

OFFICE OF SPECIAL MASTERS

No. 90-3128V

(Filed: June 30, 1999)

DR. and MRS. ROBERT A. HAUGH, as *
Parents and Legal Representatives of *
KEVIN HAUGH, a Minor, *

Petitioners, *

TO BE PUBLISHED

v. *

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

Curtis R. Webb, Twin Falls, Idaho, for Petitioners.

Glenn A. MacLeod, United States Department of Justice, Washington, DC, for Respondent.

DECISION ON ATTORNEY'S FEES AND COSTS

French, Special Master.

This matter is before the special master on Petitioners' petition for attorney's fees and costs ("Petition"), filed under the National Vaccine Injury Compensation Program (the "Act") on February 1, 1999. On April 20, 1999, Respondent filed an opposition to the Petitioners' Petition ("Opposition"). Finally, on May 3, 1999, Petitioners filed a supplemental affidavit of counsel, Curtis Webb, and a supplemental reply to Respondent's Opposition ("Reply").

A brief history of this case is as follows. Respondent filed a Rule 4 report on August 18, 1995, recommending that compensation be denied. An evidentiary hearing concerning the issue of entitlement was held on March 5, 1996 in Washington, DC. Factual testimony was heard at that time. Following the factual hearing, expert testimony was given at a hearing in Boston, Massachusetts, on May 11, 1998. Following the second hearing, the undersigned issued a decision denying compensation to Petitioners.

The Vaccine Act permits an award of fees and costs when the Petitioners are denied compensation, as here, if the special master determines that the petition was filed in good faith and that a reasonable basis existed for the claim. Section 15(e)(1). The undersigned finds that these criteria have been met in the instant case and, therefore, an award of fees and costs is appropriate.

I. FEES

The lodestar method is employed by this court to determine reasonable attorney's fees. See *Blanchard v. Bergerson*, 489 U.S. 87 (1989); *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." 489 U.S. at 94 (quoting *Blum*, 45 U.S. at 888). The court is given the discretion, however, to adjust the initial estimate if "a fee is charged out of time with the nature of the services rendered." *Pierce v. Underwood*, 487 U.S. 552, 581 (1988) (Brennan J., concurring).

To determine the number of hours reasonably expended in a particular case, the court must "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission." *Hensley*, 461 U.S. at 434. The reasonableness of the attorney fee rate claimed is "to be calculated according to the prevailing market rates in the relevant community...." *Blum*, 465 U.S. at 896. "The burden is on the fee applicant to produce satisfactory evidence -- in addition to the attorney's own affidavits -- that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonable comparable skill, experience, and reputation." *Id.* at 896.

Hourly Rates

Petitioners request a total of \$29,704.50 in attorney's fees in this retrospective case.⁽²⁾ Specifically, Petitioners request an hourly rate of \$140, \$150, and \$175 for the services of Mr. Webb during his representation of this case.⁽³⁾ Respondent objects to the hourly rate of \$175 as excessive and unsupported.

It is the burden of the fee applicant to produce satisfactory evidence which demonstrates that the requested hourly rate is the prevailing market rate in the relevant community for similar services by lawyers of comparable skill, experience, and reputation. *Blum v. Stenson*, 465 U.S. 886, 895 (1984). Proof of prevailing market rates may be demonstrated in a number of ways, including: (1) affidavits of other attorneys or experts; (2) citations to prior precedents showing reasonable rate adjudications for fee applicant, for comparable attorneys, or for comparable cases; (3) references to fee award studies showing reasonable rates charged or awarded in the relevant community; (4) testimony of experts or of other attorneys in the relevant community; (5) discovery rates charged by the opposing party; and (6) reliance on the court's own expertise to recognize applicable prevailing rates. Newberg, **ATTORNEY FEE AWARDS** 198 (1986).

