

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-427V

(Filed October 1, 2014)

NOT TO BE PUBLISHED

AMBER ROBERTS,

Petitioners,

v.

SECRETARY OF HEALTH
AND HUMAN SERVICES,

Respondent.

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Decision based on proffer;
tetanus-diphtheria-acellular
pertussis (“Tdap”) vaccine;
transverse myelitis (“TM”)

Thomas K. Herren, Herren and Adams, Lexington, KY, for Petitioner.

Ann D. Martin, U.S. Dep’t of Justice, Washington, D.C., for Respondent.

DECISION AWARDING DAMAGES¹

On July 1, 2009, Amber Roberts filed a petition seeking compensation under the National Vaccine Injury Compensation Program (“Vaccine Program”).¹ Petitioner alleges that she suffered from transverse myelitis as a result of receiving the tetanus-diphtheria-acellular pertussis (“Tdap”) vaccine.

Respondent filed a Proffer on October 1, 2014, recommending an award of compensation for Petitioner (a copy of which is attached). I have reviewed the file, and based upon that review, I conclude that the parties’ proffer is reasonable. I therefore adopt it as my decision in awarding damages on the terms set forth therein.

The Proffer awards:

A. A lump sum payment of **\$478,905.74**, representing compensation for life care expenses expected to be incurred during the first year after judgment (\$204,750.74) and Trust seed funds for the U.S. Grantor Reversionary Trust established for the benefit of Amber Roberts (\$274,155.00), in the form of a check payable to Bank of the Bluegrass & Trust Company, as trustee.

¹ The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended, 42 U.S.C.A. § 300aa-10 – 34 (2006)) [hereinafter “Vaccine Act” or “the Act”]. Individual sections references hereafter will be to § 300aa of the Act.

B. A lump sum payment of **\$1,075,075.87**, representing compensation for lost future earnings (\$820,286.73), pain and suffering (\$250,000.00), and past unreimbursable expenses (\$4,789.14), in the form of a check payable to petitioner, Amber Roberts.

C. A lump sum payment of **\$15,553.11**, representing compensation for satisfaction of the Commonwealth of Kentucky Medicaid lien, payable jointly to petitioner and

Kentucky Medicaid Recovery Unit
c/o HP Enterprise Services
P.O. Box 2107
Frankfort, KY 40602
Attn: Veronica J. Cecil, Director
Tel: 502-564-4958

Petitioner agrees to endorse this payment to Kentucky Medicaid Recovery Unit.

D. A lump sum payment of **\$3,101.91**, representing compensation for satisfaction of the WellCare Medicaid lien, payable jointly to petitioner and

First Recovery Group LLC
26899 Northwestern Hwy
Suite 250
Southfield, MI 48033
Attn: Bryan Cooley, Recovery Attorney
Tel: 248-443-4800, ext. 276

Petitioner agrees to endorse this payment to First Recovery Group LLC.

E. An amount sufficient to purchase an annuity contract, subject to the conditions described in the Proffer, that will provide payments for the life care items contained in the joint life care plan, as illustrated by the chart at Tab A.

Proffer at § II(A-E).

I approve a Vaccine Program award in the requested amount set forth above to be made to Petitioner. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.²

IT IS SO ORDERED.

/s/ Brian H. Corcoran
Brian H. Corcoran
Special Master

² Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by both (either separately or jointly) filing a notice renouncing their right to seek review.

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

AMBER ROBERTS,)	
)	
Petitioner,)	
)	
v.)	No. 09-427
)	Special Master Corcoran
SECRETARY OF HEALTH)	ECF
AND HUMAN SERVICES,)	
)	
Respondent.)	

RESPONDENT'S PROFFER ON AWARD OF COMPENSATION

I. Items of Compensation

A. Life Care Items

The parties engaged life care planners, Shelly Kinney, MSN, RN, CCM, CNCLP, for respondent, and Cameron Parker, RN, BSN, CLCP, for petitioner, to provide an estimation of Amber Roberts’s future vaccine-injury related needs. See Respondent’s Exhibit Q (joint life care plan). For the purposes of this proffer, the term “vaccine-related” is as described in Special Master Zane’s Ruling on Entitlement filed August 29, 2013.¹ All items of compensation identified in the joint life care plan are supported by the evidence, and are illustrated by the chart entitled Appendix A: Items of Compensation for Amber Roberts, attached hereto as Tab A.² Respondent proffers that Amber Roberts should be awarded all items of compensation set forth in the joint life care plan and illustrated by the chart attached at Tab A. Petitioner agrees.

¹ This case was reassigned to Special Master Hastings on September 5, 2013, and to Special Master Corcoran on January 14, 2014.

