

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 12-742V

Filed: July 26, 2013

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SYDNEY RICH,

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Special Master

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Hamilton-Fieldman

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Petitioner,

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v.

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SECRETARY OF HEALTH  
AND HUMAN SERVICES,

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Proof of Vaccination

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Respondent.

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Andrew Downing, Phoenix, AZ, for Petitioner.

Tara J. Kilfoyle, Washington, DC, for Respondent.

## **ORDER AND RULING ON FACTS PERTAINING TO PETITIONER'S RECEIPT OF A COVERED VACCINATION**

On November 1, 2012, Petitioner, Sydney Rich, filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10, et seq. ("the Act"). The petition alleged that the seasonal influenza vaccine Petitioner received on September 26, 2010, caused various symptomology, ultimately resulting in Petitioner being hospitalized and diagnosed with Acute Disseminated Encephalomyelitis ("ADEM"). (Petition ("Pet."), preamble, ¶¶ 6-22).

This case was reassigned to Special Master Hamilton-Fieldman from Special Master Vowell on March 4, 2013. Respondent has raised the issue of whether Petitioner actually received a covered vaccine as plead in the Petition. The Visiting Nurse Association (the entity that allegedly administered the vaccination to Petitioner) is unable to locate a consent form for the Petitioner from September 26, 2010, nor is it able to find documentation specifically referencing vaccination administration, which would demonstrate that Petitioner received the vaccination.

### **I. Standards for Finding Vaccination**

A petitioner must prove as a threshold matter that she received a vaccine covered by the Act within the United States. 42 U.S.C. § 300aa-11(C)(1)(A) and (B).

In determining the persuasiveness of the evidence, the special master must assess “the record as a whole” and may not find that a petitioner received a vaccine “based on the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion.” 42 U.S.C. § 300aa-13(a)(1). Vaccine Rule 2 holds, in accordance with 42 U.S.C § 300aa-11 (c), that a petition shall be accompanied by “all available medical records supporting the allegations in the petition, including physician and hospital records relating to: the vaccination itself.” Vaccine Rule 2(c)(2)(A)(i).

Although strictly contemporaneous documentation of vaccination from a health care provider is the best evidence, its production is not an absolute requirement. *See Centmehaiey v. HHS*, 32 Fed. Cl. 612, 621 (1995) (“The lack of contemporaneous documentary proof of a vaccination . . . does not necessarily bar recovery.”) Vaccine Rule 2 states that “[i]f the required medical records are not submitted, the petitioner must include an affidavit detailing the efforts made to obtain such records and the reasons for their unavailability.” Vaccine Rule 2(c)(2)(B)(i). Furthermore, if petitioner’s claim is “based in any part on the observations or testimony of any person, the petitioner should include the substance of each person’s proposed testimony in a detailed affidavit(s) supporting all elements of the allegations made in the petition.” Vaccine Rule 2(c)(2)(B)(ii).

Special masters have found in favor of vaccine administration where direct documentation of vaccination is unavailable. In such cases, preponderant evidence has been found in other medical records and/or witness testimony. For example, corroborative, though backward-looking, medical notations have been found to tip the evidentiary scale in favor of vaccine receipt. *See Lamberti v. HHS*, No. 99-507V, 2007 WL 1772058 at \*7 (Fed. Cl. Spec. Mstr. May 31, 2007) (finding multiple medical record references to vaccine receipt to constitute adequate evidence of administration); *Groht v. HHS*, No. 00-287V, 2006 WL 3342222 at \*2 (Fed. Cl. Spec. Mstr. Oct. 30, 2006).

In addition to corroborative medical records, lay testimony has been found to be a sufficient basis for finding that a vaccine was administered as alleged. *Alger v. HHS*, No. 89-31V, 1990 WL 293408 at \*2, \*7 (Cl. Ct. Spec. Mstr. Mar. 14, 1990) (finding oral testimony from a parent and the doctor who administered the vaccine to be “more than adequate to support a finding that the vaccine was administered.”).

