

I

BACKGROUND

This case concerning Jordan King is one of more than 5,000 cases filed under the Program in which it has been alleged that a child's disorder known as "autism," or a similar disorder, was 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 5,000 cases in this court, was set forth in my decision filed in the case of *Cedillo v. Secretary of HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), and will not be repeated here. However, a very brief summary of that history follows.

A. The Omnibus Autism Proceeding

Beginning in 1998, certain theories became popular, suggesting that the measles-mumps-rubella ("MMR") vaccine, and/or a mercury-based preservative known as "thimerosal" contained in several childhood vaccinations, might be causing the neurodevelopmental disorder known as autism. The emergence of those theories led to a large number of claims filed under the Program, each alleging that an individual's autism, or a similar disorder, was caused by the MMR vaccine, by thimerosal-containing vaccines, or by both. To date, more than 5,000 such cases have been filed with this court, and most of them remain pending.

To deal with this group of cases involving a common factual issue--*i.e.*, whether these types of vaccinations can cause autism--the Office of Special Masters (OSM) devised special procedures. On July 3, 2002, the Chief Special Master, acting on behalf of the OSM, issued a document entitled the *Autism General Order #1*,³ which set up a proceeding known as the Omnibus Autism Proceeding (hereinafter sometimes the "OAP"). In the OAP, a group of counsel selected from attorneys representing petitioners in the autism cases, known as the Petitioners' Steering Committee ("PSC"), was charged with obtaining and presenting evidence concerning the *general issue* of whether those vaccines can cause autism, and, if so, in what circumstances. The evidence obtained in that general inquiry was to be applied to the individual cases. *Autism General Order #1*, 2002 WL 31696785, at *3, 2002 U.S. Claims LEXIS 365, at *8.

³The *Autism General Order #1* is published at 2002 WL 31696785, 2002 U.S. Claims LEXIS 365 (Fed. Cl. Spec. Mstr. July 3, 2002). I also note that the documents filed in the Omnibus Autism Proceeding are contained in a special file kept by the Clerk of this court, known as the "Autism Master File." An electronic version of that File is maintained on this court's website. This electronic version contains a "docket sheet" listing all of the items in the File, and also contains the complete text of most of the items in the File, with the exception of a few documents that are withheld from the website due to copyright considerations or due to § 300aa-12(d)(4)(A). To access this electronic version of the Autism Master File, visit this court's website at www.uscfc.uscourts.gov. Select the "Vaccine Info" page, then the "Autism Proceeding" page.

Ultimately, the PSC elected to present two different theories concerning the causation of autism. The first theory alleged that the *measles* portion of the MMR vaccine can cause autism, in situations in which thimerosal-containing vaccines previously weakened an infant's immune system. 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 the thimerosal-containing vaccines can *directly affect* an infant's brain, thereby causing autism. That theory was presented in three additional "test cases," including this *King* case, during several weeks of trial in 2008.

On February 12, 2009, decisions were issued concerning the three "test cases" pertaining to the PSC's *first* theory. In each of those three decisions, the petitioners' causation theories were rejected. I issued the decision in *Cedillo v. Secretary of HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). Special Master Patricia Campbell-Smith issued the decision in a second case, *Hazlehurst v. Secretary of HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). Special Master Denise Vowell issued the decision in the third case, *Snyder v. Secretary of HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009).

Decisions have not yet been issued in the test cases concerning the PSC's *second* theory, including this *King* case. The parties are currently still engaged in preparing post-hearing briefs concerning those cases.

B. The Request for "Interim" Fees in this Case

On November 4, 2008, the petitioners in this case filed their application for interim fees and costs. Respondent filed a response on February 6, 2009, and a number of additional materials addressing the application have been filed by both parties since that time.

In their application, the petitioners sought a total of \$7,202,653 for interim fees and costs. This total reflected the fact that this case was, as explained above, one of the "test cases" in the OAP. Because this was a "test case," in which the petitioners sought to present *all* of the "general causation" evidence concerning the theory that thimerosal-containing vaccines can cause autism, eleven different law firms participated in the development and presentation of the evidence, while five expert witnesses prepared expert reports and testified at length on petitioners' behalf during the evidentiary hearing. The high total sought reflects the participation of all those law firms and expert witnesses.

