

# **In the United States Court of Federal Claims**

## **OFFICE OF SPECIAL MASTERS**

No. 09-0069V

Filed: July 29, 2011

Not to be Published

**DANIEL WAGNER and  
TSERENDULAM WAGNER, parents of  
SARNAI WAGNER,**

**Petitioners,**

**v.**

**SECRETARY OF HEALTH AND HUMAN  
SERVICES**

**Respondent.**

**Failure to Prosecute; Failure to  
Follow Court Orders; Dismissal**

### **DECISION**<sup>1</sup>

On February 5, 2009, petitioners filed a Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),<sup>2</sup> alleging that Sarnai was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

On February 22, 2011, petitioners were ordered to inform the court whether

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<sup>1</sup> Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

<sup>2</sup> The 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. §§ 300aa-10 *et seq.* (hereinafter “Vaccine Act” or “the Act”). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

petitioners intended to proceed with this case. Petitioners filed a motion for an extension of time on March 14, 2011. The motion was granted. Petitioners were ordered to respond to the court's February 22, 2011 Order by May 13, 2011. Petitioners did not respond to that order. On May 13, 2011, petitioners' counsel filed a Motion to Withdraw as Attorney in this matter indicating that petitioner had failed to respond to counsel's numerous attempts to contact them regarding this matter and that recent mail from counsel to petitioners was returned undeliverable. On June 15, 2011, counsel's Motion to Withdraw as Attorney was denied and counsel was directed to forward the court's June 15, 2011 Order to petitioners. Petitioners again were ordered to inform the court whether petitioners intended to proceed with this case or otherwise show cause within thirty days, why this case should not be dismissed for failure to prosecute. Petitioners failed to respond to that order as well. Petitioner's counsel filed a status report on July 5, 2011 stating that he served a copy of the court's June 15, 2011 Order on petitioners.

#### I. The Omnibus Autism Proceeding

This case is one of more than 5,400 cases filed under the Program in which petitioners alleged that conditions known as "autism" or "autism spectrum disorders" ["ASD"] were caused by one or more vaccinations. A detailed history of the controversy regarding vaccines and autism, along with a history of the development of the OAP, was set forth in the six entitlement decisions issued by three special masters as "test cases" for two theories of causation litigated in the OAP and will not be repeated here.<sup>3</sup>

Ultimately, the Petitioners' Steering Committee ["PSC"], an organization formed by attorneys representing petitioners in the OAP, litigated six test cases presenting two different theories on the causation of ASDs. The first theory alleged that the measles portion of the measles, mumps, rubella vaccine could cause ASDs. That theory was presented in three separate Program test cases during several weeks of trial in 2007. The second theory alleged that the mercury contained in thimerosal-containing vaccines could directly affect an infant's brain, thereby substantially contributing to the causation of ASD. That theory was presented in three additional test cases during several weeks of trial in 2008.

Decisions in each of the three test cases pertaining to the PSC's first theory rejected the petitioners' causation theories. *Cedillo*, 2009 WL 331968, *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst*, 2009 WL 332306, *aff'd*, 88 Fed. Cl. 473 (2009), *aff'd*, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder*, 2009 WL 332044,

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<sup>3</sup> The Theory 1 cases are *Cedillo v. Sec'y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Hazlehurst v. Sec'y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The Theory 2 cases are *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *King v. Sec'y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec'y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

*aff'd*, 88 Fed. Cl. 706 (2009).<sup>4</sup> Decisions in each of the three “test cases” pertaining to the PSC’s second theory also rejected the petitioners’ causation theories, and petitioners in each of the three cases chose not to appeal. *Dwyer*, 2010 WL 892250; *King*, 2010 WL 892296; *Mead*, 2010 WL 892248. Thus, the proceedings in these six test cases are concluded. Petitioners remaining in the OAP must now decide whether to pursue their cases, and submit new evidence on causation, or take other action to exit the Program. The petitioners in this case have failed to inform the court how they intend to proceed.

## II. Failure to Prosecute

It is petitioners’ duty to respond to court orders. Failure to respond to a court order because petitioners have failed to stay in contact with their attorney is deemed noncompliance with a court order, and noncompliance will not be tolerated. As I reminded petitioners in my June 15, 2011 order, failure to follow court orders, as well as failure to file medical records or an expert medical opinion, shall result in dismissal of petitioners’ claim. *Tsekouras v. Sec’y, HHS*, 26 Cl. Ct. 439 (1992), *aff’d per curiam*, 991 F.2d 810 (Fed. Cir. 1993); *Sapharas v. Sec’y, HHS*, 35 Fed. Cl. 503 (1996); Vaccine Rule 21(b).

## III. Causation In Fact

To receive compensation under the Program, petitioners must prove either 1) that Sarnai suffered a “Table Injury” – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Sarnai’s vaccinations, or 2) that Sarnai suffered an injury that was actually caused by a vaccine. See §§ 13(a)(1)(A) and 11(c)(1). Under the Vaccine Act, a special master cannot find a petitioner has proven their case by a preponderance of the evidence based upon “the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.” § 13(a). Petitioners have failed to file sufficient medical records and evidence in this case. Thus, an examination of the record did not uncover any evidence that Sarnai suffered a “Table Injury.” Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Sarnai’s autism spectrum disorder was vaccine-caused.

Accordingly, it is clear from the record in this case that petitioners have failed to demonstrate either that Sarnai suffered a “Table Injury” or that Sarnai’s injuries were “actually caused” by a vaccination. **This case is dismissed for insufficient proof and for failure to prosecute. The clerk shall enter judgment accordingly.**<sup>5</sup>

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<sup>4</sup> Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims.

<sup>5</sup> If petitioners elect to file a Petition for Fees and Costs pursuant to § 300aa-15(e), based on current case law petitioners will need to first establish proof of vaccination and the timely filing of their Petition for Vaccine Compensation, see §§ 16(a)(2) and 16(b), prior to any award for attorneys’ fees and costs being granted. See *Brice v. Sec’y, HHS*, 358 F.3d 865, 869 (2004), citing *Martin v. Sec’y, HHS*, 62 F.3d 1403, 1406 (1995).

**IT IS SO ORDERED.**

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Gary J. Golkiewicz  
Special Master