

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 00-117V

Filed: March 4, 2005

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MARTHA MARIE VELASQUEZ, as a \*
Legal Representative of her Minor Son \*
JOSEPH ADAM WARD, \*

Petitioner, \*

NOT TO BE PUBLISHED

v. \*
\*

SECRETARY OF THE DEPARTMENT \*
OF HEALTH AND HUMAN SERVICES, \*

Respondent. \*

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ATTORNEYS' FEES AND COSTS DECISION

On October 18, 2004, petitioner filed for an award for fees and costs in this compensated case. See Application for Award for Attorneys' Fees and Reimbursement of Costs, filed Oct. 18, 2004. Respondent filed in opposition thereto on December 13, 2004. The three primary areas of respondent's objections are: the attorneys' hourly rates, the number of hours spent on the case, and the life care planner's hourly rate. The descriptive background of the proceedings in this case is nicely laid out in Respondent's Opposition. See Respondent's Opposition to Petitioner's Application for Attorney's Fees and Costs ("R. Opp."), filed Dec. 13, 2004. The undersigned has read and considered all of the filed material. In addition, the undersigned is very familiar from prior cases with all involved in this case, having a very positive view of all. Given that no significant precedential issues are raised in this dispute, a summary decision follows, including a brief discussion of the findings and support thereof.

Hourly Rates

Following the application for fees and costs in this case, and respondent's objections thereto, Special Master Hastings issued a ruling in Hart v. Secretary of HHS, No. 01-357V, 2004 WL 3049766 (Fed. Cl. Spec. Mstr. Dec. 17, 2004). In that decision, Special Master Hastings discussed in detail the hourly rate for the same attorneys involved in the present action. The undersigned read and considered Special Master Hasting's findings and indicated to the parties the intention to follow that ruling. Counsel indicated that they had no objection to the hourly rates found in Hart. Accordingly, Richard Gage and Robert Moxely are each awarded \$175.00

and \$200.00 per hour depending upon the year of service, and Kirk Morgan is awarded the requested \$135.00 per hour.

Regarding Julie Hernandez, Special Master Hastings awarded \$85.00 per hour, the same as advocated by respondent. The argument is that Ms. Hernandez functions as a paralegal. Petitioner argues that Ms. Hernandez has a law degree and in essence performs tasks that a paralegal cannot, thereby saving the Program money since a higher priced attorney is not required. Petitioner's argument is compelling. Accordingly, the undersigned must part company with my colleague on this issue. The nature of the task defines the hourly rate. It only makes sense that a clerk with a law degree is capable of performing more challenging tasks than a paralegal with limited training. Petitioner provided a list of 16 cases where Ms. Hernandez was compensated at \$100.00 per hour. The undersigned agrees with those rulings and awards Ms. Hernandez the requested \$100.00 per hour. Please note, however, that without a Bar license this is a relatively high rate of compensation. Also, this rate of compensation is premised on Ms. Hernandez performing functions that higher paid counsel are not, thus resulting in savings to the Program. Counsel need be mindful that Ms. Hernandez's duties must not overlap with the attorneys' functions on the cases, other than a reasonable amount of supervisory time.

Respondent also questioned the \$150.00 per hour rate claimed for Jeff Herrington. In response, petitioner provided an affidavit from Mr. Scarbrough, who averred that the \$150.00 hourly rate "is more than reasonable." Petitioner's Exhibit ("P. Ex.") 50. Unfortunately, what is missing is any information about Mr. Herrington, *i.e.*, how many years he has practiced, the nature of his practice, his usual and customary charges, etc. Without this type of information, there is no way for the undersigned to assess the reasonableness of the claimed hourly rate. Thus, given petitioner's failure to meet her burden of proof, and exercising my broad discretion, Mr. Herrington is awarded \$135.00 per hour, the same hourly rate awarded Mr. Kirk Morgan.

#### Number of Hours

Respondent observes that petitioners claimed 343.15 hours of attorney time and 54.8 hours of paralegal time. While noting that this case involved substantial amounts of work, including two hearings, respondent argues that the hours should be reduced for "performing ministerial tasks such as reviewing orders and correspondence." R. Opp. at 8. Respondent makes no suggested reduction. Petitioner rejoins that "[t]he lack of specificity makes a response difficult. However, suffice it to say that petitioner's counsel does not agree with respondent's assertion that reading this Court's orders, drafting correspondence, speaking on the phone to people involved in this case, etc. are 'ministerial' tasks." Petitioner's Response to Respondent's Opposition to Fees and Costs ("P. Response"), filed Dec. 27, 2004, at 5.

