based upon the fact that, under the plain meaning of § 300aa-15(a)(3)(B), when a vaccine-injured person under age 18 is so severely injured that he will be *completely unable to work* as an adult, under the statutory formula he will clearly be limited to a "lost earnings" award in the amount of the average non-farm wage. Respondent suggests that, given that result, it would be inconsistent or unfair to permit *another* under-age-18 vaccinee, who *will* likely be able to earn the average non-farm wage, to receive a Program "lost earnings" award *in addition* to the amounts that he will in fact be able to earn. This argument perhaps has some facial appeal. But, on the other hand, strong policy arguments can also be made in favor of petitioners' interpretation as well. In this regard, Congress must have understood that there would be many different degrees of injury, and that, in the case of persons injured as children, any efforts to predict the exact extent of future earning capacity would be speculative at best. So, Congress, quite logically, could have designed a compensation scheme that gave *every* vaccine-injured person with probable future impaired earning capacity, whether that impairment be total or partial, the *same* basic level of compensation. Congress certainly could have understood that under such a scheme some injured persons would be able to earn additional amounts on their own, while others would not be capable of working at all, but nevertheless could have chosen to provide the same compensation to each injured person, merely for the sake of simplicity. Indeed, such reasoning on Congress' part would seem to be consistent with the *basic approach* of part (B) of § 300aa-15(a)(3), which is to generally treat *all* vaccine-injured persons of less than 18 years of age *similarly*, avoiding any attempts to try to predict what each such individual *might* have earned had he or she not been injured.

Moreover, the fact that the *compensation scheme* suggested by respondent is a rational one, which Congress *might* have chosen to enact, certainly does not mean that respondent's interpretation urged in this case is a "plausible" *interpretation* of the *language that Congress actually did enact*. As explained above, Congress certainly could rationally have enacted the *scheme* that respondent suggests, but likely would have utilized much more direct language if it had in fact intended to enact such a scheme; respondent has failed, on the other hand, to show how her interpretation flows from the *actual statutory language*.

In the final analysis, I suppose that the relevant legal question boils down to where a court must draw the line between proposed statutory interpretations that are "plausible" and those that are "less than plausible." I do *not* conclude that a statute is "ambiguous" only where two or more interpretations are *exactly equal* in merit. It seems to me that two different interpretations can both be "plausible," and the statute can therefore be "ambiguous," even when one interpretation does seem to be of somewhat more merit than the other. In such circumstances, a court would be obliged by the sovereign immunity doctrine to choose the interpretation more favorable to the government, even if that interpretation seemed somewhat less likely.

But, by the same token, it would also seem wrong to conclude that *any* statutory interpretation proposed by the government, even one of the most dubious merit, must be considered "plausible" and therefore adopted. It seems to me that there must be at least *some reasonable level* of merit to an argument, based upon the *actual statutory language*, before it can be considered a "plausible" one.[(25)] Note that even the 1990's Supreme Court opinions cited above, which have so strongly enforced the sovereign immunity doctrine, have repeated the *caveat* that "just as we should not take it upon ourselves to extend the waiver beyond that which Congress intended * * * [n]either, however, should we assume the authority to narrow the waiver that Congress intended." *United States v. Idaho, supra*, 508 U.S. at 7, quoting *Smith v. United*

States, 507 U.S. 197, 206 (1993).

In this case, I simply have concluded that the statutory subsection is not "ambiguous," and that the respondent's proposed interpretation is not of sufficient merit to be considered a "plausible" one.

