

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. 03-2153V

May 2, 2011

To be Published

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Estate of ESABELLA OSWALT, by

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VICTORIA LYNN OSWALT-HITE, her mother,

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Petitioner,

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v.

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Attorneys' fees and costs;

Avera; Rodriguez; Masias

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SECRETARY OF THE DEPARTMENT  
OF HEALTH AND HUMAN SERVICES,

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Respondent.

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Elaine Whitfield Sharp, Marblehead, MA, for petitioner.

Melonie J. McCall, Washington, DC, for respondent.

**MILLMAN, Special Master**

## DECISION<sup>1</sup>

Petitioner filed a petition on September 11, 2003, under the National Childhood Vaccine Injury Act, 42 U.S.C. §300aa-10 et seq., alleging that a series of vaccinations that her daughter Esabella Oswalt (hereinafter "Esabella") received caused her death a day later. By September

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<sup>1</sup> Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

2005, the parties were in settlement negotiations. The undersigned issued a 15-week Order on November 17, 2005. On March 6, 2006, respondent mailed by overnight mail the stipulation to petitioner for her signature.

On April 3, 2006, petitioner's counsel moved for a 10-day extension of time to sign the stipulation and send it back to respondent, which the undersigned granted.

On April 12, 2006, petitioner's counsel asked for an additional 30-day extension of time within which to send the signed stipulation back to respondent for filing, which the undersigned granted.

Before respondent would authorize the issuance of a check to pay petitioner compensation for damages, respondent insisted that petitioner obtain representational authority for her dead daughter's estate from the Alabama state courts. On April 20, 2006, the undersigned held a telephonic status conference concerning whether the Alabama Code permits the custodial mother of a dead child to receive the proceeds for her death without seeking authorization from the Alabama state courts. In the instant action, petitioner is unaware of the identity of Esabella's biological father. P. Affidavit, filed May 1, 2006. Respondent took the position that petitioner had to go to the Alabama state courts to be authorized to represent Esabella's estate. Petitioner took the position that the Alabama Code obviated the need to go seek authorization from the state courts.

Petitioner, at the undersigned's suggestion, brought in an Alabama attorney, Patrick Ballard, who participated in a status conference on May 11, 2006 to discuss the effect of the Alabama Code on who is the appropriate person to receive compensation on behalf of a child's estate. The undersigned ordered Mr. Ballard to write an affidavit explaining what the Alabama

Code states in reference to whether state law considered petitioner to be the appropriate representative of her daughter's estate.

On May 22, 2006, the undersigned issued an Order based on Mr. Ballard's affidavit, dated May 18, 2006, discussing the relevant Alabama cases, the relevant Alabama Code provisions, and petitioner's affidavit of May 1, 2006, stating that petitioner was entitled to be personal representative of Esabella's estate without seeking authorization from the Alabama state courts.

On July 14, 2006, the parties filed a stipulation for damages in the amount of \$222,000.00 to settle this case. On July 19, 2006, the undersigned issued a Decision Awarding Damages, stating "the court awards a lump sum of \$222,000.00 in the form of a check made payable to petitioner." On July 27, 2006, the parties filed a joint notice of decision not to seek review. Judgment entered on July 31, 2006.

On August 2, 2006, the undersigned issued an Order giving petitioner until May 2, 2007 to file for attorneys' fees and costs or they would be deemed waived. Petitioner filed an election to accept judgment on August 4, 2006. Check number 2049 83437242 in the amount of \$222,000.00, dated August 26, 2006, made payable to the Estate of Esabella Oswalt by Victoria Lynn Oswalt-Hite was sent to Elaine Whitfield Sharp, Esq., 796 Atlantic Ave., Marblehead, MA 01945. Ms. Sharp's name and address were under the name of the payee on the United States Treasury check. Docket no. 78-2, filed May 8, 2008 (P Ex. 1 to Second Reply to R Objections to Petition for Fees and Costs).

On April 9, 2007, petitioner made an oral motion for a three-month extension of time within which to file an application for attorneys' fees and costs, to which respondent did not object and which the undersigned granted.

On July 23, 2007, petitioner made an oral motion for a 30-day extension of time within which to file an application for attorneys' fees and costs, to which respondent did not object and which the undersigned granted.

Petitioner orally moved for another extension of time to file an application for attorneys' fees and costs and, on August 31, 2007, the undersigned set a new deadline of October 31, 2007, a further two months, which gave petitioner 15 months to file for attorneys' fees and costs.<sup>2</sup>

On November 7, 2007, petitioner filed her Fee Petition. However, petitioner's counsel communicated with the undersigned's law clerk to say that she had made a few errors in the Fee Petition and requested additional time to file corrections. On February 5, 2008, the undersigned issued an Order giving petitioner until March 7, 2008 to file her corrections as an amended petition. On March 7, 2008, petitioner asked for and received a three-day extension of time to file her Amended Petition.

On March 10, 2008, petitioner filed her Amended Fee Petition. On page 16 of the Amended Fee Petition, petitioner's counsel includes a letter dated November 22, 2006 to petitioner stating that petitioner's award from the court was \$222,000.00 and that petitioner and her counsel Ms. Sharp had agreed that Ms. Sharp would retain \$20,000.00 to pay for costs and expert fees incurred. Ms. Sharp said after she received her attorneys' fees and costs from the

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<sup>2</sup> The undersigned is aware that petitioner's counsel Ms. Sharp's husband and law partner Daniel Scott Sharp was ill from glioblastoma multiforme, a primary brain tumor, from 2007 to 2010 leading to his death on February 23, 2010. The undersigned expresses her sympathy to Ms. Sharp, and to petitioner whose child's death is the focus of this case.

court, she would refund whatever of the \$20,000.00 was left over plus funds petitioner provided during the course of the litigation. Ms. Sharp states, “Based on the fact that the government delayed paying you the \$222,000 for as long as they could, I would expect it to take at least several months before the costs and fees issues are resolved in court.” Id. What Ms. Sharp did not tell petitioner was that she had not yet applied for attorneys’ fees and costs. In fact, Ms. Sharp did not file the Fee Petition until fully one year after the date of this letter.