The undersigned agrees with petitioner. Quite frankly, it is incredibly difficult to strike a reasonable balance between requiring sufficient explanation of time spent to determine its reasonableness with requiring so much explanation that you unreasonably burden the moving party thereby requiring the expenditure of inordinate amounts of time explaining their time; time

that is ultimately compensable. Thus, while sympathetic to respondent's objections, the undersigned is mindful that the tasks are necessary. The question really devolves to whether the tasks should be accomplished in 0.1 or 0.2 of an hour. For example, on 10/30/2000, Mr. Gage charged 0.2/hr for "Re-did entry of appearance per court." Clearly a necessary and compensable act, but should it have taken 0.2/hr? The answer is complicated by the fact that 2.4 hours were spent the same day by Ms. Hernandez on various tasks, including the substitution of counsel. Thus, Mr. Gage was editing Ms. Hernandez's work. One could say that 2.4 hours was already awarded, thus an additional 0.2 is unreasonable, or one could argue that by disallowing Mr. Gage's 0.2/hr you dissuade Mr. Gage from utilizing the services of a lesser-paid employee and push him into doing the work himself, at twice the hourly rate. This is a long story to say that it is not an easy task to determine whether each and every tenth of an hour was well spent. But that is my job, and after reviewing each and every time entry it is concluded that 2.8 hours should be deducted from Ms. Hernandez's time. 1.3 hours of this time relates to file reviews. Given Mr. Gage's extensive involvement in this case and given the continuous and unbroken chain of this litigation, file reviews by Ms. Hernandez should be unnecessary. Further, the 1.3 hours Ms. Hernandez spent on a letter to the client duplicated Mr. Gage's work effort performed on 11/30/2001. Lastly, 0.2 hours were found excessive as an unexplained review of the file. From Mr. Gage's time is deducted 0.6 hours for time filing papers, a task which should have been performed by Ms. Hernandez. Thus, 0.6 hours is added back to Ms. Hernandez's time. All other claimed time is found reasonable.

In summary, 2.2 hours is deducted from Ms. Hernandez's time and 0.6 hours is deducted from Mr. Gage's time. In general, the undersigned, while supporting fully respondent's diligent review of this fee submission, disagrees with the objection to the small blocks of time spent reviewing orders, corresponding and placing calls. All of these tasks are necessary elements of litigation and petitioner's counsel should be commended for minimizing the total charges by the effective use of Ms. Hernandez and by minimizing the time spent by higher priced counsel in performing these tasks.

#### Supplemental Request

In petitioner's supplemental fee petition, filed on January 7 and February 8, 2005, petitioner submitted requests for additional hours expended in this case.<sup>1</sup> Respondent objects to the additional fees and costs, as well as hours, requested by Mr. Gage and Ron Creswell, petitioner's trust attorney, for changes or review of the reversionary trust agreement. Response to Petitioner's Supplemental Fee Petition and Life Care Planner Rates ("R. Response"), filed Jan. 24, 2004, at 1-3. Respondent argues that without respondent's knowledge or consent, petitioner submitted a trust agreement to the Texas courts for approval. *Id.* at 2. Respondent contends that, following objections by respondent, petitioner agreed to amend the language of the trust to

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<sup>1</sup>The two requests total 11.4 hours at a rate of \$200.00 per hour. See Petitioner's Supplement to Fee Petition, filed Jan. 7, 2004 (requesting 9 additional hours); Petitioner's Supplement to Fee Petition, filed Feb. 8, 2004 (requesting 2.4 additional hours).

comply with the trust language previously agreed upon. *Id.* Thus, respondent avers, “[a]lthough respondent appreciates the cooperation offered by petitioner in correcting her inadvertent error, these expenses should not be borne by the Vaccine Program.” *Id.* at 3.

Petitioner responded to respondent’s objections by first pointing out that there are no charges in the supplemental petition for any work done by Ron Creswell. Petitioner’s Response to Respondent’s Opposition to Petitioner’s Supplemental Fee Petition, (“P. Resp. to R. Opp.”), filed Feb. 9, 2005, at 1. Moreover, regarding the time charged by Mr. Gage, petitioner states that “the standard for awarding fees to petitioners counsel is that of ‘reasonableness’.” *Id.* at 1-2. Thus, petitioner argues,

it was completely reasonable for petitioner’s counsel to work with respondent’s counsel and petitioner’s trust attorney to get a trust in place that satisfies Texas law and the wishes of respondent. After all, both respondent’s counsel and petitioner’s trust attorney called Richard Gage to work through the issues each had with the trust. It would seem a little unfair to now say that Richard Gage should not be paid for that work.