As a final note, I acknowledge that at first glance it may seem somewhat surprising that I reject, as "implausible," a statutory interpretation that apparently was found *meritorious* by two of my colleague special masters. See *Brown v. Secretary of HHS* and *Wasson v. Secretary of HHS*, discussed at p. 8 above. I note, however, that in neither *Brown* nor *Wasson* did either special master explain the *reasoning* behind the statutory interpretation adopted, so that there is no way to determine *why* those masters may have read the statute differently than I do, or, indeed, whether the petitioners in those cases even contested the statutory interpretation advanced by the respondent. Moreover, the recent case of *United States v. Williams*, *supra*, illustrates the fact that reasonable minds can differ even as to whether an argument is "plausible" or not. In that case, the Supreme Court resolved a statutory interpretation question against the government. 514 U.S. at 527. Three dissenting justices complained that the government's statutory interpretation was a reasonable one, and should have been adopted, under the sovereign immunity doctrine. *Id*. at 544. A concurring opinion of Justice Scalia, however, answered that, in the view of the majority justices, the interpretation advanced by the government was simply an "implausible" one. *Id*. at 541. Thus, we see in *Williams* that even in a situation where *three Supreme Court justices* found a particular statutory interpretation advanced by the government to be not only "plausible" but to be the *more likely* interpretation, nevertheless six other justices of that Court found that same proposed interpretation *not* to rise to the level of being "plausible." Thus, perhaps, it is not too surprising that special masters of this court might differ as to whether the respondent's interpretation proposed in this case is a "plausible" one.

In short, for all the reasons stated above, I conclude that § 300aa-15(a)(3)(B) must be interpreted as authorizing a Program award for "lost earnings" *whenever* a vaccine-injured person will likely have substantially impaired earning capacity as an adult, regardless of whether that person still will be able to earn as much as the average non-farm wage. Therefore, Patrick qualifies for such an award in this case.

IV

ISSUE OF THE PROPER AMOUNT

OF THE "LOST EARNINGS" AWARD

My interpretation of the statute is that *whenever* an under-age-18 vaccine recipient qualifies for a "lost earnings" award pursuant to § 300aa-15(a)(3)(B), he or she simply receives the amount derived from the formula provided in the final part of that subsection. There is no need for attempting to predict the exact amount of the impairment, or what the individual will likely be able to earn. The only variables are the date upon which the injured individual will reach 18; the latest available figure for the average weekly non-farm wage; the figures for the appropriate subtractions for taxes and health insurance, as provided in the statutory formula; and the calculations necessary to produce the "net present value" of the award. In this case, the petitioners have submitted proposed figures for "lost earnings" awards on several occasions. But the respondent then submitted a calculation on September 30, 1998, that offered figures for all the appropriate variables noted above, and calculated a "bottom-line" net present value figure of $331,859.03. Petitioners have not responded to that filing of respondent.

After evaluating respondent's filing, I find that the figures supplied there seem reasonable and appropriate under the statutory formula. Accordingly, I conclude that the "net present value" of Patrick's future loss of earnings is $331,859.03.

V

CONCLUSION

A final Decision in this case, formally awarding the amount calculated here for "lost earnings" plus the other "damages" elements detailed in my prior rulings in this case, will follow very shortly.

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George L. Hastings, Jr.

Special Master

1. The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (1994 ed.). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (1994 ed.).

2. See also fn. 2 of my Ruling dated August 18, 1998, in this case.

3. Petitioners have the burden of demonstrating the facts necessary for proving the amount of the award by a "preponderance of the evidence." § 300aa-13(a)(1)(A). Under that standard, the existence of a fact must be shown to be "more probable than not." *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring).

4. "Tr." references in this opinion will be to the transcript of that hearing.

5. I note that petitioners have filed a number of documentary exhibits at various times throughout the proceedings; some of those were designated as exhibits A through EE, while others were not originally given letter designations. The exhibits to which I will refer in this Ruling include "Ex. S," which is a report of Dr. Moyer not originally given an exhibit letter, but attached to petitioners' "life care plan" filed on November 25, 1996; Ex. W, filed on May 11, 1998; and Ex. Y, filed on June 1, 1998.

6. I refer to the exchange at Tr. 144, lines 11 through 23. Obviously, the reporter made at least one clerical error in this transcription, since I believe that Dr. Lees-Haley began his answer with the words "I certainly would." In addition, it appears to me that while respondent's counsel asked whether Patrick would likely earn the average "non-farm" wage, Dr. Lees-Haley missed the syllable "non," and replied that Patrick could earn the average "farm" wage.