In this letter of November 22, 2006, Ms. Sharp also recounts how she paid in small portions \$202,000.00 of the \$222,000.00 award to petitioner, retaining \$20,000.00 for expert fees and costs. When Ms. Sharp received the check made payable to petitioner, Ms. Sharp did not send it to petitioner. Ms. Sharp revealed during a status conference on May 8, 2008 that she put petitioner’s check for damages in an IOLTA account. According to the letter of November 22, 2006 that Ms. Sharp sent to petitioner, these were the payments she had made up to that date, other than retaining the \$20,000.00 for expert fees and costs: on 12/14/05, she paid petitioner \$1,000.00 (since the US Treasury check was dated August 25, 2006, it is unclear why Ms. Sharp paid petitioner \$1,000.00 prior to the award of damages, although the undersigned is aware that petitioner paid \$6,880.03 prior to the award in costs to Ms. Sharp [Amended Fee Petition, p. 4]); on August 28, 2006, she paid petitioner \$2,000.00; on September 14, 2006, she paid petitioner \$3,000.00; on September 20, 2006, she paid petitioner \$10,000.00; on September 28, 2006, she paid petitioner \$25,000.00; on October 23, 2006, she paid petitioner \$20,000.00; on November 1, 2006, she paid petitioner \$5,000.00, for a total of \$66,000.00. By November 22, 2006, the date of this letter, Ms. Sharp still owed petitioner \$136,000.00 of her damages award. On that date,

Ms. Sharp had her IOLTA account debited for \$136,000.00 which she sent to petitioner.

Amended Fee Petition, p. 18.

At this point in the proceedings, Ms. Sharp of Marblehead, Massachusetts, a suburb of Boston, billed at a rate of \$300.00 per hour for 2002-07. Mr. Ballard of Birmingham, Alabama, billed at a rate of \$180.00 per hour for 2002-06 (Mr. Ballard had been working on the case with Ms. Sharp before he became involved in April 2006 concerning the issue of whether petitioner needed to seek Alabama court authorization to represent her dead daughter's estate; in fact, Mr. Ballard had been consulting with Ms. Sharp a year before the petition was filed). In the Amended Fee Petition, petitioner sought \$68,135.00 in attorneys' fees for Ms. Sharp, \$3,852.00 for attorneys' fees for Mr. Ballard, \$2,082.40 in costs for Ms. Sharp, \$6,880.03 in costs for petitioner plus \$20,000.00 in expert fees that petitioner paid, and \$5,309.00 for the balance of expert fees. Amended Fee Petition, pp. 3-4.

The undersigned, in an Order dated March 12, 2008, gave respondent a deadline of April 8, 2008 to notify the undersigned if she had any objections to petitioner's Amended Fee Petition.

On April 8, 2008, respondent orally moved for a 30-day extension of time within which to file her objections to petitioner's Amended Fee Petition. Respondent also requested more documentation from petitioner for which the undersigned set a deadline of April 23, 2008. Respondent had until May 6, 2008 to file objections to petitioner's Amended Fee Petition.

On May 7, 2008, respondent filed her Response to Petitioner's Application for Attorneys' Fees and Costs. Respondent objected to Ms. Sharp's requested hourly rate from 2002-2006 of \$300.00. Moreover, respondent stated, some of Ms. Sharp's activities could have been performed by a paralegal. Respondent assumed in her response that Ms. Sharp's hourly rate was

determined by the rate for attorneys practicing in her geographic locale, i.e., in Marblehead or Northeastern Massachusetts. R. Response, p. 5.

However, the Federal Circuit states in Avera v. Sec'y of HHS, 515 F.3d 1343, 1348 (Fed. Cir. 2008), that the forum, i.e., DC, rate generally applies unless an attorney has not spent the bulk of his or her time in DC on the case and the local geographic market rate for the attorney is very significantly below the DC rate. This is known as the Davis exception from Davis County Solid Waste Management and Energy Recovery Special Service District v. United States Environmental Protection Agency, 169 F.3d 755, 758 (D.C. Cir. 1999). Avera, 515 F.3d at 1349. Petitioners' attorney in Avera was Robert Moxley of Cheyenne, Wyoming. 515 F.3d at 1346. Initially, petitioners in Avera requested \$200.00 per hour for Mr. Moxley's fee. In an amended fee petition, petitioners requested Laffey Matrix<sup>3</sup> fees for Mr. Moxley amounting to \$574.00 to \$598.00 per hour. The Federal Circuit held that Mr. Moxley's local geographic market rate was very significantly below the DC rate and, therefore, the Davis exception applied since the bulk of Mr. Moxley's activities were outside DC. In Davis, the attorney whose fees were at issue practiced in Salt Lake City, Utah. 515 F.3d at 1349. The Federal Circuit determined in Avera that the local rate for Cheyenne was \$200 based on petitioners' original fee request, and that the DC or forum rate was approximately \$600 based on petitioners' amended fee request, showing that the local geographic market rate for Cheyenne was one-third or very significantly less than the forum rate. 515 F.3d at 1350.

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<sup>3</sup> Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354 (D. DC 1983), aff'd in part, rev'd in part on other grounds, 746 F.2d 4 (DC Cir. 1984), overruled by Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516, 1525 (DC Cir. 1988) ("We do not intend, by this remand, to diminish the value of the fee schedule compiled by the District Court in Laffey.").

In the instant action, Ms. Sharp practices law in a suburb of Boston. The local market rate for Boston is not very significantly below the DC rate and, therefore, Ms. Sharp receives the forum rate. Mr. Ballard, on the other hand, practices in Birmingham, Alabama. Just as Salt Lake City, Utah, in Davis and Cheyenne, Wyoming, in Avera are locales whose market rates are very significantly below the DC rate, so Birmingham is a locale whose market rate is very significantly below the DC rate. Mr. Ballard receives the rate for his geographic locale. The undersigned notes that Mr. Ballard's original request for an hourly rate of \$180.00 is below Mr. Moxley's clients' original request for an hourly rate of \$200.00 in Avera.

