

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

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DONALD R. MASIAS,

Petitioner,

v.

SECRETARY OF HEALTH  
AND HUMAN SERVICES,

Respondent.

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\* No. 99-697V  
\* Senior Judge Robert H. Hodges, Jr.  
\* Special Master Christian J. Moran  
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\* Filed: January 30, 2013  
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\* Attorneys' fees and costs, correction  
\* of clerical errors in fees judgment,  
\* RCFC 60(a)  
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Robert T. Moxley, Esq., Robert T. Moxley, P.C., Cheyenne, Wyoming, for Petitioner;  
Catharine Reeves, Esq., U.S. Department of Justice, Washington, D.C., for Respondent.

### **PUBLISHED DECISION CORRECTING CLERICAL ERRORS IN ATTORNEYS' FEES DECISIONS\***

On March 30, 2012, Petitioner filed a Motion for Correction of Clerical Errors in Fees Judgments Under RCFC 60(a) ("motion"). Petitioner requests the correction of an "overt clerical error" that he alleges "shortchanged" his counsel, Robert T. Moxley, several thousand dollars over the course of three attorneys' fees decisions. Specifically, petitioner asserts that the undersigned intended to apply the inflation rate for the State of Wyoming in determining the hourly rate to be awarded, but instead mistakenly applied the national inflation rate, which was lower. Mot. at 3.

Respondent does not oppose petitioner's motion to the extent that "the inflation factor that was applied by the special master in determining [the] hourly rates was incorrect." That being said, respondent does not "necessarily agree with the accuracy of

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\* The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002), requires that the Court post this decision on its website. Pursuant to Vaccine Rule 18(b), the parties have 14 days to file a motion proposing redaction of medical information or other information described in 42 U.S.C. § 300aa-12(d)(4). Any redactions ordered by the special master will appear in the document posted on the website.

the recalculated rates as set forth in petitioner's Motion, or with the amount petitioner asserts is due." Resp't Resp., filed Apr. 13, 2012.

Petitioner's motion to correct clerical errors is **GRANTED**. While the recalculated award uses the intended inflation factor to derive the appropriate hourly rates, the amounts awarded slightly differ from those requested in petitioner's motion.

## **I. Relevant Procedural History of Requests for Attorneys' Fees and Costs**

Petitioner's motion to correct a clerical error in judgment actually affects three different judgments due to the complex procedural history of attorneys' fees decisions in this case. In essence, a mistake made in one decision was carried over into two subsequent decisions. The sequence of these decisions is set forth below.

### **A. Interim Fees Decision**

On March 10, 2008, petitioner filed a timely fee application. Respondent strongly disputed petitioner's requested hourly rate and objected to several smaller issues. See Resp't Resp., filed Mar. 24, 2008. While his fee application was pending, petitioner moved for an interim award of the "irreducible minimum" amount of attorneys' fees and costs, arguing that such an award was appropriate because disagreements over the initial fee application would not be resolved for some time. See Mot. Interim Fees, filed May 27, 2008. Respondent opposed petitioner's request. Resp't Resp., filed June 30, 2008.

On March 12, 2009, petitioner was awarded interim attorneys' fees and costs in the amount of \$48,367.65. Interim Fees Decision, 2009 WL 899703 (Fed. Cl. Spec. Mstr.). This award, which included \$42,065.50 in attorneys' fees and \$6,302.15 in costs, represented the "irreducible minimum" in attorneys' fees and costs—an amount "no reasonable litigant could dispute" is due petitioner's counsel. Id. at \*1. The undersigned calculated this irreducible minimum after determining the hourly rates and number of hours not reasonably in dispute. Id. at \*4. Since Respondent did not oppose compensation "at rates equal to the rates [previously] awarded Mr. Moxley by special masters in published decisions," hourly rates from \$160 to \$215 were accepted as rates not reasonably in dispute. Id. at \*4 (citing Resp't Resp., filed Mar. 24, 2008, at 14-15).<sup>1</sup>

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<sup>1</sup> Respondent argued that "Mr. Moxley's reasonable rates [were] set by prior decisions and should be determined accordingly for this case." Resp't Resp., filed Mar. 24, 2008, at 14-15 (citing Hart v. Sec'y of Health & Human Servs., 2004 WL 3049766 (Fed. Cl. Spec. Mstr. Dec. 17, 2004) (awarding \$175 per hour for year 2003, and \$200 per hour for the year 2004 and thereafter); Gallagher v. Sec'y of Health & Human Servs., 2002 WL 1488759 (Fed. Cl. Spec. Mstr. May 22, 2002) (awarding \$175 hourly rate); Barnes v. Sec'y of Health & Human Servs., 1999 WL 797468, at \*5 (Fed. Cl. Spec. Mstr. Sept. 17, 1999) (awarding \$160 per hour for work after 1998); Walker v. Sec'y of Health

With respect to the number of hours, only those to which respondent did not object were included. Id. at \*4.