In addition, in this fees application the PSC lawyers also seek compensation for *several years* of work concerning the Omnibus Autism Proceeding. During the period between 2002 and 2007, PSC lawyers were engaged in extensive discovery proceedings and other preliminary matters that set the stage for the beginning of the "test case" hearings in 2007. The PSC attorneys now seek, in this application, compensation for those years of work.

This fees application dwarfs any previous fees application in the history of the Program, in the amount sought, the number of law firms involved, and in the scope and complexity of the disputes between the parties concerning individual issues. During unrecorded telephonic status conferences, I have discussed with counsel for both sides strategies for most efficiently dealing with these many issues. Among other discussions, during an unrecorded telephonic status conference on May 11, 2009, counsel for both sides agreed that due to the unique nature of this case as a “test case” in the Omnibus Autism Proceeding, neither side would object to the issuance of a *series* of interim awards, one interim award as to each firm, to the several law firms that participated in the presentation of evidence in this case.

It is also noteworthy that a similar “interim fees” application was filed in the *Cedillo* case on August 19, 2008, seeking \$2.2 million in fees and costs, incurred by seven different law firms, pertaining to the efforts involved in presenting the PSC’s above-described *first theory* of autism causation in 2007. In decisions issued on March 11 and May 21, 2009, I have awarded interim fees to four of the seven firms involved in that case,⁴ while the application remains pending as to the other three firms.

Ordinarily, it is my practice, and that of other Program special masters, to act on fees applications in a very prompt fashion. In light of the scale and complexity of the fees applications in both this case and the *Cedillo* case, and the timing of those applications, however, that has not been possible with respect to these applications. My first priority in recent months was resolution of the entitlement issue in *Cedillo*, which was completed with the issuance of my 174-page decision in that case on February 12, 2009. I have also in recent months spent considerable time studying the entitlement issue in this *King* case, and on a variety of matters in other cases, both autism cases and non-autism cases. I will continue to work on the pending interim fees applications, concerning both the eleven firms involved in this *King* application, and the three firms yet to be addressed in the *Cedillo* application, and I will resolve those applications as soon as possible, likely in a *series* of decisions. On July 10, 2009, I filed a decision resolving the request of one of the law firms involved in this *King* case.⁵ In this Decision I resolve the request from a second law firm, that of attorney Edward Kraus.

II

DISCUSSION

An interim award of fees and costs is permissible, if appropriate under the particular circumstances, in a Program case. *Avera v. Secretary of HHS*, 515 F.3d 1343 (Fed. Cir. 2008). I

⁴The first of those two decisions was published. *Cedillo v. Secretary of HHS*, No. 98-916V, 2009 WL 811449 (Fed. Cl. Spec. Mstr. Mar. 11, 2009).

⁵That decision was published. See *King v. Secretary of HHS*, No. 03-584V, 2009 WL _____ (Fed. Cl. Spec. Mstr. July 10, 2009).

find that the circumstances are appropriate for such an interim award at this time in this case. In the vast majority of Program cases, only *one* award for *interim* fees and costs, if any, would be appropriate. In this case, however, the extremely unusual circumstances justify more than one interim award, and I agree with the parties that this is the appropriate way to proceed.

In addition, I conclude that the petitioners filed this petition in good faith, and with a reasonable basis for the claim, so that an award is appropriate pursuant to § 300aa-15(e)(1).

Further, after reviewing the entire record of this case and the Omnibus Autism Proceeding in general, I conclude that the amounts set forth herein are reasonable and appropriate compensation for the services provided by Mr. Kraus.

A. Positions of the Parties

Attorney Edward Kraus submitted his application for \$4,000.00 in fees and \$594.14 in costs as Tab O of the Petitioners' Application for Interim Fees and Costs on November 4, 2008 (hereinafter "P-1"). Mr. Kraus requests fees for sixteen hours spent traveling to and attending OAP status conferences and PSC meetings in November of 2004 and October of 2006. (P-1, p. 6269.) He charges a rate of \$250 per hour. (*Id.*) His claimed costs are for a hotel and airfare between Chicago and Washington, D.C. in connection with the November 2004 meetings. (*Id.* at 6270-71.)