On May 8, 2006, the undersigned held a telephonic status conference during which Ms. Sharp stated she put petitioner's check for \$222,000.00 in damages in an IOLTA account and disbursed different amounts to petitioner at different times. She stated that petitioner told her to pay the experts. Respondent's counsel objected that petitioner did not get all of her compensation and wanted to see an affidavit from petitioner agreeing to pay the witness fees.

In respondent's response to petitioner's amended fee petition, filed May 7, 2008, respondent raised a number of specific objections to petitioner's amended fee request, which the undersigned will address below. Respondent did not object to the payment of \$6,880.03 for personal costs of petitioner. R Response, p. 10. Respondent discussed Ms. Sharp's depositing petitioner's damages check in an IOLTA account, Ms. Sharp's piecemeal partial payments of damages to her client, and Ms. Sharp's withdrawing \$20,000.00 of the damages award for payment of expert fees which Ms. Sharp stated in her letter to her client she would pay back to her when attorneys' fees and costs were awarded. Respondent cited the Federal Circuit case in Beck v. Sec'y of HHS, 924 F.2d 1029, 1033 (Fed. Cir. 1991), for the principle that no petitioner's attorney may invade an award of damages to his client in order to obtain attorneys'

fees and costs. R Response, pp. 12-14. Respondent requested that petitioner file documentation that she had received her full award of damages. R Response, p. 14.

On May 8, 2008, petitioner filed a response and an affidavit. The response states that this was an initial response to be followed by a fuller response on June 2, 2008; that respondent's counsel had written an accusation of her conduct without having previously telephoned her to explore respondent's concerns; that before the April 2006 concern about whether the Alabama Code permitted petitioner to represent her dead daughter's estate without seeking Alabama court authorization, Mr. Ballard had been handling some financial planning matters for petitioner, and had been instructed at one point to set up a trust for petitioner's surviving son, Bradley, and also to put some of the award money toward buying a home, which explained why the award was paid in various installments; that Ms. Sharp paid petitioner in the manner that petitioner requested; that petitioner instructed Ms. Sharp to pay any outstanding bills to petitioner's experts from the award, which \$20,000.00 was to be refunded to petitioner; that the Beck decision was inapposite because it involved a pre-Act case; that respondent's counsel accused her of behaving unethically despite a telephone call between counsel in which Ms. Sharp explained the facts; that respondent violated Ms. Sharp's right of due process, the Fifth Amendment, and the First Amendment, and this constituted defamation. Attached to this filing is petitioner's affidavit, dated May 6, 2008, as Exhibit 1, in which she states that she personally instructed Ms. Sharp to pay the experts out of the award she received, and that at no time has Ms. Sharp asked her to pay her attorney fees.

On May 8, 2008, the undersigned issued an Order stating that by June 2, 2008, petitioner shall file her affidavit substantiating the establishment of a trust fund, as well as petitioner's

grant of power of attorney to Ms. Sharp to allow her to distribute funds out of that trust to pay medical experts, a copy of the trust agreement, and a second amended application for fees and costs addressing the apparent duplication in amounts paid to experts and specifically responding to respondent's objections to petitioner's amended fee petition.

Also, on May 8, 2008, petitioner filed a Second Reply to Respondent's Objections to Petition for Attorneys [sic] Fees and Costs. In that response, Ms. Sharp states that during the telephone conference of that day, she stated that she recalled that the damages check was made out jointly to petitioner and Ms. Sharp, which respondent's counsel called into question. That evening, Ms. Sharp located a copy of the check. She asserts in paragraph three, that the damages check is made out jointly to both petitioner and her. P Second Reply, p. 1. Ms. Sharp considered respondent's complaints to be "waived" since it was the Government that made out the check. Ms. Sharp stated that, since Ms. McCall was counsel of record at the time the check was jointly made out to petitioner and Ms. Sharp, Ms. McCall could have objected at the time of its issuance. P Second Reply, pp. 1–2. Ms. Sharp attached a copy of her limited power of attorney allowing her to deposit and disburse funds on petitioner's behalf and/or to her directly. (This is another Exhibit 1.) As for the trust agreement that the undersigned ordered petitioner to produce, Ms. Sharp states in this Second Reply that there is no such trust agreement or that she does not and never has possessed it. P Second Reply, p. 2. She was not the lawyer helping petitioner to make financial plans for the use of the damages awarded to her. At one point, that lawyer was Mr. Ballard. Ms. Sharp states that Massachusetts law required her to place the \$222,000.00 damages award in an IOLTA account and she disbursed it from that account to petitioner either directly from the IOLTA account or from the IOLTA account to Ms. Sharp's business account and then to petitioner. Ms. Sharp "simply held the money for Petitioner and disbursed it as she

directed.” Id. Ms. Sharp states that she provides this information “under protest and without waiving any objections under law.” P Second Reply, p. 3. Ms. Sharp states she contacted petitioner to ensure that she would waive the attorney-client privilege to permit Mr. Ballard to explain why the damage award disbursements were periodic and uneven. Id. Ms. Sharp states she will file a third reply by June 2, 2008 as to other issues raised in the undersigned’s Order of May 8, 2008. Id. The Special Limited Power of Attorney attached as Exhibit 1 to petitioner’s Second Reply gives Ms. Sharp the authority to sign petitioner’s name, including reducing to possession any and all monies due to petitioner, such as payment of damages. Petitioner signed it on April 21, 2006. The second page of Exhibit 1 is a copy of the United States Treasury check for \$222,000.00, dated August 26, 2006.

On May 9, 2008, the undersigned issued an Order to respondent to explain, in light of the copy of the US Treasury check for \$222,000.00 listing both petitioner’s name and petitioner’s counsel’s name, why petitioner’s counsel was a co-payee when the stipulation for damages between the parties, the undersigned’s decision, and the judgment in the case all state that a check for \$222,000.00 was to be made payable solely to petitioner.

