

ORIGINAL

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

FILED

NOV 26 2003

U.S. COURT OF
FEDERAL CLAIMS

IN RE: CLAIMS FOR VACCINE)
INJURIES RESULTING IN AUTISM)
SPECTRUM DISORDER, OR A SIMILAR)
NEURODEVELOPMENTAL DISORDER,)

Various Petitioners,)

v.)

SECRETARY OF HEALTH AND)
HUMAN SERVICES,)

Respondent.)

Autism Master File
Special Master Hastings

RESPONDENT'S OBJECTION TO NOTICE CONCERNING
ATTORNEYS' FEES AND COSTS INCURRED IN
OMNIBUS AUTISM PROCEEDING

In a notice dated October 29, 2003, the Special Master approved and filed as an attachment the petitioners' steering committee's proposed guidelines for attorneys' fees and costs incurred in connection with the above-captioned proceeding. After considering carefully the proposed guidelines, respondent notes the following possible objections to any future claim for fees and costs under these guidelines.¹

Discussion

I. General Objections

Respondent has made specific objections to the rules and

¹ Inasmuch as petitioners have not yet requested compensation for fees and costs in this matter, any discussion of this issue is anticipatory. Nevertheless, respondent would like to raise the concerns herein before significant fees and costs are incurred according to these guidelines.

procedures implemented by the Special Master relating to the instant omnibus proceeding, several of which are pertinent to any future claim for compensation for fees and costs associated with these proceedings. The Vaccine Act permits an award of compensation for reasonable attorneys' fees and costs incurred only in proceedings "on a petition." 42 U.S.C. § 300aa-15(e) (emphasis added). As previously argued by respondent, a "petition" under the Act must contain the records described in Section 11. It must also have been filed in good faith and be supported by a reasonable basis to support an award of fees and costs. 42 U.S.C. § 300aa-15(e). Lastly, jurisdiction must exist over the claim. Martin v. HHS, 62 F.3d 1403, 1407 (Fed. Cir. 1995).

The proposed practice of incurring fees and costs without relation to any particular petition does not comport with the Vaccine Act or the Court's Rules. Moreover, inasmuch as these proceedings are not tied to any particular set of facts, theory of causation, or medical opinion, proceedings have been and will continue to be wide-ranging and unfocused. This creates considerable potential for unreasonable fees and costs. Respondent also renews his objection to the Special Master's decision at the outset of these proceedings to set a procedural rule permitting petitioners to "opt out" at the conclusion of the omnibus proceedings and decline to accept the Special Master's

eventual ruling as to vaccine-causation.² Fees and costs related to a proceeding designed to weigh evidence and make determinations as to vaccine-causation are not reasonable if the results of that proceeding are not binding on the parties. Respondent also renews his objection to that portion of the Special Master's Order permitting petitions to be filed without required documentation. Stewart v. HHS, No. 02-819V, Respondent's Motion to Dismiss at 2-3. Although the Special Master has discretion to consolidate cases for processing under the Vaccine Act, he does not have authority to relieve petitioners of the requirement to file necessary documentation with the petitions in those cases. As a consequence of the improper rule which relieves petitioners of that responsibility

² In the spring of 2002, the Office of the Special Masters ("OSM") convened a series of conferences to discuss methods for resolving cases alleging autism caused by childhood vaccination. The OSM invited to these conferences certain petitioners' counsel and representatives of the Department of Justice. During these conferences, the Department of Justice representatives advocated resolving the issue of causation in the context of a particular case determined to be emblematic of the claims in the majority of the autism cases filed. In addition, they asserted that all cases needed to be filed with records to comply with Section 11 of the Vaccine Act and that any omnibus proceeding must be expeditious to comply with the Act's stricture that cases be resolved within 240 to 420 days of filing. Finally, Department of Justice representatives stated that petitioners who chose to have their cases included in the omnibus proceeding should not be allowed to "opt out" once the causation decision was determined. To permit them to do so would render that decision advisory and eviscerate the judicial economy that was the impetus for the omnibus proceeding in the first place. The OSM declined to adopt these recommendations.

in the autism cases, it has been impossible to determine the legitimate scope and number of claims cognizable under the Act, the relevant factual bases for these claims, the common medical issues, or even whether jurisdiction exists over them. Given this fundamental lack of information, it is impossible to set reasonable metes and bounds on these proceedings. As a consequence, they have become too far-ranging, exploratory, time-consuming, and expensive.³

To comport with the Vaccine Act and this Court's Rules, respondent continues to urge that all reasonable fees and costs in furtherance of the issue of an alleged causal relationship between thimerosal containing vaccines and autism spectrum disorder be recorded with respect to a single petition which conforms to the Act's requirements. This may easily be accomplished in the context of "omnibus" proceedings by going forward with a properly documented case that is sufficiently representative of the other cases with respect to basic issues of causation that the results might prove useful to other cases. With respect to the case so identified, the counsel of record should proceed under the Act according to the rules and standards applied in Program proceedings governing "reasonableness" as they

³ This has become particularly evident with respect to ongoing proceedings related to discovery.

relate to that case.⁴

II. Specific Objections

Turning to the specifics of the steering committee's proposed guidelines, respondent would anticipate objecting to a number of the costs and fees referred to in these guidelines including, but not limited to, the following.