## **II. Discussion**

Petitioner has filed circumstantial evidence, which she contends demonstrates her receipt of the vaccination on September 26, 2010. This included various documentation and witness statements. To address this threshold question, the Court ordered a fact hearing be held to hear evidence on the sole issue of Petitioner’s receipt of the influenza vaccination. The parties submitted pre-hearing statements setting forth their respective positions. The hearing was conducted by videoconference on June 24, 2013, with Petitioner, her counsel, and Petitioner’s witnesses appearing in Oklahoma City, Oklahoma, and the Court and Respondent’s Counsel in Washington, D.C. Having

reviewed the relevant portions of the record and assessed the credibility of the witnesses, the Court now makes the following Findings of Fact and enters the following order:

## **A. Witness Testimony**

### **1. Heather Rich**

Heather Rich testified first for the Petitioner. Petitioner has previously submitted a statement from Heather Rich as Petitioner's Exhibit 16. Heather Rich testified:

- Heather Rich is Petitioner's Mother. (Tr. at 7).
- Heather Rich first learned that an immunization clinic was going to be held at her church a couple of days before vaccination administration, as it was in the church bulletin. She was not required to sign up beforehand. (Tr. at 14).
- Heather Rich made the decision that Petitioner should receive a flu shot in September of 2010 due to Petitioner having asthma. (Tr. at 8).
- Heather Rich made arrangements for Petitioner to receive a flu shot at their Church on September 26, 2010. (Tr. at 8).
- Heather Rich spoke with Petitioner the day before the flu shots were to be given at the church, and Petitioner told her that while she had to work that day, she would do everything she could to make it to the church for the vaccination. (Tr. at 14-15).
- After attending church on September 26, 2010, Heather Rich, along with her son, went to get their flu shots. Petitioner was not with them because she was at work. (Tr. at 8).
- Heather Rich paid for two shots – one for her son and the other for Petitioner. Heather Rich paid for the vaccinations with one check. She was shown Petitioner's Exhibit 13, and she identified Exhibit 13 as the check that she wrote for the vaccinations. The memorandum line on the check reads "Cody Schumacher, Sydney Rich, flu shots".
- Heather Rich spoke with Pastor Marilyn Lanphier (Pastor Lanphier was in charge of the flu shot clinic at the church) and informed Ms. Lanphier that she was writing a check for flu shots for both of her children (that Sydney would be coming to the clinic after she got off work for her vaccination). (Tr. at 9, 17).

- The check written by Heather Rich for her children's flu shots, Exhibit 13, was cashed by the Visiting Nurse Association, and it cleared Heather Rich's account. (Tr. at 9-10).
- It was Heather Rich's understanding, as she had discussed with Pastor Lanphier, Petitioner was going to come that afternoon to the church for her flu shot. However, later in the day, at around 2:30 p.m. on September 26, 2010, she received a phone call from Pastor Lanphier, and Pastor Lanphier was calling Heather Rich to tell her that the people from the Visiting Nurse Association were going to be leaving around 3:00 p.m., and that Petitioner had not shown up yet for her shot. (Tr. at 11-12, 15).
- Heather Rich called Petitioner at work and told Petitioner to get to the church as soon as possible to get her flu shot. (Tr. at 12, 15-16).
- Petitioner's work was located approximately two miles away from the church, and it took Petitioner approximately ten to fifteen minutes to drive from her place of work to the church.
- Petitioner called Heather Rich when she was on her way back to her dorm room later that same afternoon to tell Heather Rich that she had gotten the shot. (Tr. at 12). Heather Rich recalled this conversation because her daughter had been somewhat flippant with her concerning her insistence that Petitioner receive the shot. (Tr. at 12).
- Heather Rich is aware of a reference in Petitioner's medical chart that Petitioner tested positive for the H1N1 virus. Petitioner was hospitalized in January 2011 for what was eventually diagnosed as ADEM. Heather Rich's recollection was that the hospital initially ran a bunch of tests on Petitioner, and H1N1 was one of those tests. Everything came back negative. Then, almost two weeks into Petitioner's hospital stay, hospital staff told Heather Rich that Petitioner had tested positive for H1N1 in a different test that had been run. (Tr. at 12-13, 16).