² The chart at Tab A illustrates the annual benefits provided by the joint life care plan. The annual benefit years run from the date of judgment up to the first anniversary of the date of judgment, and every year thereafter up to the anniversary of the date of judgment.

B. Lost Earnings

The parties agree that based upon the evidence of record, Amber Roberts has suffered a past loss of earnings and will continue to suffer a loss of earnings in the future. Therefore, respondent proffers that Amber Roberts should be awarded lost earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(B).³ Respondent proffers that the appropriate award for Amber Roberts's lost earnings is \$820,286.73. Petitioner agrees.

C. Pain and Suffering

Respondent proffers that Amber Roberts should be awarded \$250,000.00 in actual pain and suffering. See 42 U.S.C. § 300aa-15(a)(4). Petitioner agrees.

D. Past Unreimbursable Expenses

Evidence supplied by petitioner documents the expenditure of past unreimbursable expenses related to her vaccine-related injury. Respondent proffers that petitioner should be awarded past unreimbursable expenses in the amount of \$4,789.14. Petitioner agrees.

E. Commonwealth of Kentucky Medicaid Lien

Respondent proffers that Amber Roberts should be awarded funds to satisfy the Commonwealth of Kentucky Medicaid lien in the amount of \$15,553.11, which represents full satisfaction of any right of subrogation, assignment, claim, lien, or cause of action the Commonwealth of Kentucky may have against any individual as a result of any Medicaid payments the Commonwealth of Kentucky has made to, or on behalf of, Amber Roberts from the date of her eligibility for benefits through the date of judgment in this case as a result of her vaccine-related injury suffered on or about July 1, 2006, under Title XIX of the Social Security Act.

³ Amber Roberts was eleven years of age at the time of the vaccine-related injury. She turned eighteen during the pendency of the petition.

F. WellCare Medicaid Lien

Respondent proffers that Amber Roberts should be awarded funds to satisfy the WellCare Medicaid lien in the amount of \$3,101.91, which represents full satisfaction of any right of subrogation, assignment, claim, lien, or cause of action WellCare may have against any individual as a result of any Medicaid payments WellCare has made to, or on behalf of, Amber Roberts from the date of her eligibility for benefits through the date of judgment in this case as a result of her vaccine-related injury suffered on or about July 1, 2006, under Title XIX of the Social Security Act.

II. Form of the Award

The parties recommend that the compensation provided to Amber Roberts for her future vaccine-related medical care be made to a U.S. Grantor Reversionary Trust established for the benefit of Amber Roberts with payments made to the Trust through a combination of a one-time cash payment and future annuity payments as described below, and request that the Special Master's decision and the Court's judgment award the following items of compensation:⁴

Respondent proffers and petitioner agrees that an award of compensation include the following elements:

A. A lump sum payment of \$478,905.74, representing compensation for life care expenses expected to be incurred during the first year after judgment (\$204,750.74) and Trust seed funds for the U.S. Grantor Reversionary Trust established for the benefit of Amber Roberts (\$274,155.00), in the form of a check payable to Bank of the Bluegrass & Trust Company, as trustee.

⁴ Should petitioner die prior to entry of judgment, the parties reserve the right to move the Court for appropriate relief. In particular, respondent would oppose any award for future medical expenses, future lost earnings, and future pain and suffering.

B. A lump sum payment of \$1,075,075.87, representing compensation for lost future earnings (\$820,286.73), pain and suffering (\$250,000.00), and past unreimbursable expenses (\$4,789.14), in the form of a check payable to petitioner, Amber Roberts.

C. A lump sum payment of \$15,553.11, representing compensation for satisfaction of the Commonwealth of Kentucky Medicaid lien, payable jointly to petitioner and

Kentucky Medicaid Recovery Unit
c/o HP Enterprise Services
P.O. Box 2107
Frankfort, KY 40602
Attn: Veronica J. Cecil, Director
Tel: 502-564-4958

Petitioner agrees to endorse this payment to Kentucky Medicaid Recovery Unit.

D. A lump sum payment of \$3,101.91, representing compensation for satisfaction of the WellCare Medicaid lien, payable jointly to petitioner and

First Recovery Group LLC
26899 Northwestern Hwy
Suite 250
Southfield, MI 48033
Attn: Bryan Cooley, Recovery Attorney
Tel: 248-443-4800, ext. 276

Petitioner agrees to endorse this payment to First Recovery Group LLC.