7. In addition to his oral testimony at the evidentiary hearing, Dr. Lees-Haley also provided a written report, respondent's Ex. G filed on August 28, 1998. This report was filed by respondent, ostensibly specifically with respect to the "lost earnings" issue. Curiously, however, it did not specifically address that issue.

8. The record indicates that both of Patrick's parents are college graduates; that his father, a C.P.A., earns approximately $110,000 annually; and that his mother graduated from college with a high class rank and has been measured to have an (unspecified) high I.Q. (Pet. Ex. Y, pp. 1, 23.) Dr. Moyer has indicated that based upon these factors Patrick's parents probably have I.Q.'s of at least 115, since that is the average figure for college graduates. (Pet. Ex. S, pp. 6-7.)

9. As will be explained in part III of this Ruling, the respondent has argued that petitioners must demonstrate not only that Patrick's future earnings will be significantly impaired by his encephalopathy, but also that his earning capacity is *so impaired* that he will not be able to earn as much as the "average * * * earnings of workers in the private, non-farm sector." Because I have rejected that legal argument, it is a moot point whether the record would support a factual conclusion that Patrick's impairment is in fact so severe that he will not be able to earn the average non-farm wage. For the record, however, I will note that I would find as fact that Patrick's impairment, while significant, is *not* of that severity.

To begin with, petitioners have *not* argued that Patrick will have no earning capacity whatsoever as an adult. They acknowledge that despite his physical deficits and specific cognitive deficits, the fact that his general cognitive abilities are within the average range means that he will likely be gainfully employed in some capacity. They acknowledge that Patrick will most likely earn a high school diploma, and possibly will be able to also complete a two-year college program, although they doubt that he will be able to obtain a bachelor's degree from a four-year college program. (See, *e.g.*, "Petitioners' Evidence" filed on July 10, 1998, p. 3.) In addition, petitioners have even stated, quite candidly, that Patrick "may be able to make the average private non-farm weekly rate." (*Id.* at 6.) Finally, my search of the record indicates that *no* witness, including Dr. Moyer, has ever opined that Patrick will not be able to earn as much as the average earnings of workers in the private, non-farm sector. Therefore, petitioners clearly have not demonstrated that Patrick's earning capacity is impaired enough so that he will not be able to earn that amount.

10. It will be noted that, as will be discussed, the Supreme Court has cautioned that in interpreting a statute that, like the one in question, waives the "sovereign immunity" of the United States, a court should *not* utilize legislative history to interpret statutory language that is ambiguous on its face. See p. 11, *infra*. I include this discussion of the legislative history, rather, to point out that *even if* a resort to the legislative history were appropriate, the brief legislative history relevant to the specific statutory subsection at issue here would be of no help.

11. The cited legislative history pertinent to this particular statutory subsection mentions "adjustment" of the Program award at the age of 18, and also mentions the possibility of changing the award if the vaccine recipient's condition "improves." H.R. Rept. No. 99-908, p. 21 (1986 U.S.C.C.A.N. at 6362). I note that those notations are irrelevant to the Program statutory language that is applicable here. Those notations refer to an *earlier* version of the statute in which Program awards were to consist of *annual renewable* grants that could be adjusted each year. Ultimately, under statutory language enacted in 1987, the compensation provision was modified so that a *single* award is made to cover the rest of the vaccinee's life. See H.R. Rept. No. 100-391, p. 691 (1987 U.S.C.C.A.N. at p. 2313-365).

12. The special master's decision in *Brown* was affirmed on most points by a judge of this Court. *Brown v. Secretary of HHS*, 18 Cl. Ct. 834 (1989). As to the "lost earnings" issue, however, while the judge agreed that no award was appropriate, the judge apparently did *not* reach the legal question at issue here, since he seems to have concluded that the petitioner failed as a *factual matter* to demonstrate impairment. *Id*. at 843 fn.12. The case then was appealed to the U.S. Court of Appeals for the Federal Circuit. That court's ruling on a separate legal point made the entire issue of "lost earnings" a moot point, so that court also did not reach the legal issue relevant here. *Brown v. Secretary of HHS*, 920 F. 2d 918, 920-21 (Fed. Cir. 1990).