A table in the Appendix of the Interim Fees Decision, titled “Calculations for Mr. Moxley,” set forth the lodestar calculations used to determine petitioner’s attorneys’ fee award, which totaled \$35,932.00 for Mr. Moxley.<sup>2</sup> The hourly rates awarded Mr. Moxley in this decision ranged from \$160 to \$220 per hour depending on when the work was performed. The specific rates awarded for each time period were calculated from the base hourly rate of \$160, which was adjusted upward at yearly intervals for inflation. These rates were then multiplied by the number of hours not reasonably in dispute.

The Interim Fees Decision awarded compensation for work done in the merits phase of the case. Resolution of all remaining objections and disputed items was postponed and decided in the Final Fees Decision issued on June 12, 2009, which awarded fees for work related to the fee application phase of the case. The Interim Fees Decision was not appealed. Judgment entered on April 24, 2009.

## **B. Final Fees Decision**

On June 12, 2009, petitioner was awarded an additional \$19,035.25 in fees and \$14,873.32 in costs for work done during the fee application phase. Final Fees Decision, 2009 WL 1838979 (Fed. Cl. Spec. Mstr.). The Final Fees Decision resolved the dispute over the reasonable hourly rate and respondent’s objections to claimed costs. The hourly rates awarded in the Interim Fees Decision—rates in the range of \$160-\$220 per hour—were found to be reasonable. Id. at \*31.

Petitioner originally sought \$42,627.50 in attorneys’ fees for work performed during this phase, dividing the time among different briefs and filings related to attorneys’ fees and costs. See id. at \*34 (table summarizing different pleadings and associated fees). Except for the time spent preparing a motion for summary judgment, the hours claimed were found to be reasonable. The requested hourly rates, however, were unreasonable as they were based on the Laffey matrix and petitioner had failed to

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& Human Servs., 1992 WL 92243 (Cl. Ct. Spec. Mstr. Apr. 10, 1992) (awarding \$100 per hour); Estabrook v. Sec’y of Health & Human Servs., 1991 WL 225096 (Cl. Ct. Spec. Mstr. Oct. 16, 1991) (awarding \$100 per hour)).

<sup>2</sup> The lodestar calculation involves a two-part process. First, the reasonable number of hours is multiplied by a reasonable hourly rate. Second, the lodestar calculation is adjusted upward or downward “based on other specific findings.” See Avera v. Sec’y of Health & Human Servs., 515 F.3d 1343, 1347-48 (Fed. Cir. 2008) (citing Blum v. Stenson, 465 U.S. 886, 888 (1984)).

establish entitlement to such rates. Petitioner instead received rates equal to those that were awarded in the Interim Fees Decision, which were approximately 50 percent lower than the requested Laffey matrix rates. Id. at \*35 (citing table 6, showing requested Laffey rates versus Interim Fees Decision rates). To calculate the award, the undersigned deducted the time claimed for preparing the motion for summary judgment and then reduced the remaining request by 50 percent to \$19,035.25, effectively awarding rates equivalent to those awarded in the Interim Fees Decision. Id. Unlike the Interim Fees Decision, the undersigned did not undertake a separate lodestar calculation in the Final Fees Decision, as it was unnecessary, having been “largely done in the decision awarding attorneys’ fees on an interim basis.” Id. (citing Interim Fees Decision, at Appendix).

The Final Fees Decision was appealed by petitioner, but subsequently affirmed by both the Court of Federal Claims and the Federal Circuit. Masias v. Sec’y of Health & Human Servs., slip op. (Fed. Cl. Dec. 10, 2009); 634 F.3d 1283 (Fed. Cir. 2011). The Federal Circuit denied a request for hearing en banc. Judgment entered on December 15, 2009.

### **C. First Supplemental Fees Decision**

On April 14, 2010, petitioner was awarded attorneys’ fees in the amount of \$25,851.40 for litigating the fee dispute between May 7, 2009 and January 4, 2010. This amount included \$25,601.40 for Mr. Moxley and \$250 for his paralegal. Mr. Moxley claimed 129.3 hours for work during this period, which was found to be reasonable. The undersigned multiplied this figure by \$220, the reasonable hourly rate for this time period—a rate that was set in the Interim Fees Decision. Thus, the lodestar calculation was  $\$220 \times 129.3 = \$28,446$ . First Supplemental Fees Decision, 2010 WL 1783542, at \*5. The lodestar value was then reduced by 10 percent to account for the low quality of Mr. Moxley’s work before the Court of Federal Claims, resulting in his award of \$25,601.40. The decision was not appealed. Judgment entered on May 26, 2010.

### **D. Outstanding Fees Disputes**

Although not directly related to petitioner’s pending motion to correct clerical errors, two other fees disputes are also pending. The first is a decision that denied petitioner’s second supplemental application for attorneys’ fees for work associated with his appeals to the Federal Circuit and to the Supreme Court. The decision was appealed to the Court of Federal Claims and remanded for reconsideration. See Masias v. Sec’y of Health & Human Servs., 106 Fed. Cl. 700 (2012), remanding, 2012 WL 2581403 (Fed. Cl. Spec. Mstr. June 7, 2012). The second fees dispute involves a third supplemental fees application, filed October 22, 2012, for the work performed in appealing the undersigned’s decision denying petitioner’s second supplemental application. These disputes will be resolved in the future.