E. An amount sufficient to purchase an annuity contract,⁵ subject to the conditions described below, that will provide payments for the life care items contained in the joint life care plan, as illustrated by the chart at Tab A, attached hereto, paid to the life insurance company⁶

⁵ In respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

⁶ The Life Insurance Company must have a minimum of \$250,000,000 capital and surplus, exclusive of any mandatory security valuation reserve. The Life Insurance Company must have one of the following ratings from two of the following rating organizations:

- a. A.M. Best Company: A++, A+, A+g, A+p, A+r, or A+s;
- b. Moody's Investor Service Claims Paying Rating: Aa3, Aa2, Aa1, or Aaa;

(continued. . .)

from which the annuity will be purchased.⁷ Compensation for Year Two (beginning on the first anniversary of the date of judgment) and all subsequent years shall be provided through respondent's purchase of an annuity, which annuity shall make payments directly to the trustee of the U.S. Grantor Reversionary Trust established for the benefit of Amber Roberts, only so long as Amber Roberts is alive at the time a particular payment is due. At the Secretary's sole discretion, the periodic payments may be provided to the trustee in monthly, quarterly, annual or other installments. The "annual amounts" set forth in the chart at Tab A describe only the total yearly sum to be paid to the trustee and do not require that the payment be made in one annual installment.

1. Growth Rate

Respondent proffers that a four percent (4%) growth rate should be applied to all non-medical life care items, and a five percent (5%) growth rate should be applied to all medical life care items. Thus, the benefits illustrated in the chart at Tab A that are to be paid through annuity payments should grow as follows: four percent (4%) compounded annually from the date of judgment for non-medical items, and five percent (5%) compounded annually from the date of judgment for medical items. Petitioner agrees.

2. Life-contingent annuity

The trustee will continue to receive the annuity payments from the Life Insurance Company only so long as Amber Roberts is alive at the time that a particular payment is due.

c. Standard and Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+, or AAA;

d. Fitch Credit Rating Company, Insurance Company Claims Paying Ability Rating: AA-, AA, AA+, or AAA.

⁷ Petitioner authorizes the disclosure of certain documents filed by the petitioner in this case consistent with the Privacy Act and the routine uses described in the National Vaccine Injury Compensation Program System of Records, No. 09-15-0056.

Written notice shall be provided to the Secretary of Health and Human Services, the trustee, and the Life Insurance Company within twenty (20) days of Amber Roberts's death.

3. Guardianship

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

III. Summary of Recommended Payments Following Judgment

A.	Lump sum paid to Bank of the Bluegrass & Trust Company:	\$ 478,905.74
B.	Lump sum paid to petitioner:	\$1,075,075.87
C.	Commonwealth of Kentucky Medicaid lien:	\$ 15,553.11
D.	WellCare Medicaid lien:	\$ 3,101.91
E.	An amount sufficient to purchase the annuity contract described above in section II. E.	

Respectfully submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General

RUPA BHATTACHARYYA
Director
Torts Branch, Civil Division

VINCENT J. MATANOSKI
Deputy Director
Torts Branch, Civil Division

GLENN A. MACLEOD
Senior Trial Counsel
Torts Branch, Civil Division

s/ Ann D. Martin
ANN D. MARTIN
Senior Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, D.C. 20044-0146
Telephone: (202) 307-1815

Dated: October 1, 2014

TAB A

Appendix A: Items of Compensation for Amber Roberts

ITEMS OF COMPENSATION	G.R.	*	Lump Sum Compensation Year 1	Compensation Year 2	Compensation Year 3	Compensation Year 4	Compensation Year 5	Compensation Year 6	Compensation Year 7	Compensation Year 8
			2014	2015	2016	2017	2018	2019	2020	2021
Gloves	4%		150.96	150.96	150.96	150.96	150.96	150.96	150.96	150.96
Adult Diapers	4%		792.00	792.00	792.00	792.00	792.00	792.00	792.00	792.00
Chux	4%		345.60	345.60	345.60	345.60	345.60	345.60	345.60	345.60
Mattress Protector	4%		44.46	44.46	44.46	44.46	44.46	44.46	44.46	44.46
Protein Supp	4%		864.00	864.00	864.00	864.00	864.00	864.00	864.00	864.00
Disp Washcloths	4%		56.00	56.00	56.00	56.00	56.00	56.00	56.00	56.00
Medical ID Bracelet	4%		35.00	11.67	11.67	11.67	11.67	11.67	11.67	11.67
Skilled Nurse Visit	4%	*								
Home Health Aide	4%		110,960.00	31,616.00	31,616.00	31,616.00	31,616.00	31,616.00	31,616.00	31,616.00
Trust Seed/Assisted Living	4%		274,155.00							
Mileage: Physician Apts	4%		148.05	45.12	45.12	45.12	45.12	45.12	45.12	45.12
WC Access Van	4%		28,092.50							
Hand Controls	4%		1,400.00					1,400.00		
Van Maint	4%		225.00	225.00	225.00	225.00	225.00	225.00	225.00	225.00
Road Service	4%		102.00	102.00	102.00	102.00	102.00	102.00	102.00	102.00
Lost Future Earnings			820,286.73							
Pain and Suffering			250,000.00							
Past Unreimbursable Expenses			4,789.14							
Kentucky Medicaid Lien			15,553.11							
WellCare Medicaid Lien			3,101.91							
Annual Totals			1,572,636.63	169,518.70	54,268.70	55,977.90	48,966.00	50,366.00	48,966.00	64,716.00

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.

Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment.

As soon as practicable after entry of judgment, respondent shall make the following payment to Bank of the Bluegrass & Trust Company for Yr 1 life care expenses (\$204,750.74) and trust seed funds (\$274,155.00): \$478,905.74.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner for lost earnings (\$820,286.73), pain and suffering (\$250,000.00), and past unreimbursable expenses (\$4,789.14): \$1,075,075.87.

As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and Kentucky Medicaid Recovery Unit, as reimbursement for the Commonwealth's Medicaid lien: \$15,553.11.

As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and First Recovery Group LLC, as reimbursement for the WellCare Medicaid lien: \$3,101.91.

Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment.

Annual amounts shall increase at the rates indicated above in column G.R., compounded annually from the date of judgment.

Items denoted with an asterisk (*) covered by health insurance and/or Medicare.

Appendix A: Items of Compensation for Amber Roberts

ITEMS OF COMPENSATION	G.R.	*	Compensation Years 9-10 2022-2023	Compensation Year 11 2024	Compensation Years 12-14 2025-2027	Compensation Year 15 2028	Compensation Year 16 2029	Compensation Years 17-20 2030-2033	Compensation Year 21 2034	Compensation Year 22 2035
United Healthcare Choice Plus Premium	5%									
United Healthcare Choice Plus Deductible	5%									
United Healthcare Choice Plus MOP	5%									
Anthem Gold Direct Premium	5%		2,474.88	2,474.88	2,474.88	2,474.88				
Anthem Gold Direct Deductible	5%		750.00	750.00	750.00	750.00				
Anthem Gold Direct MOP	5%		6,000.00	6,000.00	6,000.00	6,000.00				
Medicare Part B Premium	5%						1,258.80	1,258.80	1,258.80	1,258.80
Medicare Part B Deductible	5%						147.00	147.00	147.00	147.00
Medicare Advantage Premium	5%						756.00	756.00	756.00	756.00
Medicare Advantage MOP	5%						6,500.00	6,500.00	6,500.00	6,500.00
Medicare Adv Rx Deductible	5%						100.00	100.00	100.00	100.00
Primary Care	5%	*								
Urologist	5%	*								
Urology Surgery	5%	*								
PMR Physician	5%	*								
Orthopedic Surgery	5%	*								
Wound Physician	5%	*								
ER	5%	*								
Genito-Urinary Surger & Training	5%	*								
Cystoscopy	5%	*								
Urodynamic Testing	5%	*								
Cystoscopy	5%	*								
Renal Function Studies	5%	*								
Cystatin C	5%	*								
Urinalysis	5%	*								
Urine Culture	5%	*								
Venipuncture	5%	*								
Spine X-rays	5%	*								
Macrochantin	5%	*	120.00	120.00	120.00	120.00				
Abilify	5%	*	600.00	600.00	600.00	600.00				
Celebrex	5%	*	600.00	600.00	600.00	600.00				