*Id.* at 2.

A review of the original fee petition reveals charges for fees concerning petitioner’s trust. Respondent does not object to these and the undersigned awards Mr. Gage fees for such. The undersigned agrees with their allowability for the cogent reasons petitioner expressed. Regarding the new charges related to amending the trust, the undersigned finds the issue very similar to one presented in *Ceballos v. Secretary of HHS*, No. 99-97, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 25, 2004). In *Ceballos*, the undersigned disallowed petitioner’s request for guardianship fees that had been incurred post-judgment. *Id.* at 22. Specifically, the guardianship fees were found not compensable because they did not arise “during the pendency of a petition before a special master” and as part of the “prosecution of the vaccine petition.” *Id.* at 20 (citing *Mol v. Secretary of HHS*, 50 Fed. Cl. 588, 591 (2001)).

Judgment was entered on the damages portion of the above-captioned case on October 7, 2004. On October 18, 2004, Petitioner filed an Election to Accept Judgment. Thus, any fees incurred following judgment are outside the jurisdiction of this court. The dates of the new charges range from December 20, 2004 to February 2, 2005, clearly post-judgment and thus not incurred during the “prosecution of the vaccine petition.” Accordingly, the new charges related to amending the trust are disallowed.

#### Summation of Attorneys’ Fees

##### *Richard Gage*

181.25 hours times \$200 per hour, totaling \$36,250.00

129 hours times \$175 per hour, totaling \$22,575.00

*Robert Moxley*

0.40 hours times \$175 per hour, totaling \$70.00

*Kirk Morgan*

31.90 hours times \$135 per hour, totaling \$4,306.00

*Jeff Herrington*

33.80 hours times \$135 per hour, totaling \$4,563.00

*Julie Hernandez*

52.6 hours times \$100 per hour, totaling \$5,260.00

**TOTAL Attorneys' Fees = \$73,024.00**

#### Petitioner's Costs

Respondent objected to several cost items requested. See R. Opp. at 9. Respondent is correct that the lost wages are not compensable as a cost item. Thus, \$480.00 is disallowed. Child care costs are also non-compensable. Thus, \$225.00 is disallowed. Respondent objected to a number of cost items which were later clarified by petitioner. Respondent no longer objects to those items, but requests adjustments in accordance with Mr. Gage's letter. See R. Opp. at Tab A. Those adjustments are made. Accordingly, \$125.00 is deducted for a double billing of Dr. Rosin. Further, the \$150.00 mistaken billing for 2 hours of travel to Conroe is disallowed.

The largest area of disagreement is over the life care planner's bill, both to the hourly rate and alleged claimed ministerial acts. See R. Opp. at 10-12. Respondent raises three primary objections: 1) Ms. Arnold's hourly rate of \$140.00 per hour is too high; 2) the total hours spent on her life care plan is too high; and 3) the total cost of the life care plan "is out of proportion with other life care plan reimbursements by the Program and reflects no reasonable effort by petitioner to keep the plan within reasonable bounds." R. Response at 3-5.

Petitioner responded through the life care planner, Terry Arnold. Ms. Arnold states that her current rate is \$150.00 per hour, with \$200.00 per hour for testimony.<sup>2</sup> She states further that she was awarded the \$150.00 per hour in a vaccine case, Curtis v. Secretary of HHS, No. 00-548V, which was decided by the undersigned in September of 2004. P. Ex. 58. In addition, she documents awarded rates of \$125.00 to \$130.00 per hour in several other cases. Id. Respondent's rejoinder is curious, arguing that Ms. Arnold's awarded rates are "misleading." Respondent writes that "[a]lthough Ms. Arnold may have requested those rates, the parties

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<sup>2</sup>The undersigned disagrees with awarding higher rates for testimony.

negotiated rates of compensation based upon a reduced hourly rate, and reduced hours.” R. Response at 3. If respondent is correct, given that the \$150.00 per hour reflects a negotiated rate, presumably downward, in this case where negotiations have failed, Ms. Arnold’s actual rate should be higher. Stated another way, if the negotiated rates support her current requested rate, it follows ineluctably that Ms. Arnold’s requested hourly rate is reasonable. In fact, petitioner argues that Ms. Arnold’s hourly rate was not negotiated down. See P. Resp. to R. Opp. at 2. Petitioner has submitted support in affidavits and prior decisional awards, clearly sufficient evidence to shift the burden of persuasion. Respondent’s arguments to the contrary amount to nothing more than unsupported broad generalizations. Ms. Arnold’s \$140.00 hourly rate is found reasonable.