On May 9, 2008, the undersigned issued an Order to petitioner to explain in detail the purpose for Mr. Ballard’s assistance from 2002 to 2006 since that work predated the April 2006 status conference discussion concerning what the Alabama Code signifies regarding representative authority for a custodial parent.

On May 29, 2008, respondent filed a Response to Order of May 9, 2008, stating that respondent’s counsel had conferred with representatives of the Division of Vaccine Injury Compensation at HHS and was informed that HHS issued a request for payment of judgment to

the Department of the Treasury on August 23, 2006 which directed that the award be made payable solely to the Estate of Esabella Oswalt by Victoria Lynn Oswalt-Hite and that the check be addressed to Elaine Whitfield Sharp, petitioner's attorney of record. R Response to Order, p.

1. "Because the payee and addressee blocks are spatially limited on the face of a Treasury check, the payee and/or addressee may sometimes be truncated, or may appear to run together without delineation." R Response to Order, p. 2.

On May 30, 2008, petitioner orally moved for an extension of time until June 9, 2008 to file an affidavit from petitioner substantiating the establishment of a trust fund, a copy of the trust agreement, and a second amended fee petition addressing the apparent duplication in sums paid to experts and specifically responding to respondent's objections to petitioner's amended fee application, which motion the undersigned granted in an Order dated June 3, 2008.

On June 16, 2008, petitioner orally moved for a two-week extension of time to file an affidavit from petitioner substantiating the establishment of a trust fund, a copy of the trust agreement, and a second amended fee petition addressing the apparent duplication in sums paid to experts and specifically responding to respondent's objections to petitioner's amended fee petition, which motion the undersigned granted in an Order of the same date.

On July 1, 2008, petitioner filed Petitioner's Reply to Government's Reply [sic] to Application for Attorneys' Fees and Costs. Petitioner states at page two that the decision not to pursue a trust was made "after the check was jointly made out to Petitioner and her counsel, Attorney Sharp, but before all the funds were dispensed." Petitioner's counsel Ms. Sharp continued to insist on page three that the damages award "was intentionally made out as a joint payee check." Ms. Sharp attached as Exhibit A an affidavit from petitioner, dated May 6, 2008, stating that she received \$202,000.00 from Ms. Sharp, and that the money was paid to her as she

instructed Ms. Sharp to send it to her. Ms. Sharp states at page four of Petitioner's Reply that the duplication of expert fees was only in the summary. The total paid to experts was \$25,909.00. She argues that counsel should not receive paralegal fees for doing paralegal, i.e., administrative, work when she and her husband were sole practitioners. P Reply, p. 7.

Petitioner amended her hourly rate so that for 2002, she requested an hourly rate of \$250.00. Ms. Sharp stated she does not believe there can be only one attorney on a case particularly since respondent's counsel has various signatures on respondent's pleadings. P Reply, p. 9. Ms. Sharp explained the necessity of retaining Dr. Vera Byers because of the untimely demise of Dr. Kevin Garaghty. Id. Attached to P Reply is the affidavit of Kevin Conway, who practices in Boston as a partner in the firm Conway Homer and Chin-Caplan. He states that Ms. Sharp's fee request of \$275 to \$350 per hour from 2002 to 2008 is reasonable. (Actually, Ms. Sharp's fee request begins at \$250 per hour in 2002, continues at \$250 in 2003, advances to \$275 in 2004, jumps to \$300 in 2005, increases to \$325 in 2006, and ends at \$340 an hour for 2007. There was at this point no billing for 2008.). Doc. 84-5, pp. 1-35.

On July 1, 2008, petitioner filed an Affidavit of Patrick Ballard in Support of Application for Attorneys' Fees and Costs. In Mr. Ballard's affidavit, he now amends his billing statement to base his fees on the Laffey Matrix, asking for \$385/hour from November 2002 through April 2003; \$405/hour from August 2003 through March 2004; \$423/hour from July 2004 through March 2005; \$452/hour from June 2005 through May 2006; and currently \$536/hour. Ballard affidavit, ¶ 11. From April through May 2006, he had discussions with petitioner about establishing a trust for petitioner's son, but Mr. Ballard does not know if a trust was ever established. Ballard affidavit, ¶ 9. Mr. Ballard did not bill for this time. Id. He was also

engaged in discussions with Ms. Sharp over whether to pursue a medical malpractice case but tried not to bill for that time as well. Ballard affidavit, ¶ 10. Attached to Mr. Ballard's affidavit is Exhibit A, which is his Amended Time Ledger. Although Mr. Ballard is now seeking Laffey Matrix rates, he attached as the last page of his portion of the filing an Affidavit of James A. Shands, an attorney in Jefferson County, Alabama, dated July 1, 2008, who states that the rate of \$180.00 per hour from 2002 to 2006 is the prevailing and customary attorney rate, and \$200.00 per hour from 2006 to 2008 is the prevailing and customary attorney rate.

On July 11, 2008, the undersigned issued an Order giving respondent until August 15, 2008 to respond to petitioner's filings.

On August 15, 2008, respondent filed her Response to "Petitioner's Reply to Government's Reply to Application for Attorneys' Fees and Costs." Respondent renews her objection to paying Ms. Sharp attorney rates for paralegal work. R Response to P Reply, p. 2. Respondent further objects to Mr. Ballard's receiving any fees for work he performed from November 2002 through January 2006 as redundant and unnecessary due to Ms. Sharp's involvement in the case. R Response to P Reply, p. 3. Respondent also objects to Mr. Ballard's receiving Laffey Matrix rates. Id.