Appendix A: Items of Compensation for Amber Roberts

ITEMS OF COMPENSATION	G.R.	*	Compensation Years 9-10 2022-2023	Compensation Year 11 2024	Compensation Years 12-14 2025-2027	Compensation Year 15 2028	Compensation Year 16 2029	Compensation Years 17-20 2030-2033	Compensation Year 21 2034	Compensation Year 22 2035
Gloves	4%		150.96	150.96	150.96	150.96	150.96	150.96	150.96	150.96
Adult Diapers	4%		792.00	792.00	792.00	792.00	792.00	792.00	792.00	792.00
Chux	4%		345.60	345.60	345.60	345.60	345.60	345.60	345.60	345.60
Mattress Protector	4%		44.46	44.46	44.46	44.46	44.46	44.46	44.46	44.46
Protein Supp	4%		864.00	864.00	864.00	864.00	864.00	864.00	864.00	864.00
Disp Washcloths	4%		56.00	56.00	56.00	56.00	56.00	56.00	56.00	56.00
Medical ID Bracelet	4%		11.67	11.67	11.67	11.67	11.67	11.67	11.67	11.67
Skilled Nurse Visit	4%	*								
Home Health Aide	4%		31,616.00	31,616.00	31,616.00	31,616.00	31,616.00	31,616.00	31,616.00	31,616.00
Trust Seed/Assisted Living	4%									
Mileage: Physician Apts	4%		45.12	45.12	45.12	45.12	45.12	45.12	45.12	45.12
WC Access Van	4%			28,092.50					28,092.50	
Hand Controls	4%			1,400.00			1,400.00		1,400.00	
Van Maint	4%		225.00	225.00	225.00	225.00	225.00	225.00	225.00	225.00
Road Service	4%		102.00	102.00	102.00	102.00	102.00	102.00	102.00	102.00
Lost Future Earnings										
Pain and Suffering										
Past Unreimbursable Expenses										
Kentucky Medicaid Lien										
WellCare Medicaid Lien										
Annual Totals			48,966.00	81,257.50	48,966.00	64,716.00	48,141.32	46,286.66	78,578.16	62,316.56

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.

Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment.

As soon as practicable after entry of judgment, respondent shall make the following payment to Bank of the Bluegrass & Trust Company for Yr 1 life care expenses (\$204,750.74) and trust seed funds (\$274,155.00): \$478,905.74.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner for lost earnings (\$820,286.73), pain and suffering (\$250,000.00), and past unreimbursable expenses (\$4,789.14): \$1,075,075.87.

As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and Kentucky Medicaid Recovery Unit, as reimbursement for the Commonwealth's Medicaid lien: \$15,553.11.

As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and First Recovery Group LLC, as reimbursement for the WellCare Medicaid lien: \$3,101.91.

Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment.

Annual amounts shall increase at the rates indicated above in column G.R., compounded annually from the date of judgment.

Items denoted with an asterisk (*) covered by health insurance and/or Medicare.

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ITEMS OF COMPENSATION	G.R.	*	Compensation Years 23-25 2036-2038	Compensation Year 26 2039	Compensation Years 27-30 2040-2043	Compensation Year 31 2044	Compensation Years 32-35 2045-2048	Compensation Year 36 2049	Compensation Years 37-43 2050-2056	Compensation Years 44-Life 2057-Life
Gloves	4%		150.96	150.96	150.96	150.96	150.96	150.96	150.96	150.96
Adult Diapers	4%		792.00	792.00	792.00	792.00	792.00	792.00	792.00	792.00
Chux	4%		345.60	345.60	345.60	345.60	345.60	345.60	345.60	345.60
Mattress Protector	4%		44.46	44.46	44.46	44.46	44.46	44.46	44.46	44.46
Protein Supp	4%		864.00	864.00	864.00	864.00	864.00	864.00	864.00	864.00
Disp Washcloths	4%		56.00	56.00	56.00	56.00	56.00	56.00	56.00	56.00
Medical ID Bracelet	4%		11.67	11.67	11.67	11.67	11.67	11.67	11.67	11.67
Skilled Nurse Visit	4%	*								
Home Health Aide	4%		31,616.00	31,616.00	31,616.00	31,616.00	31,616.00	31,616.00		
Trust Seed/Assisted Living	4%								-	39,165.00
Mileage: Physician Apts	4%		45.12	45.12	45.12	45.12	45.12	45.12	45.12	45.12
WC Access Van	4%					28,092.50				
Hand Controls	4%			1,400.00		1,400.00		1,400.00		
Van Maint	4%		225.00	225.00	225.00	225.00	225.00	225.00		
Road Service	4%		102.00	102.00	102.00	102.00	102.00	102.00		
Lost Future Earnings										
Pain and Suffering										
Past Unreimbursable Expenses										
Kentucky Medicaid Lien										
WellCare Medicaid Lien										
Annual Totals			48,816.56	50,216.56	48,816.56	78,309.06	48,816.56	50,216.56	16,873.56	53,788.56

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.

Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment.

As soon as practicable after entry of judgment, respondent shall make the following payment to Bank of the Bluegrass & Trust Company for Yr 1 life care expenses (\$204,750.74) and trust seed funds (\$274,155.00): \$478,905.74.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner for lost earnings (\$820,286.73), pain and suffering (\$250,000.00), and past unreimbursable expenses (\$4,789.14): \$1,075,075.87.

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As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and First Recovery Group LLC, as reimbursement for the WellCare Medicaid lien: \$3,101.91.

Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment.

Annual amounts shall increase at the rates indicated above in column G.R., compounded annually from the date of judgment.

Items denoted with an asterisk (*) covered by health insurance and/or Medicare.