Respondent does not object to Mr. Kraus's hourly rate, nor to compensation for a reasonable amount of time spent in attending the PSC meetings. (Respondent's Response to Petitioners' Request for Interim Attorneys' Fees and Costs, Feb. 6, 2009, (hereinafter R-1), p. 109.) Respondent objects to twelve hours of Mr. Kraus's time and all of his costs. (*Id.*) Specifically, respondent argues that it is inappropriate to compensate Mr. Kraus for attending the Court of Federal Claims *judicial conference*, which was held on the same days as the OAP status conferences and PSC meetings in 2004 and 2006. (Respondent's Memorandum of Law in Support of Respondent's Objections to the Fees and Costs Requested in the King Case, Feb. 6, 2009, p. 17.)

Mr. Kraus's reply argues that the PSC meetings that he attended, along with his travel time, account for all sixteen hours for which he seeks compensation. (PSC Reply in Support of Interim Fee Petition, Tab 7, Mar. 27, 2009 (hereinafter P-2), p. 1.) Additionally, he argues that he was justified in attending the meetings in person, and thus incurring travel expenses. (P-2, p. 2.) Mr. Kraus provides no explanation of exactly how the sixteen hours were divided between travel and meeting attendance.

B. Time Spent in PSC Meetings and OAP Status Conferences

Mr. Kraus, as an attorney representing approximately twenty petitioners in the OAP, acted reasonably on behalf of such petitioners by participating in PSC meetings and OAP status conferences in November 2004 and October 2006. I conducted OAP status conferences on November 10, 2004, and October 25, 2006, and encouraged all attorneys with cases pending in the OAP to attend. (*Autism Master File*, Notice Re Judicial Conference and Special “In-Person” Autism Status Conference, Sept. 14, 2004, p. 1; *Autism Master File*, Supplemental Notice Re Judicial Conference and Special “In-Person” Autism Status Conference, Sept. 1, 2006, p. 1.) I also encouraged participation by attorneys in PSC activities. The PSC held meetings in Washington in conjunction with the OAP status conferences. These OAP status conferences and PSC meetings were also, intentionally, scheduled to coincide with the court’s general judicial conferences on those same days. Accordingly I find it reasonable for Mr. Kraus to bill for time spent at the *PSC meetings* and *OAP status conferences* in 2004 and 2006.

The record of this case does not indicate exactly how many hours Mr. Kraus spent at the PSC meetings and OAP status conferences. However, I recall that each of the OAP status conferences lasted approximately two hours, and that on each occasion I was informed that the PSC meetings had lasted about two hours. Accordingly, it seems likely that on each of the two trips Mr. Kraus spent about four hours on PSC/OAP matters. Therefore, I will compensate him for eight hours of work at his ordinary hourly rate of \$250. For the additional eight claimed hours, I will compensate him at the “travel rate” of one-half his hourly rate, as is the common practice in Program proceedings. *Shaw v. Secretary of HHS*, No.01-707V, 2009 WL 1010058, at *3 n.2 (Fed. Cl. Spec. Mstr. Mar. 27, 2009); *Kuttner v. Secretary of HHS*, No. 06-195V, 2009 WL 256447, at *10 (Fed. Cl. Spec. Mstr. Jan.16, 2009); *Isom v. Secretary of HHS*, No.94-770V, 2001 WL 101459, at *3 (Fed. Cl. Spec. Mstr. Jan. 17, 2001).

C. Expenses

Lastly, Mr. Kraus seeks reimbursement for \$594.14 in expenses incurred on his 2004 trip to Washington, D.C. (P-1, p. 6270-71.) Mr. Kraus’s flight between Chicago and Baltimore cost \$307.19, and his hotel bill was \$286.95. Because I have already determined that his attendance at the D.C. status conferences and PSC meetings was reasonable, it follows that it was reasonable for Mr. Kraus to incur these expenses. Further, I find the price of both his hotel and flight to be reasonable and well within the PSC’s guidelines on fees and costs associated with the general causation issues in this case. (Court Ex. I, p.1-2.) Mr. Kraus shall be reimbursed for these expenses.

III

CONCLUSION

Therefore, Mr. Kraus shall be compensated for eight hours of work at a rate of \$250 per hour, eight hours of travel at a rate of \$125 per hour, and \$594.14 in expenses for his work related to the general causation issues in this case through July 2008. Pursuant to § 300aa-15, I hereby award \$3,594.14, to be awarded in the form of a check payable jointly to petitioners and their counsel of record. This amount is to be promptly forwarded to Mr. Kraus.

In the absence of a timely-filed motion for review of this Decision, the Clerk of this court shall enter judgment accordingly.

/s/ George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master