Referring to Ms. Sharp's withholding of petitioner's damages award, even with the consent of petitioner, respondent notes that the Federal Circuit stated in Beck that "money awarded under the Vaccine Act as victim compensation may only be used to pay for injury-related expenses upon which it was calculated, and may not be used to pay for attorney fees and costs, whether associated with the Vaccine Act proceedings or with litigation of a private civil suit." 924 F.2d at 1034. This means that Ms. Sharp could not withhold part of petitioner's damage award paid under §15(a)(2) of the Act to pay for expert fees, which may be paid only

from §15(e) of the Act which deals with costs. R Response to P Reply, p. 9. Attached to respondent's filing is the Laffey Matrix as Exhibit B, p. 7. That grid starts in 2003-04 with an hourly rate of \$380 for someone with 20 years of experience. That increases \$10.00 to \$390 from 2004-05, moves to \$405 from 2006-07, and ends at \$440 in 2008. Footnote three states that the increase in the hourly rate was determined by adding the change in the cost of living for the Washington, DC area as measured by the Consumer Price Index and then rounding to the nearest multiple of \$5.00. Id.

On September 22, 2008, the undersigned issued an Order inquiring whether petitioner intended to reply to respondent's Response.

On September 25, 2008, petitioner filed her intent to reply and asked that a status conference be scheduled.

On October 7, 2008, the undersigned issued an Order setting a status conference for October 15, 2008. This conference did not occur.

On October 23, 2008, the undersigned issued an Order setting a status conference for November 17, 2008. This conference did not occur.

On October 30, 2008, the undersigned issued an Order cancelling the status conference set for November 17, 2008.

On December 9, 2008, the undersigned issued an Order based on Ms. Sharp's stated intent to file a supplementary application for attorneys' fees and costs, setting a deadline for her to file this application by December 17, 2008.

On December 10, 2008, petitioner filed a Supplementary Application for Attorney's Fees and Costs, seeking \$6,209.25 for "defending the fee petition." Attached was Exhibit 1 in which

she lists her hours and those of her paralegals and seeks an hourly rate of \$350.00 for herself and \$95.00 for her paralegals. Ex. 1, pp. 1-4.

On January 30, 2009, respondent filed her Response to Petitioner's Supplementary Application for Attorney's Fees and Costs. Respondent objected to the fees sought for Ms. Sharp's work from March 7, 2008 through December 9, 2008 as excessive because she billed for an "inordinate amount of time to perform simple routine tasks." R Response, p. 2. Respondent claims that a number of the tasks described are ministerial or administrative and, thus, not compensable.

On February 11, 2009, the undersigned issued an Order requesting petitioner's counsel to notify the undersigned by February 18, 2009 whether she intended to file a reply to respondent's response.

On February 17, 2009, petitioner's counsel orally moved for an additional 30 days to file a reply to respondent's response, which motion the undersigned granted in an Order dated February 19, 2009.

On April 16, 2009, petitioner filed her Reply to Government's Reply to Supplementary Application for Attorney's Fees and Costs, contending that her tasks were reasonable and not ministerial. She requests an addition \$1,400.00 for filing this Reply. P Reply, p. 5.

On April 22, 2009, the undersigned issued an Order giving respondent until April 30, 2009 to file a response to petitioner's filing at respondent's request.

On April 27, 2009, respondent filed her Response to "Petitioner's Reply to Government's Reply to Supplementary Application for Attorney's Fees and Costs," objecting to petitioner's request for an additional \$1,400.00 in attorneys' fees.

Because of the question of whether Ms. Sharp's depositing the damages award in an IOLTA account instead of sending the damages check to petitioner directly and, in addition, withholding (even with petitioner's consent) \$20,000.00 of that damages award in order to compensate experts (which constituted costs) was unethical (specifically, whether counsel violated her fiduciary duty to petitioner, and acted in violation of the Federal Circuit's proscription in Beck against taking attorneys fees and/or costs from a damages award), the undersigned requested the former chief special master to determine whether further proceedings by the United States Court of Federal Claims ethics review committee would be appropriate.

On September 27, 2010, the former chief special master and the parties' counsel had a recorded status conference, during which Ms. Sharp stated that this was the first fee petition she had filed. Tr. at 45. Ms. Sharp stated that the reason petitioner wanted Ms. Sharp to keep the damages award was that petitioner was living with her boyfriend who had access to her bank account and she did not want money put into the bank account because he had access to it. Tr. at 5. Since petitioner did not need the money all at once, she asked Ms. Sharp to hold it for her which is what she did. Id. There was never any written agreement but Ms. Sharp did have power of attorney. Tr. at 6. The power of attorney was signed April 21, 2006. The damages check was dated August 25, 2006. Tr. at 11. Petitioner was adamant that she did not want to wait for the experts to be paid. Tr. at 12. Ms. Sharp did not think the decision in Beck applies to this case because it concerned a pre-Act case where attorney's fees were capped. Tr. at 15. The former chief special master stated, "I do think that in withholding the funds at your client's request and to pay the experts' fees and costs, you did not comport with the rules under the Vaccine Act or the statute." Tr. at 16. The former chief special master stated her purpose was to

determine if anything improper occurred. *Id.* Ms. Sharp said that petitioner had constructive receipt of the funds and had given Ms. Sharp a power of attorney and her direction to disburse the funds as she specifically directed from time to time. Tr. at 17. Ms. Sharp wanted to have Ms. McCall (respondent's counsel) put under oath because Ms. Sharp said that Ms. McCall agreed to issue the damages check in Ms. Sharp's name. Tr. at 17-18. Ms. Sharp said that in Massachusetts, when holding money for a client, she has no choice but to put the funds in an IOLTA account. Tr. at 20-21. The former chief special master was interested in whether any contemporaneous documentation from petitioner existed, as compared to later affidavits, which would substantiate that she agreed to have \$20,000.00 of her damages award withheld to pay experts. Tr. at 29-30. Ms. Sharp said that sometimes petitioner called and sometimes she e-mailed. Tr. at 30. Ms. Sharp stated, "I didn't do anything wrong. It was always her money. She always had control of it. It was never my money. I never withheld a penny from that woman. Any time she needed anything, all she had to do was call me. She called me on my cell phone. She had my home number. All she had to do was call me and we wired the money to her or we sent her a cashier's check or a check at her direction. That was the arrangement." Tr. at 38. Ms. Sharp said she would send \$20,000.00 to petitioner but she would not compromise on her fee request by \$20,000.00. Tr. at 41, 43. She then decided not to send the \$20,000.00. Tr. at 44. Ms. Sharp said she was acting as petitioner's agent, not as her vaccine lawyer. Tr. at 46. Ms. McCall stated that the government did not agree to pay damages to both petitioner and Ms. Sharp. Tr. at 48. The stipulation sets forth that payment is to go solely to petitioner. *Id.* Ms. Sharp insisted that the check was made out jointly to petitioner and to her. Tr. at 50.