Respondent asserts that Mr. Webb's hourly rate should be reduced to reflect the hourly rate of an attorney similarly situated and in the same geographic area. In support of her claim, Respondent cites the 1998 Small Law Firm Survey (Response, at Tab A) and a 1995 Wyoming State Bar Member Survey (Response, at Tab B). Respondent contends that \$175 is an excessive rate to be charged by an attorney practicing in Twin Falls, Idaho and practicing in this geographic

area does not warrant the premier rate of \$175.⁽⁴⁾

In support of his requested hourly rates, Mr. Webb provided not only affidavits of attorneys and a District Judge in Twin Falls, Idaho but a thorough and detailed rebuttal to Respondent's Opposition. Although Respondent complains that the affidavits are conclusory, that criticism does not move the court to consider the statements of two lawyers and a District Court judge totally irrelevant.⁽⁵⁾ Although one might request supplemental information if one was completely ignorant of the skills and reputation of the attorney, that is not necessary in the instant case. There are many aspects of Mr. Webb's practice that are significant to the special master. Mr. Webb not only has considerable experience under the Program but he has demonstrated great skill, efficiency and knowledge in numerous cases before this special master. His competent handling of difficult and complex litigation before the special master is not easily matched by other Program attorneys and his understanding of vaccine cases assists his clients as well as educating the undersigned. The undersigned carefully reviewed Respondent's arguments and objections but finds them unwarranted. Further, the court is dismayed by the fact that Respondent has raised strong objections to an hourly rate that the undersigned finds eminently reasonable for Mr. Webb. For the reasons stated below, the special master will award Mr. Webb an hourly rate of \$175.

First, Respondent strongly contends that the geographic location of Mr. Webb does not warrant the premier rate of \$175 per hour. Although Mr. Webb lives in a less populated area than other Program attorneys, he is one of the most well-respected, experienced and practiced attorneys in his geographic location and Program-wide. In addition, Mr. Webb's practice under the Program involves travel and representation nationwide. His cases are not confined to Twin Falls, Idaho. For example, Mr. Webb has presented cases, before the undersigned special master alone, in which petitioners reside in locations from as far away as Florida, Texas and Chicago, Illinois. Other special masters could undoubtedly lengthen that list. Respondent provided information that an attorney similarly situated to Mr. Webb would average an hourly rate considerably less than \$175. This reasoning does not take into account the fact that Mr. Webb must advance many of the costs of his cases and in addition, must wait months or even years for his fees and costs to be reimbursed by this Program.⁽⁶⁾ Respondent would be hard pressed to find an attorney with such a similar practice in Twin Falls, Idaho.

Second, the undersigned feels most strongly that if Respondent objects to the fees of Mr. Webb and attorneys similar to Mr. Webb, this will not only force experienced and valued Program attorneys to leave the practice of vaccine cases but it may also have a chilling effect on new attorneys under the Program to pursue these types of cases. It is fundamental that Petitioners and Respondent alike be represented by efficient and competent counsel. Thus, Petitioners counsel should be awarded reasonable attorneys fees. To deny Petitioners counsel reasonable attorney's fees would serve as an injustice to all Petitioners and thwart the objectives of the National Vaccine Injury Compensation Program.

Third, Mr. Webb has been awarded an hourly rate of \$175 in other Program cases. In Evenson v. Secretary of HHS, No. 96-0115V, slip op. (Fed. Cl. Spec. Mstr. Sept. 23, 1998) (unpublished), Special Master Edwards awarded Mr. Webb an hourly rate of \$175. In addition, Special Master Wright awarded Mr. Webb \$175 per hour in the case of Murphy v. Secretary of HHS, No. 93-0194V, slip op. (Fed. Cl. Spec. Mstr. Oct. 6, 1998) (unpublished).⁽⁷⁾ Although these cases may not be directly analogous, it is evidence that the services of Mr. Webb have been compensated at the rate that the undersigned finds reasonable for Mr. Webb.

Number of Hours Claimed

Petitioners request reimbursement for 189.9 hours of attorney time for the services of Mr. Webb. Respondent objects to the total number of hours requested by Petitioners as excessive and inefficient, citing Mr. Webb's ample expertise under the Program. Further, Respondent points out to the court that this case was a relatively simple on-Table encephalopathy case and involved no issues secondary to entitlement. Finally, Respondent notes that many of the hours claimed by Mr. Webb were spent performing paralegal tasks and for that Mr. Webb should be reimbursed at a paralegal rate not to exceed \$50 per hour.