Respondent also questions the \$100.00 per hour rate claimed for Gia Rodriquez, arguing that Ms. Rodriquez’s services are akin to those of a paralegal and should be paid as such. See R. Opp. at 11-12. In response, petitioner submitted, as exhibit 56, a letter from Ms. Arnold explaining Ms. Rodriquez’s background and hourly rate. Most meaningful, Ms. Arnold states that Ms. Rodriquez’s “rate of \$100.00 per hour has been allowed in at least four other vaccine cases: Leah Miller, Rachael Zuhlke, Jackson Daniel, and Pam Curtis.” P. Ex 56. Respondent provided no rebuttal evidence. For the same reasons discussed above for Ms. Arnold’s hourly rate, Ms. Rodriquez’s requested rate is allowed.

Respondent next questions the hours spent by Ms. Arnold, noting that “Ms. Arnold’s life care plan relied upon several other experts who were duly paid for their opinions, and who will be reimbursed by the Program.” R. Response at 4. Ms. Arnold responded in a detailed letter filed February 9, 2005. See attachment to P. Resp. to R. Opp.

The undersigned is in full agreement with the contents of Ms. Arnold’s letter. Petitioners’ life care planners bear the brunt of the production of a comprehensive lifetime plan of services. Certainly, generalizations like the one produced here that Ms. Arnold’s hours “far exceed the hours expended by respondent’s life care planner for a lower hourly rate,” are not only unpersuasive but border on meaningless. R. Response at 6. Substance is lacking in respondent’s objections. At this point it should be mentioned that the undersigned shares respondent’s concern over the relatively high cost of this life care plan, but attacking the request in general terms is not the answer. In the future, what should be done is a concerted effort by all concerned, including the court, to ensure the cooperative, collaborative, and simultaneous gathering of information. Such efforts should eliminate the one-sided, seriatum approach which leads to questions, follow-up gathering of information and much duplication of efforts. It is apparent in Ms. Arnold’s letter attached to petitioner’s February 9, 2005 filing that a certain lack of cooperation, or lack of coordinated efforts, led to some extra effort by Ms. Arnold to address respondent’s life care planner’s questions, questions that may have been unnecessary if mutual efforts had taken place.

With that said, the undersigned is concerned over the 344.75 hours spent on this life care plan. An extensive review of the hours discloses vague, non-descriptive periods of time spent on

the plan. For example, "case coordination" is a component of each block of charges. "Attorney contact" is a ubiquitous phrase. Quite frankly, it is not clear to the undersigned why such substantial time is spent on attorney contact when the life care planner's objective is future services, not legal issues. That is especially true with such a veteran planner. The substantial time spent in these two categories and the general descriptions of services provided, for example, "medical contact" with no indication of who was contacted, leads the undersigned to reduce the requested hours by 20%. Ms. Arnold is forewarned that much greater specificity is required in her billings. This reduction should be in no way interpreted as a negative comment on Ms. Arnold or the services she provides. This is a reduction due to the failure to adequately explain and justify the hours claimed.

#### Summation of Life Care Planner's Fees

##### *Terry Arnold*

138 hours, reduced by 20%, times \$140.00 per hour, totaling \$15,456.00

##### *Gia Rodriguez*

197.45 hours, reduced by 20%, times \$100.00 per hour, totaling \$15,796.00

**TOTAL Costs = \$56,428.03**

#### Conclusion

After a thorough review of petitioner's fee petition and respondent's objections, petitioner is awarded \$73,024.00 in attorneys' fees and \$56,428.03 in costs. It should be noted that nothing stated in this opinion should be interpreted negatively regarding those involved. Respondent exercised judiciously his right to object, raising legitimate concerns, and petitioner's bases for not acceding to respondent's objections were appropriate as well. Hopefully, some level of guidance was provided by the undersigned to enable future informal resolutions between the involved parties. This case was well litigated throughout.

Accordingly, pursuant to Vaccine Rule 13, petitioners are hereby awarded a total of \$129,452.03 in attorney's fees and costs.<sup>3</sup> In the absence of a motion for review filed pursuant to

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<sup>3</sup> This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C.A. §300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) which would be in addition to the amount awarded herein. See generally, Beck v. Secretary of HHS, 924 F.2d 1029 (Fed. Cir. 1991).

RCFC, Appendix B, the Clerk is directed to enter judgment according to this decision.<sup>4</sup>

**IT IS SO ORDERED.**



Gary J. Golkiewicz  
Chief Special Master

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<sup>4</sup> Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a U.S. Court of Federal Claims judge.