On September 28, 2010, the undersigned issued an Order for petitioner to file on or before October 12, 2010 any documentation showing that petitioner instructed counsel to keep

the \$222,000.00 damages award until petitioner requested payment of funds and that petitioner, with knowledge that the undersigned might reduce any amount claimed for expert fees, still directed counsel to use \$20,000.00 of her damages award to pay the experts in the case.

Petitioner's counsel subsequently asked for an extension of time to file the documentation.

On October 7, 2010, the former chief special master and counsel had another digitally recorded status conference. The former chief special master was concerned that when petitioner agreed to have Ms. Sharp take \$20,000.00 from the damages award that Ms. Sharp was retaining, petitioner might not have realized that she might not receive the full \$20,000.00 in the award of costs. In light of petitioner's request for more time to file the substantiating documentation, the former chief special master referred the matter to the U.S. Court of Federal Claims. Tr. at 2.

On November 22, 2010, petitioner filed her affidavit, Ex. A, dated November 20, 2010, stating that she instructed Ms. Sharp and her husband Daniel Sharp, who was her law partner, to retain the \$222,000.00 award and to pay her when she requested in lump sums as she requested, and that she understood that she might not be reimbursed totally for the expert fees she paid and understood that at the time she paid the fees. It was after the receipt of this affidavit that the former chief special master withdrew the ethics inquiry from the U.S. Court of Federal Claims.

On December 3, 2010, the undersigned held a status conference with counsel. Ms. Sharp had inquired of the undersigned's law clerk if she were to loan petitioner \$3,000.00, could Ms. Sharp then get the money back from the proceeds of any award to petitioner for her costs in this proceeding. The undersigned asked at the status conference what happened to the \$202,000.00 damages portion that Ms. Sharp had remitted to her client. Ms. Sharp said her client spent it. The undersigned said that whether or not Ms. Sharp wanted to lend petitioner \$3,000.00 was her

business and had nothing to do with the case. However, under no circumstances was Ms. Sharp to deposit any award to petitioner for costs and remove \$3,000.00 from it to repay the loan she might make to petitioner. The undersigned attempted during this conference to settle the attorneys' fees and costs issues without success.

Since Mr. Ballard had requested Laffey Matrix fees in his most recent filing, and the Federal Circuit was determining in three cases more of the issues about what attorneys' fees are applicable in the Vaccine Program and the availability *vel non* of the Laffey Matrix, the undersigned waited until the Federal Circuit issued those three opinions. Now those opinions are published.

In Rodriguez v. Sec'y of HHS, 632 F.3d 1381 (Fed. Cir. Feb. 9, 2011), petitioner's counsel John McHugh, an attorney practicing in New York City, received forum rates because NYC rates are not very significantly different than DC rates. However, Mr. McHugh, on behalf of petitioner, wanted Laffey Matrix rates. Id. at 1383, 1384. Initially, petitioner sought \$450 per hour for Mr. McHugh, but then raised that request to hourly rates of \$598 in May 2006, \$614 between June 2006 and May 2007, and \$645 for work done after May 2007. Id. at 1383. Special Master Denise Vowell, based on evidence of rates awarded to a DC senior partner in a vaccine case, as well as the Cost of Living Index, awarded Mr. McHugh \$310 for 2006, \$320 for 2007, and \$335 for 2009. Id. Unlike the complex and extraordinary litigation in the Laffey case, vaccine litigation is not analogous to complex federal litigation so as to justify use of the Laffey Matrix instead of the rates Vaccine Act practitioners charge. Id. at 1385. The Federal Circuit agreed that vaccine cases do not merit Laffey Matrix rates. Id. If a vaccine case were particularly challenging, that would be reflected in the number of hours expended. Id. Another distinction is that, for the Laffey Matrix to apply, a plaintiff must prevail, whereas petitioners in

vaccine cases who do not prevail could still recover reasonable attorneys' fees and costs if they filed their petitions in good faith and had a reasonable basis to go forward. *Id.* If the Laffey Matrix applied to Vaccine Act cases, vaccine attorneys (most of whom receive compensation in fees and costs) would be in a more favorable position than their brethren who receive fees only in fee-shifting cases in which they prevail. *Id.* at 1385-86.

In the instant action, Ms. Sharp, to her credit, did not ask for Laffey Matrix fees. Her requested hourly rates are in line with the rates awarded to Mr. McHugh. However, Mr. Ballard, of Birmingham, Alabama, did request in his final filing Laffey Matrix rates.

In Masias v. Sec'y of HHS, 634 F.3d 1283 (Fed. Cir. March 15, 2011), Robert Moxley, the same attorney who appeared for petitioners in Avera, returned to the Federal Circuit to argue on behalf of his client that Avera was wrong. *Id.* at 1288. Special Master Christian Moran awarded Mr. Moxley an hourly rate of \$160-\$220 in Masias. *Id.* at 1286. Special Master Moran determined that if Mr. Moxley practiced in DC, his likely hourly rate would be \$350. *Id.* Special Master Moran rejected petitioner's argument that the Laffey Matrix should apply to his hourly fee rate. *Id.* The Federal Circuit held that the decision in Avera is thorough and well-reasoned. *Id.* at 1288. The Federal Circuit rejected Mr. Moxley's argument on behalf of his client that vaccine attorneys should be compensated at a "federal specialty" rate because Vaccine Act litigation is complex. *Id.* at 1289-90.