Petitioners do provide explanation for the number of hours required in pursuit of this litigation. First, Petitioners state that none of the tasks identified by Respondent were paralegal tasks and that an attorney for the Petitioners is better suited, than an employee of the attorney, to perform the tasks noted by Respondent, including drafting and reviewing correspondence, communicating with the special master's law clerk and scheduling matters. Second, Mr. Webb cites Dr. Haugh's, the injured's father, intense involvement in the case and the number of hours devoted to the necessary communication with the family, the unsuccessful effort to reach a negotiated settlement, and the necessity of two hearings on the issue of entitlement. According to Mr. Webb, all of the time he expended in representing his clients was reasonable and necessary, and the court is fully cognizant of Mr. Webb's reputation for integrity and diligence in legal matters.

As an initial matter, the undersigned after careful and thorough review of the above-captioned matter, finds that Mr. Webb is an attorney with tremendous experience under the Program and that this case was well-argued and well-fought. Not only did Mr. Webb represent his client with skill, zeal and tenacity, so also the attorney for Respondent was required to do so in this case. Mr. Webb simply presented his case in opposition to the strong defenses raised by Respondent, in what Respondent now unfairly calls a simple on-Table encephalopathy. Mr. Webb discussed in more detail the proceedings in this case, including the attempts to reach settlement and the fact that Mr. Webb had to prepare for at least two hearings which were unforeseeably canceled. These facts are persuasive evidence that Mr. Webb's requested number of hours are more reasonable than what Respondent claims.

First, the undersigned is well aware of the fact that Mr. Webb performs many of the functions in his office without the aid of secretarial or paralegal support. Although, in other Program cases, the undersigned may take issue with similar costs claimed by other petitioner's counsel, that will not be so in the instant case.

Second, it is not surprising to the undersigned that communication with clients can be intensive and time consuming. Failure to communicate with a client or keep a client well-informed concerning the developments of the case can amount to unreasonable action by the attorney or result in malpractice liability as Respondent notes in her Opposition. It is evident from Mr. Webb's billing records that he did spend a large amount of time in communication with his clients. However, the undersigned does not feel that she can second guess at this juncture how much time would be reasonable given the circumstances with this individual client. It is easy for Respondent to object to the sheer number of hours Mr. Webb spent conferring with his client, but it is quite another to simply deny those hours without evidence to sustain their denial. Mr. Webb was in the position to represent his client in the most reasonable way he saw appropriate. The undersigned cannot second guess the judgment of an attorney at this point in time especially where there is no basis to believe that the communication was unnecessary in dealing with a client such as Dr. Haugh. Therefore, Mr. Webb will be awarded the total amount of hours requested.

Medical Expert Fees

Respondent raises objections to the fees charged by Petitioners' medical expert, Dr. Marcel Kinsbourne. The objection

is based on Respondent's contention that this was a relatively simple case and that the medical issues were relatively uncomplicated, especially for an expert like Dr. Kinsbourne who possess extensive Program experience. Respondent avers that a rate of \$200 per hour is commensurate with the services provided in this case.

The undersigned is very familiar with the expert medical services provided by Dr. Kinsbourne. He has testified in many cases before the special master and has always testified professionally and extremely competently. The undersigned considers Dr. Kinsbourne to be an excellent expert witness in Program cases. He has always proved to be exceptionally helpful to the court. The special master has awarded \$300 per hour for Dr. Kinsbourne's services in other cases and awards Petitioners that rate for Dr. Kinsbourne's services here.

Apportionment of Fee Award

Respondent raises an objection to Petitioners' request that Mr. Webb be compensated first and that Petitioners will in essence take what is left over from the \$30,000 in this retrospective case. Petitioners state in their Petition that "Petitioners wish that their attorney be reimbursed before they are." Fee Petition at 6. Respondent further contends that Mr. Webb should be required to submit a statement signed by his clients which indicates the above sentiment stated in the Petition. In a supplemental affidavit filed by Mr. Webb, he addresses the issue of apportionment of the fee award by simply expressing that his clients, Dr. and Mrs. Robert Haugh, have expressed to him that Mr. Webb should be paid his attorney's fees and costs before they are reimbursed for their own costs. Mr. Webb did not submit a signed statement by his clients. Further, in Petitioners' reply, Mr. Webb states that it would be unreasonable to require his clients to submit further documentation of their desires. He feels that Respondent's objection in this regard is simply a tactic to delay the award of attorney's fees and costs.