13. The lower courts have also at times suggested something other than "strict construction" of statutes waiving sovereign immunity. *See, e.g., May Dept. Stores Co. v. Smith*, 572 F. 2d 1275, 1276-77 (8th Cir. 1978) ("courts have been liberal in finding that [sovereign] immunity has been waived"); *Bank of Hemet v. United States*, 643 F. 2d 661, 665 (9th Cir. 1981) ("[t]he time is long past when the bar of sovereign immunity should be preserved through strained and hypertechnical interpretations of relevant acts of

Congress"); *In re Town & Country Home Nursing Services, Inc.*, 963 F. 2d 1146, 1151 (9th Cir. 1991) ("[i]t is well established that when the federal government waives its immunity, the scope of the waiver is construed to achieve its remedial purpose").

14. Cases invoking the sovereign immunity doctrine in interpreting statute of limitations provisions include *Stevens v. Secretary of HHS*, 31 Fed. Cl. 12 (1994); *Massard v. Secretary of HHS*, 25 Cl. Ct. 421 (1992); *Lombardo v. Secretary of HHS*, 34 Fed. Cl. 21 (1995); *Brice v. Secretary of HHS*, No. 95-835V, 1996 WL 718287 (Fed. Cl. Spec. Mstr., Nov. 26, 1996); *Spohn v. Secretary of HHS*, No. 95-460V, 1996 WL 532610 (Fed. Cl. Spec. Mstr. Sept. 5, 1996); *Pertnoy v. Secretary of HHS*, No. 95-218V, 1995 WL 579827 (Fed. Cl. Spec. Mstr. Sept. 8, 1995); *Weddel v. Secretary of HHS*, No. 94-524V, 1995 WL 413925 (Fed. Cl. Spec. Mstr. June 29, 1995); *Scott v. Secretary of HHS*, No. 95-129V, 1995 WL 413930 (Fed. Cl. Spec. Mstr. June 29, 1995); *Gribble v. Secretary of HHS*, No. 91-460V, 1991 WL 211919 (Cl. Ct. Spec. Mstr. Sept. 26, 1991).

15. Cases invoking the sovereign immunity doctrine in interpreting the "gatekeeping" provisions of § 300aa-11(a) include *Brown v. Secretary of HHS*, 34 Fed. Cl. 663 (1995); *Mass on Behalf of Mass v. Secretary of HHS*, 31 Fed. Cl. 523 (Fed. Cl. 1994);*Carlson v. Secretary of HHS*, 23 Cl. Ct. 788 (1991); *Polanco v. Secretary of HHS*, No. 91-195V, 1997 WL 618256 (Fed. Cl. Spec. Mstr. Sept. 11, 1997); *Edinburg v. Secretary of HHS*, No. 90-1572V, 1997 WL 74703 (Fed. Cl. Spec. Mstr. Jan. 31, 1997); *Dominick v. Secretary of HHS*, No. 90-2665V (Fed. Cl. Spec. Mstr. Nov. 14, 1995); *Karras v. Secretary of HHS*, No. 90-1701V, 1995 WL 650681 (Fed. Cl. Spec. Mstr. October 24, 1995); *Taylor v. Secretary of HHS*, No. 90-1036, 1995 WL 729519 (Fed. Cl. Spec. Mstr. March 27, 1995); *Hoffman v. Secretary of HHS*, No. 90-3451V, 1995 WL 103334 (Fed. Cl. Spec. Mstr. Feb. 21, 1995); *Salceda v. Secretary of HHS*, No. 90-1304V, 1994 WL 139375 (Fed. Cl. Spec. Mstr. Apr. 6, 1994); *Goodwin v. Secretary of HHS*, No. 90-3696V, 1992 WL 170690 (Cl. Ct. Spec. Mstr. July 2, 1992).

16. See, *e.g., Rooks v. Secretary of HHS*, 35 Fed. Cl. 1, 7 (1996).

17. The petitioners in this case have not cited these cases, nor have they cited this principle of liberal construction of remedial statutes. Nevertheless, I have found it appropriate to consider on my own this potentially-applicable theory of statutory construction.