In Hall v. Sec'y of HHS, \_\_\_F.3d \_\_\_, 2011 WL 1204399 (Fed. Cir. Apr. 1, 2011), Richard Gage, a former partner of Robert Moxley and also a practitioner in Cheyenne, Wyoming, argued on behalf of his client that Special Master Moran wrongly awarded him his local hourly rate instead of the forum rate. He had initially requested an hourly rate of \$175 to

\$200 for work performed from August 2002 to December 2005. Id. at \*1. The Federal Circuit rejected petitioner's arguments and affirmed the local rate award. Id. at \*3, 4. The Federal Circuit compared the forum hourly rate of \$350 to Mr. Gage's local hourly rate of \$220 to \$240 and found the special master's decision that this was a very significant difference to be within the special master's discretion. Id. at \*6.

The delay in resolving attorneys' fees and costs in this case are partly the responsibility of petitioner's counsel. First, it took her 15 months after judgment to file the initial fee petition. She then requested more time to file an amended fee petition to correct errors in the first filing. Secondly, Ms. Sharp's retention of petitioner's damages award concerned not only respondent, but also the undersigned, and the working out of whether there was an ethical violation involved numerous filings and conferences. Thirdly, Mr. Ballard's request for Laffey Matrix fees made it prudent to wait for the Federal Circuit to issue its three recent decisions involving the questions Mr. Ballard's request posed before issuing this decision.

The sums Ms. Sharp, on behalf of her client, has requested in separate filings for fees and costs appear overall to be reasonable. Focusing on the actual disposition of the case in chief, the undersigned finds Ms. Sharp to be a very good attorney. She achieved a settlement in a difficult case, which is an accomplishment. The undersigned read all of Ms. Sharp's time sheets and they show that she understood the legal issues facing petitioner in order to prevail in her petition. She was diligent in proving petitioner's case. Her achieving a settlement saved petitioner the trauma of reexperiencing her tragic loss by having to go through a hearing. Ms. Sharp obtained damages (\$222,000.00) that were almost the full death award (\$250,000.00) without going to trial. Ms. Sharp deserves an award fitting her skills and accomplishment.

Moreover, Ms. Sharp's claimed hourly rates are consistent with the above-cited Federal Circuit decisions, affirmances of what a practitioner in the forum (DC) in the Vaccine Program would earn. Unlike Mr. Ballard, she did not ask for Laffey Matrix fees. But, Mr. Ballard's initial request for an hourly rate of \$180.00 (which is below what Mr. Moxley and Mr. Gage received in Cheyenne, Wyoming, in Avera, Masias, and Hall) compared to his inflated request based on the Laffey Matrix, shows a very significant difference between the local geographic hourly rate and the forum rate. Mr. Ballard practices in Birmingham, Alabama, and the affidavit Mr. Ballard submitted in support of his Laffey Matrix request actually confirms that the local rate is \$180.00-\$200.00.

On March 10, 2008, petitioner filed her Amended Fee Petition, seeking \$68,135.00 for Ms. Sharp, \$3,852.00 for Mr. Ballard, \$2,082.40 in costs for Ms. Sharp, \$26,880.03 in costs for petitioner (which includes \$20,000.00 petitioner paid for expert fees), and \$5,309.00 in remaining expert fees. P Amended Fee Pet, pp. 3-4. On December 10, 2009, petitioner filed a Supplementary Application for Attorney's Fees and Costs, seeking \$6,209.25 for hours spent defending the application, at an hourly rate of \$350.00. On April 16, 2009, petitioner asked for another \$1,400.00 for filing a reply to the respondent's response to petitioner's supplementary application for attorneys' fees and costs.

Mr. Ballard's request for Laffey Matrix rates, filed July 1, 2008, shows his initial billing from November 9, 2002 to May 22, 2006 at an hourly rate of \$180.00 which he then restates at Laffey Matrix rates of \$385.00 to \$536.00 with a third permutation of an hourly rate of \$180.00 from November 9, 2002 to May 22, 2006 and an hourly rate of \$200.00 from June 17, 2008 to July 1, 2008. Appended to this filing is the affidavit of James A. Shands stating that an hourly

rate of \$180.00 from 2002 to 2006 for Jefferson County, Alabama, is reasonable as is an hourly rate of \$200.00 from 2006 to the present. Filing at p. 14. The total amount requested in attorneys' fees for Mr. Ballard using the \$180.00 to \$200.00 hourly rate is \$4,773.00.

Attorney Ballard notes in his affidavit, paragraphs 3-4, of his affidavit filed July 1, 2008 that he spent 10-12 minutes on August 30, 2003 reviewing an autopsy report of petitioner's baby to prepare to research and discuss with Ms. Sharp whether to file a petition in the Vaccine Program or to proceed with a medical malpractice suit in Alabama. The Vaccine Act, §300aa-11(a)(2)(A) ("No person may bring a civil action for damages...in a State or Federal court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after the effective date of this subpart, and no such court may award damages..., unless a petition has been filed....") requires petitioners who allege vaccine injuries to file in the Vaccine Program. Therefore, whether to institute suit in the Program or in local court for medical practice was never an issue and neither counsel can get paid for discussing a non-issue. Petitioner had to proceed with a vaccine petition. If after the resolution of the vaccine suit, she elected to reject judgment and sue civilly, she could then file a medical malpractice suit. The amount Mr. Ballard requested in compensation for this time on August 30, 2003 is \$36.00 which the undersigned deducts from his total award. On page 7 of his attached list of activities, Mr. Ballard notes a discussion with Ms. Sharp of petitioner's legal remedies on September 10, 2003 ("election of remedies") for a fee of \$252.00. The undersigned also deducts this from his total award. The petition was filed one day later, on September 11, 2003. The total deduction from Mr. Ballard's award of attorneys' fees is \$288.00. Mr. Ballard requested \$4,773.00. He is awarded **\$4,485.00**.