Respondent provided the special master a more persuasive argument as to why the apportionment of the fee award should not be as Petitioners wish. It is noted that Respondent's counsel knows of no precedent in the Vaccine Program that states that counsel gets paid first and then Petitioners can have "what's leftover" absent a written agreement that so states that desire. Opposition at 12. Accordingly, it is the purpose behind General Order #9 that Petitioners receive compensation for their costs and further, the Vaccine Act clearly provides that compensation should be awarded to a Petitioner and that payment of awards should be to a Petitioner, not to his or her counsel. Respondent has a legitimate interest to protect--that of ensuring that the government pays the proper parties the proper amount. The court agrees that this interest is legitimate. Therefore, the court will award the Petitioners the full amount that is requested in the documentation filed in compliance with General Order #9. Petitioners are awarded \$6,270.00 for their costs.

III. CONCLUSION

Having determined that Petitioners are entitled to an award greater than \$30,000, the special master shall, in accordance with statutory provisions, award a total of \$30,000 in attorney's fees and costs which includes the Petitioners' costs of \$6,270.00.⁽⁸⁾ Pursuant to 42 U.S.C. § 300aa-15(e) and Vaccine Rule 13, Petitioners are hereby awarded \$6,270.00 in costs and \$23,730.00 in attorney's fees and costs.⁽⁹⁾ In the absence for a motion for review filed pursuant to RCFC Appendix J, the Clerk is directed to enter judgment in accordance herewith.⁽¹⁰⁾

IT IS SO ORDERED.

E. LaVon French

Special Master

1. The statutory provisions governing the Vaccine Act are found in 42 U.S.C.A. §§ 300aa-1 *et seq.* (West 1991 & Supp. 1998). Reference will be to the relevant subsection of 42 U.S.C.A. § 300aa.
2. Petitioners' amended their original request for attorney's fees. In their Reply, Petitioners added \$2,362.00 to the total amount requested for attorney's fees to reflect the additional time spent by Mr. Webb in responding to Respondent's Opposition.
3. Mr. Webb has increased his fees during his representation of his clients in this matter. Through July 1, 1996, Mr. Webb's hourly rate was \$140. Mr. Webb increased his hourly rate to \$150 through December 31, 1997 and from then until the present, Mr. Webb's hourly rate has been \$175.
4. It has been held in some cases that \$175.00 is a premier hourly rate under the Program that should be reserved for the most experienced attorneys providing the best representation and practicing in high cost geographical areas. *Anaya v. Secretary of HHS*, No. 91-285V, 1993 WL 241433, slip op. at 4 (Fed. Cl. Spec. Mstr. June 17, 1993). That hourly rate, discussed in 1993, over seven years ago, does not bind the court in 1999.
5. There are some notable aspects of the affidavits filed by Mr. Webb in support of his Petition for attorney's fees and costs. Specifically, Mr. Kenneth L. Pedersen discusses his knowledge of Mr. Webb's practice, particularly Mr. Webb's "considerable expertise" in the area of vaccine injury litigation, and also notes that he and Mr. Webb co-authored an article on the National Vaccine Injury Compensation Program in the August 1989 issue of Trial Magazine. In addition, Judge Daniel B. Meehl states that by presiding over requests for attorney's fees in a variety of cases, he is familiar with the rates charged for legal services in Twin Falls and in the state of Idaho. In Judge Meehl's opinion Mr. Webb's rates are "within the range of hourly rates charged in Twin Falls, Idaho, and within the state of Idaho." Further, Judge Meehl states that, "In my opinion, \$175 an hour is a reasonable rate for Mr. Webb to charge in light of his experience and abilities."
6. It should be noted as anecdotal evidence that the undersigned has learned from one experienced Program attorney that he currently has 7,000 hours of unpaid attorney time under the vaccine Program. In addition, the undersigned is currently presiding over a pro se case in which the pro se Petitioner was turned down by many attorneys because of the difficulties obtaining adequate reimbursement under the Program.
7. In Murphy, Respondent did not raise any opposition to the hourly rate of \$175 for Mr. Webb. The special master awarded his fees accordingly.
8. Petitioners are reminded that in a case where the vaccination was administered prior to October 1, 1988, the award for attorney's fees and costs is limited to \$30,000. 42 U.S.C. § 300aa-15(b).
9. This amount is intended to cover all legal expenses. This award encompasses all charges by an attorney against a

client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the amount awarded herein. *See generally, Beck v. Secretary of HHS*, 924 F.2d 1029 (Fed. Cir. 1991).

10. Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party filing a notice waiving the right to seek review.