18. It may be noted that in some of "remedial legislation" cases cited above, the United States or an agency thereof is listed as a party. However, in none of those cases was the "remedial legislation" doctrine utilized in interpreting a statute that afforded relief *against the government*. For example, in *United States v. Zacks*, it was found that the statute in question was *not* "remedial" in nature. 375 U.S. at 68. And in the cases in which the Secretary of Labor was a party to the litigation, that Secretary participated only in the posture of assisting a worker in obtaining relief *against a private employer*.

19. See also *United States v. Horn*, *supra*, in which the court explained that where the sovereign immunity doctrine conflicted with the doctrine of the "supervisory powers" of federal courts, the sovereign immunity doctrine, being a "mandatory and absolute" doctrine, would take precedence. 29 Fed. 3d at 764-767.

20. Note that the Supreme Court in *McMahon*, while affirming the appellate court's *result*, merely interpreted the statutory language in the government's favor, without explaining whether it approved of the court of appeals' comment as to the *statutory construction rules*. 342 U.S. at 26.

21. Finally, I note that I have considered one Vaccine Act opinion that could be considered as inconsistent with my conclusion here. That is, in *McGowan v. Secretary of HHS*, *supra*, the court applied the doctrine of sovereign immunity in interpreting one of those portions of the Vaccine Act that

determine whether a petitioner is *initially qualified* to seek an award, suggesting that the provision in question constituted a "jurisdictional requirement." 31 Fed. Cl. at 740. But, noting that the Vaccine Act is "remedial" in nature, the court added language that might conceivably be interpreted as implying that once it is determined that a claimant meets the statute's "jurisdictional requirements," there is no need for strict construction of those *additional* statutory provisions that are *non-jurisdictional*. *Id.* In my view, that would be a misinterpretation of *McGowan*. The important teaching of *McGowan* is that the court *did* apply rule of strict construction to the Vaccine Act provision there at issue; if there is any suggestion in the opinion that such a rule might not apply to *other* provisions of the Vaccine Act--and it is certainly *not* clear that the *McGowan* court made any such suggestion-- that suggestion would clearly constitute *dicta*. Further, I would respectfully conclude that any such suggestion would be erroneous, in light of the precedent discussed at pp. 11-15 above.

22. This is what I understand to be the *basic* interpretation of the statutory subsection proposed by the petitioners in this case. As will be seen in part IV of this Ruling, when it comes to the *specific* interpretation of the *third part* of the subsection, with respect to the *amount* of compensation, I cannot agree with all of petitioners' suggestions. But I do agree with the *central thrust* of their interpretation, which is that a person with significantly-impaired earning capacity is entitled to a "lost earnings" award *even if* he is capable of earning the average non-farm wage.

23. On the latter point, the respondent certainly is correct in arguing that the very different structures of parts (A) and (B) of § 300aa-15(a)(3) demonstrates that Congress indeed *did* intend very different "lost earnings" treatment between over-18 and under-18 vaccinees.

24. Presumably, under the respondent's interpretation, a person who likely could earn something, but less than the average non-farm wage, would receive compensation in the amount of the average non-farm wage *less* the amount of his likely earnings.

25. I am aware that in *Lane v. Pena, supra*, at one point the majority opinion noted that it rejected the petitioner's argument that "the reading proposed by the government is entirely irrational." 518 U.S. at 196. Does this mean that under the doctrine of sovereign immunity any proposed statutory interpretation advanced by the federal government must be adopted unless it is "entirely irrational?" I cannot so conclude. A close reading of that opinion reveals that in the previous sentences, the majority was discussing the petitioner's argument that adoption of the government's statutory interpretation would allegedly result in an "illogical" *statutory scheme* that Congress could not have intended. In rejecting that argument, the Court clearly was not remarking upon the rationality of the government's *statutory interpretation*, but instead was stating the view that the *statutory scheme* that Congress had set up, according to the government's interpretation, was not "entirely irrational." There is no indication that the Court was adopting a test in which any government-proposed *statutory interpretation* must be accepted unless it is "entirely irrational."