Ms. Sharp's total amount requested in attorneys' fees is \$75,744.25. In petitioner's Fee Petition, p. 6, Ms. Sharp lists  $\frac{3}{4}$  of an hour on September 10, 2003 spent reading Mr. Ballard's discussion of election of remedies. For the same reason this is not compensable described above for Mr. Ballard, i.e., petitioner had to sue under the Vaccine Program before electing to reject judgment and sue civilly, the undersigned will not compensate Ms. Sharp for this  $\frac{3}{4}$  of an hour. She asked for \$250.00 an hour in 2003. The undersigned deducts \$187.50 from her total fee award. Also on September 10, 2003, Ms. Sharp bills for three hours in preparing her application for admission to the bar of the United States Court of Federal Claims. She is not entitled to compensation for obtaining the professional enhancement in order to represent her client. The undersigned deducts \$750.00 from her total fee award. On September 17, 2003, Ms. Sharp lists  $\frac{1}{2}$  hour in learning about the Vaccine Program practice. Ms. Sharp's educational advancement is not appropriate activity for compensation. The undersigned deducts \$125.00 from her total fee award. Also on September 17, 2003, Ms. Sharp's paralegal completed the ECF registration form and faxed it, which took  $\frac{1}{2}$  hour. Making herself CM-ECF capable is not compensable. The undersigned deducts \$47.50 from her total fee award. On June 29, 2004, Ms. Sharp billed  $\frac{1}{4}$  of an hour for a telephone conference to find out how to file documents with the court. Learning how to file documents is part of Ms. Sharp's educational experience in order to function as a vaccine attorney and is not recoverable. In 2004, Ms. Sharp billed \$275.00 per hour. The undersigned deducts \$68.75 from her total fee award. On June 29, 2004, Ms. Sharp spent one hour directing her paralegal how to make copies and insert tab numbers. This is paralegal work, not attorney work. Instead of \$275.00, Ms. Sharp gets \$95.00. The undersigned deducts \$185.00 from her total fee award. On January 24, 2005, Ms. Sharp spent about one-sixth of an

hour e-mailing for information on subpoenaeing federal documents. This is paralegal work, not attorney work. Instead of \$300.00 an hour (which she requested for 2005), Ms. Sharp gets \$95.00 an hour. The undersigned deducts \$51.00 from her total fee award but adds \$15.80 for the work, which amounts to a deduction of \$35.20 from her total fee award. On July 19, 2005, Ms. Sharp charged two hours for reorganizing her files, which is paralegal work. She reduced her hourly rate from \$300.00 to \$150.00, but that rate still exceeds the paralegal rate of \$95.00 an hour. Instead of \$300.00, Ms. Sharp receives \$180.00. The undersigned deducts \$120.00 from her total fee award. The total deductions from Ms. Sharp's total fee award amount to \$1,518.95. Ms Sharp asked for \$75,744.25. The undersigned awards her **\$74,225.30**.

In petitioner's Amended Fee Petition, filed March 10, 2008, petitioner's costs of \$2,082.40 include 30 filings with Federal Express. The undersigned does not find the repeated use of Federal Express, particularly for filings with the court, to be reasonable. The total amount expended for Federal Express mailings was \$428.26. The undersigned deducts half of this amount or \$214.13 from the \$2,082.40 requested in costs for an award of costs of **\$1,868.27**.

Costs for the medical experts petitioner used to persuade respondent to settle are divided among six doctors, but they really are five because Dr. Kevin Geraghty died and petitioner replaced him with Dr. Vera Byers. Dr. Geraghty's bill is \$600.00. Dr. Jamie Downs' bill is \$3,000.00. Dr. Jan Leestma's bill is \$3,879.00 . Dr. Vera Byers' bill is \$10,750.00. Dr. Marcel Kinsbourne's bill is \$6,430.00. Dr. Leonard Worden's bill is \$1,250.00. The total amounts to \$25,909.00, of which petitioner has paid \$20,000.00. Amended Fee Pet, p. 23. The undersigned is familiar with the work of Dr. Geraghty, Dr. Byers, and Dr. Kinsbourne because they have appeared before her and their reports have been submitted in numerous cases that the undersigned has decided. The undersigned has considered their testimony in an overwhelming

number of these cases as persuasive. Respondent objects to the number of experts as well as their fees. But this was a complex case, involving not only vaccine injury but also death.

The undersigned is inclined to be generous regarding the use of five experts as well as considerable fees for some of them in light of the fact that the use of these experts and their expenditure of effort and time resulted in a settlement. Because of the settlement, petitioner and respondent did not have to expend more time and incur more expense in going to hearing. The undersigned also benefited in terms of time saved through this settlement.

The undersigned is cognizant of respondent's objections to various amounts paid, either in activities performed or costs expended, describe in petitioner's various fee petitions. However, the sums requested are mostly reasonable, and Ms. Sharp did a very good job.

The undersigned awards as follows:

Attorneys' fees to Ms. Sharp in the amount of **\$74,225.30**. This amount shall be paid in a check made payable jointly to petitioner and Ms. Elaine Whitfield Sharp.

Attorneys' fees to Mr. Ballard in the amount of **\$4,485.00**. This amount shall be paid in a check made payable jointly to petitioner and Mr. Patrick Ballard.

Attorney costs of **\$7,777.27** (constituting the remaining costs of \$5,909.00 in expert fees and Ms. Sharp's costs of \$1,868.27). This amount shall be paid in a check made payable jointly to petitioner and Ms. Elaine Whitfield Sharp.

Petitioner's personal costs of **\$26,880.03** (consisting of \$20,000.00 she paid to the medical experts and \$6,880.03 in uncontested costs). This amount shall be paid in a check made payable solely to petitioner.

## CONCLUSION

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.<sup>4</sup>

**IT IS SO ORDERED.**

May 2, 2011  
DATE

s/Laura D. Millman  
Laura D. Millman  
Special Master

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<sup>4</sup> Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.