## **2. Sydney Rich**

Petitioner, Sydney Rich, next testified. Petitioner has previously submitted a statement from Sydney Rich as Petitioner's Exhibit 1. Petitioner testified as follows:

- In the fall of 2010, Petitioner started at the University of Oklahoma as a freshman. (Tr. at 23).
- Petitioner was also working weekends at Panera Bread. She would come home Friday night, work the weekend, and then head back to the dorms on Sunday. (Tr. at 23, 28).

- Given a pre-existing problem with asthma, Petitioner's Mother wanted Petitioner to get the seasonal flu shot. (Tr. at 24). In September of 2010, Petitioner made the decision to get the seasonal flu shot.
- Petitioner recalls the date that she received the shot as Sunday, September 26, 2010. Prior to this date Petitioner and her mother had discussed the fact that Petitioner would get a flu shot on this date. (Tr. at 24-25). Petitioner knew that the clinic was at her church and that it was scheduled to end at 3:00 p.m. (Tr. at 26, 30-31).
- That Sunday, Petitioner was at work. If Petitioner departed her place of employment after receiving a call from Heather Rich at approximately 2:45 p.m., Petitioner could have made it to the church by 3:00 p.m. (Tr. at 20-21). She was scheduled to work until approximately 1:00 p.m. or 2:00 p.m., but was still at work at a bit before 3:00 p.m. She received a call from her Mother at around 2:30 p.m. or 2:45 p.m. Her mother was irritated at Petitioner because she had already paid for the shot and the Visiting Nurse Association staff was about to leave. (Tr. at 24-25, 28-29).
- Petitioner worked for another ten to fifteen minutes and then left work at close to 3:00 p.m. to make the ten to fifteen minute drive to the church to receive her shot. (Tr. at 25, 29-30, 34).
- On arrival at the church, Petitioner parked on the south side of the church and was let into the church by Pastor Lanphier. Pastor Lanphier led her straight to the room where the vaccinations were being given. She was the only vaccine recipient in the room. (Tr. at 25-26, 30-32).
- The nurse at the church had Petitioner sign a consent form about getting the shot. The nurse did not discuss possible side effects of the vaccination with her, and Petitioner admitted that she did not read the consent form. She then went to another part of the room and was given the flu shot in the left arm. (Tr. at 26, 31-33)
- Petitioner spoke with her Mother after receiving the shot to inform her that she had received the vaccination. (Tr. at 26-27, 33). As did her mother, Petitioner remembered that she was a bit flippant during this phone conversation. This factor is important to the Court as a finder of fact as it helps to explain why Petitioner and her mother remember this conversation in particular among the hundreds of conversations they have had over the years.

### 3. Shannon Robbins

Shannon Robbins next testified for Petitioner. Ms. Robbins's witness statement is filed as Petitioner's Exhibit 2. Ms. Robbins has also responded to Interrogatories that have been filed with the Court as Document 16. Ms. Robbins testified as follows:

- Shannon Robbins is employed by the Visiting Nurse Association, a non-profit United Way agency. There is a branch of the Visiting Nurse Association in Oklahoma City that provides wellness services. (Tr. at 36).
- The Visiting Nurse Association has a flu immunization program that goes into the community and provides flu shots at nursing homes, senior centers, churches, and other businesses. (Tr. at 36-37).
- The Visiting Nurse Association administered flu shots at Memorial Christian Church on September 26, 2010. This clinic had a nurse and a clerk. The clerk would help people fill out paperwork, do crowd control, and help the clinic run smoothly for the nurse. The clerk would not give vaccinations, but would help people sign their consent forms. (Tr. at 37, 44-45).
- A blank site sheet is given out to the nurse to advise where the clinic staff should be, what time they are supposed to be there, and how many vaccinations might be needed for a particular location. At the end of the day, the site sheet is also the tally sheet to document how many shots were actually given. (Tr. at 38).
- The Visiting Nurse Association's procedure for documenting vaccinations given at a particular flu shot clinic location specifies that each client fills out a consent form, and then those consent forms are put with the site sheet from a particular location. Each individual fills out a separate consent form. (Tr. at 37).
- The nurses will always count the consent forms and fill out the site sheets at the clinic. Additionally, the Visiting Nurse Association would also reconcile the number of payments and the number of vaccinations given at a particular clinic. (Tr. at 37-38, 47-48).
- The consent form is a one-sided document. The Visiting Nurse Association retains the original; clients are not provided with a copy. (Tr. at 45).