As an initial matter, respondent has several concerns regarding travel expenses that are authorized by the proposed guidelines. For example, the steering committee assures reimbursement for "PSC group meetings and expenses as approved by the PSC." However, respondent notes that travel costs for such meetings are only recoverable to the extent that the meetings are necessary and reasonable. Hines, 22 Cl. Ct. at 755.

The steering committee's guidelines also assure recovery of travel costs in individual cases for "non common witness, attorney or paralegal for deposition, court committee meetings, or legislative issues that could affect petitioners." This is problematic for two reasons. First, respondent will object to the reimbursement of travel costs for individuals who are not necessary at the event for which travel expenses are claimed.

⁴ Those rules and standards proscribe, for example, fees resulting from excessive conferencing, Thomas v. HHS, 92-46V, 1997 WL 74664 at *5, too numerous counsel, Baron v. HHS, 90-1078V, 1992 WL 333122, FN 11, (Fed. Cl. Spec. Mstr. Oct. 27, 1992), unnecessary travel, Hines v. HHS, 22 Cl. Ct. 750, 755 (1991), and costs that exceed reasonable bounds by Program standards.

See Potter v. HHS, No. 90-2V, 1992 WL 35788 (Cl. Ct. Spec. Mstr. Feb. 7, 1992) (travel expenses denied to individual unnecessary at hearing); See also Cain v. HHS, No. 91-817V, 1992 WL 379932 (Fed. Cl. Spec. Mstr. Dec. 3, 1992) (paralegal determined to be unnecessary at hearing). Second, petitioners cannot recover the costs of travel for "legislative issues," because those costs are not incurred in relation to any proceeding on a petition.

Respondent also objects to the proposed policy of reimbursing attorneys for up to \$50 per trip in "cash expenses" for which receipts are generally not available. While respondent does not object per se to the reimbursement of such incidentals, these expenses must be documented contemporaneously and must be reasonable. That a particular request falls within the steering committee's self-imposed \$50 limit does not necessarily make it reasonable.

As a final note regarding travel, the proposed guidelines put no limitations on the reimbursement of meals, other than requiring a copy of the restaurant's receipt. The guidelines should, however, state clearly that meals will only be reimbursed if incurred by individuals who are traveling, and then only to the extent such expenses are reasonable. Meal expenses are not recoverable if they are incurred by attorneys or experts in their home cities.

Respondent objects to the steering committee's designation

of certain common overhead expenses as reimbursable. These common expenses are those associated with maintaining an office, which include cellular phone service, local phone service, facsimile, and in-house printing costs. Such expenses are an ordinary cost of doing business and are subsumed within the attorney's hourly rate. As such, they should not be reimbursed. Grice v. HHS, No. 94-410V, 1996 WL 16055 (Fed. Cl. Spec. Mstr. Jan. 3, 1996) ("[c]ompensation is no more available for cellular telephone service than it is for the basic service fee for hard-wired telephones"); Isom v. HHS, No. 94-770, 2001 WL 101459 (Fed. Cl. Spec. Mstr. Jan. 17, 2001) (facsimile costs denied as overhead).

Respondent further objects to the steering committee's designation of computer equipment and office supplies as reimbursable. It is well established that office supplies are part of a firm's overhead costs and therefore not recoverable. Arbuthnott v. HHS, No. 90-1739V, 1994 WL 17926 (Fed. Cl. Spec. Mstr. Jan. 7, 1994); Plott v. HHS, No. 92-633V, 1997 WL 842543 (Fed. Cl. Spec. Mstr. April 23, 1997) (dividers, notebooks, tabs, envelopes, secretarial expense, pens, pencils, notepads, binders); Guy v. HHS, 38 Fed. Cl. 403 (1997) (binders, bonded carbon, and ribbon). Moreover, respondent is not aware of a single Program case in which the costs of leasing or purchasing computer equipment were reimbursed. Computer equipment, which is

necessary to run any business, is an overhead cost that should be viewed no differently than less expensive office supplies. Accordingly, petitioners should not be reimbursed for this expense.

Finally, petitioners include "assessments" and "investigative" services on their list of reimbursable costs. However, without an explanation as to the nature and necessity of these costs, respondent cannot determine whether they are, in fact, reasonable. Further documentation would be required in the event petitioners were to seek compensation for such expenses.

Conclusion

The guidelines proposed by the steering committee and approved by the Special Master do not comport with the Act. Consequently, should petitioners request attorneys' fees and costs incurred under the proposed guidelines, respondent anticipates that he will raise a number of objections, including but not limited to, those discussed above.

Respectfully submitted,

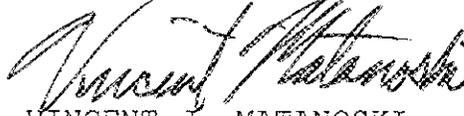
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CERTIFICATE OF SERVICE

I certify that on this 26th day of November,
2003, a copy of respondent's RESPONDENT'S OBJECTION TO NOTICE
CONCERNING ATTORNEYS' FEES AND COSTS INCURRED IN OMNIBUS AUTISM
PROCEEDING was served, by first class mail, postage prepaid,
upon:

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