- At the end of a given clinic, once the money is accounted for, the signed consent forms are kept together with the site sheets, and filed by date and location. (They also maintain a separate file on each client, but the only document that file would contain would be a copy of the consent form). (Tr. at 45-46). After a clinic, the consent forms and site sheets stay at the Visiting Nurse Association office for a few months until after the flu season is over, and then they are sent to an off-site storage center where health records are stored. (Tr. at 45-46).
- Ms. Robbins identified the site sheet for Memorial Christian Church on September 26, 2010, as the last page of Document 16 filed in this case. The site sheet for September 26, 2010 at Memorial Christian Church reflects they estimated they would be giving 75 flu shots in this particular clinic. (Tr. at 39-40).
- The site sheet reflects that at Memorial Christian Church, 11 flu shots were actually given to clients who paid cash (including checks). An additional 11 flu shots were given to Medicare clients. This makes a total of 22 flu shots documented as being administered at Memorial Christian Church on September 26, 2010, and of those 22, three were pediatric patients. (Tr. at 40-41).
- When Petitioner's counsel contacted Ms. Robbins about Petitioner's consent form, an effort was made, by the Visiting Nurse Association, to locate Sydney Rich's signed consent form. They pulled the file for Memorial Christian Church on September 26, 2010, documenting that 22 shots were administered, but only 21 consent forms. The Visiting Nurse Association also retrieved all of the 2010 and 2011 records, but they were unable to locate a signed consent form for Petitioner. (Tr. at 41-42, 45-46).
- Because the site sheet revealed 22 shots were given, but the file on Memorial Christian Church for September 26, 2010, only contained 21 consent forms, Ms. Robbins concluded, and the Court agrees, that the Visiting Nurse Association is missing a consent form for the date in question. (Tr. at 42).
- Although no one knows for sure if it was followed in this case, the Visiting Nurse Association's procedure, if an inquiry was made about a specific vaccine/ vaccination, would have been as follows: If Pastor Lanphier had called the Visiting Nurse Association inquiring about a problem with one of her parishoners' flu vaccines, the Visiting Nurse Association representative would have told her that they could not disclose anything specific about the vaccination to her unless she was the vaccinee or the vaccinee's parent or guardian. The Visiting Nurse Association

representative would have suggested that the vaccinee/vaccinee's family member contact the Visiting Nurse Association. The Visiting Nurse Association would have pulled the site sheet and associated consent forms awaiting that contact. In the context of such a contact, the Visiting Nurse Association would have pulled the consent form of the individual patient about whom the inquiry was being made; i.e., the Visiting Nurse Association would have pulled Petitioner's consent form from the file. It is possible the Visiting Nurse Association misplaced Petitioner's consent form during this process. (Tr. at 37- 44).

#### **4. Marilyn Lanphier**

Marilyn Lanphier next testified for Petitioner. Ms. Lanphier's witness statement is filed as Petitioner's Exhibit 14. Ms. Lanphier testified as follows:

- Ms. Lanphier is currently employed by the Oklahoma Department of Human Services. In September of 2010, she was the health minister and faith community nurse at Memorial Christian Church in Oklahoma City, Oklahoma. She started her employment with the church in 2004 (Tr. at 57, 65).
- Ms. Lanphier's job as health minister was to assist her congregation with the prevention of illness. Given the difficulty in obtaining flu shots the prior year, in 2010, Ms. Lanphier contacted the Visiting Nurse Association to come and administer flu shots to her congregation. The scheduled date for the flu shot clinic at Memorial Christian Church was Sunday, September 26, 2010. The clinic was specifically set following church for convenience to the congregation members who wanted to get vaccinated. (Tr. at 57-58, 66-67).
- Ms. Lanphier has known Petitioner and her Mother, Heather Rich, for approximately ten to fifteen years through the congregation of Memorial Christian Church. (Tr. at 58). The congregation has approximately 100 total members, and 50-65 members would attend church on any given Sunday. (Tr. at 66).
- Church typically ended at approximately 12:00 p.m., and the flu clinic was to begin after church at around 1:00 p.m. (Tr. at 68). Ms. Lanphier recalls seeing Heather Rich following church on September 26, 2010. Ms. Lanphier recalls Heather Rich stating that she was going to pay for two vaccinations, and that one of those was for Petitioner, but Petitioner was at work at Panera Bread and would be coming later. (Tr. at 58-59).

- Ms. Lanphier testified that at approximately 2:30 or 3:00 in the afternoon of September 26, 2010, she called Heather Rich to tell her that the Visiting Nurse Association was getting ready to leave and Petitioner had not yet come to the church for her vaccination. Heather Rich asked Ms. Lanphier to have the nurse wait and that she would call Petitioner. (Tr. at 59-60, 69-70). Heather Rich called Ms. Lanphier back to tell her that she had spoken to Petitioner and that Petitioner was on her way to the church. (Tr. at 76).
- A short time later, Petitioner came to Memorial Christian Church on September 26, 2010. It is roughly a ten minute drive from Petitioner's place of work and the church. Petitioner was still in her work uniform. Ms. Lanphier was watching for Petitioner because they were waiting on Petitioner before they closed the clinic. (Tr. at 60-61, 71-72, 76-77).
- The Visiting Nurse Association sent two people, one to give the immunization and then also a clerk. They were set up in separate rooms to help the flow of the immunizations. Each person that came in to get an immunization would go into one room to sign the consent form and then went into the next room to get the immunization. (Tr. at 61).
- Ms. Lanphier recalls Petitioner going in to sign her consent form, although she did not actually witness her signing a form. She then witnessed Petitioner going into the room where the shots were given. Ms. Lanphier stated that she saw this all take place because Petitioner was the only one there and as soon as they were finished with Petitioner, they could close down the clinic. (Tr. at 62-63).
- Ms. Lanphier did not keep any paperwork on the flu clinic. She relied on the Visiting Nurse Association for that, and for collecting the money. (Tr. at 63, 72).
- In January of 2011, Ms. Lanphier learned that Petitioner had been hospitalized and that it was possibly due to her getting vaccinated. Ms. Lanphier contacted the Visiting Nurse Association and gave them the name of the church and date of the flu shot clinic. She asked them if they had received any other reported incidents of ill effects following the immunizations. Ms. Lanphier was told that they were not aware of any. (Tr. at 63-64, 74-75).

### **III. Conclusion**

The Court has considered the testimony of the witnesses presented at the hearing, as well as the exhibits filed by Petitioner. The Court found the witnesses credible, and the

sequence of events they described plausible. The Court therefore finds that Petitioner, Sydney Rich, has established by preponderant evidence that she received the influenza vaccination at Memorial Christian Church in Oklahoma City, Oklahoma on September 26, 2010. Petitioner has satisfied her burden as to receipt of a vaccine listed on the Vaccine Injury Table within the United States. *See*, 42 U.S.C. § 300aa-11(C)(1)(A) and (B).

The Order makes no determination of any kind as to whether Petitioner's alleged damages are a result of an adverse reaction to her influenza vaccination. That will be the subject of future proceedings. However, the Court notes that the positive H1N1 test result was in January 2011, when Petitioner was hospitalized for ADEM. Petitioner received her vaccination on September 26, 2010, and began to suffer fatigue, weakness, dizziness, and headaches only a few weeks thereafter.

Respondent shall file a status report no later than 14 days from the date of this Order, indicating a realistic deadline for the submission of Respondent's Rule 4 (c) report.

**IT IS SO ORDERED.**

/s/ Lisa Hamilton-Fieldman  
Lisa Hamilton-Fieldman  
Special Master