## **II. Petitioner's Assertion of Clerical Error**

The instant motion involves the three aforementioned attorneys' fees decisions. Petitioner "seeks the simple correction of [a] series of identical clerical errors" originating in the Interim Fees Decision, where the undersigned purportedly applied the incorrect inflation rate, resulting in an unintended lower award. Mot. at 3. According to petitioner, the undersigned intended "to award rates adjusted for Wyoming but . . . failed to do so, . . . awarding rates based on 'national inflation'" instead—an error that was then carried over to the next two decisions. Petitioner calculates that this series of errors ultimately shortchanged his counsel for a total of \$5,438.40. Id.

## **III. Jurisdiction**

Petitioner initially directed this Rule 60(a) motion to the reviewing judge at the Court of Federal Claims. See Vaccine Rule 36(a)(1). On September 19, 2012, the Court of Federal Claims issued an order referring petitioner's motion for correction of clerical errors to the undersigned for further action. See Vaccine Rule 36(b)(1).

Relief from judgment may be granted "where the movant does not seek review of the merits of the special master's decision, but rather requests correction of an error of the court." Patton v. Sec'y of Health & Human Servs., 25 F.3d 1021, 1029 (Fed. Cir. 1994). "Rule 60(a) affords relief from minor clerical mistakes or errors arising from simple oversight or omission." Id. (citing 6A James W. Moore and Jo Desha Lucas, Moore's Federal Practice ¶ 60.06 (2d ed. 1993); United States v. Bealy, 978 F.2d 696, 699 (Fed. Cir. 1992)). As petitioner's request does not seek review of the merits of the specified decisions, but only the correction of minor clerical errors, and because respondent does not oppose on substantive grounds, it is appropriate to consider petitioner's motion pursuant to Patton.

## **IV. Correction of Clerical Errors**

The three attorneys' fees decisions discussed herein contain clerical errors that require correction. It was the undersigned's intent to calculate petitioner's attorneys' fees by adjusting the \$160 per hour rate awarded in Barnes v. Secretary of Health & Human Services, 1999 WL 797468 (Fed. Cl. Spec. Mstr. Sept. 17, 1999) upward each year after 1999 using the Wyoming inflation rate. Beginning in 2004, the \$200 per hour rate awarded in Hart v. Secretary of Health & Human Services, 2004 WL 3049766 (Fed. Cl. Spec. Mstr. Dec. 17, 2004)—adjusted thereafter for inflation using the Wyoming inflation rate—was to be factored into the equation, with petitioner receiving an hourly rate equal to the average of the adjusted Barnes and Hart rates. The actual awarded rates, however, do not reflect this intention. Therefore, the undersigned corrects the clerical errors that led to this mistake and recalculates petitioner's award using the intended hourly rates.

## **A. Corrected Hourly Rates**

The corrected hourly rates for petitioner's attorney are calculated as follows. For the year 1999, petitioner is awarded a rate of \$160 per hour. This rate, which was awarded in Barnes, serves as the base rate for petitioner's award.

The hourly rate for the year 2000 is \$165 per hour, calculated by adjusting the base rate of \$160 upward using the Wyoming inflation rate of 3.2 and rounded to the nearest dollar (i.e.,  $\$160 \times 1.032 = \$165.12$ ). The rates for 2001 through 2003 are calculated similarly.

The hourly rate for 2004 is \$196 per hour. This rate is calculated by averaging the adjusted Barnes rate and the rate awarded in Hart (i.e.,  $\$191.50 + \$200 = \$391.50 / 2 = \$195.75$ ). The hourly rate for 2005 is \$206 per hour and is calculated averaging the adjusted Barnes and Hart rates (i.e.,  $\$201.07 + \$210 = \$411.07 / 2 = \$205.54$ ).

The rate for 2006 is \$216 per hour and is calculated by averaging the adjusted Barnes and Hart rates and the rate awarded in Hall v. Sec'y of Health & Human Servs., 2009 WL 3423036, at \*28 (Fed. Cl. Spec. Mstr. Oct. 6, 2009) (i.e.,  $\$209.92 + \$219.24 + \$220 = \$649.16 / 3 = \$216.39$ ). The rates for 2007 through 2009 are calculated similarly. See Appendix, table 1 (summary of correct hourly rates).

## **B. Corrected Lodestar Calculations**

The lodestar values, beginning with the Interim Fees Decision, are now recalculated using the corrected hourly rates shown in Appendix, table 1. The corrected lodestar calculation multiplies the corrected hourly rate for each time period by the number of hours claimed during the period. The number of hours remains unchanged. For simplicity, the undersigned has awarded the corrected hourly rate that corresponds with the end of each period, rather than an averaged rate (e.g., 7/2/2001 to 6/4/2002 awarded the 2002 hourly rate of \$177).

For the Interim Fees Decision, the corrected lodestar calculation results in an additional award of **\$2,162.60** in attorneys' fees. See Appendix, table 2.

The adjustment in the Interim Fees Decision serves as the basis for the adjustment in the Final Fees Decision. The amount of attorneys' fees awarded in the corrected Interim Fees Decision was 6.02 percent more than the amount of attorneys' fees awarded in original Interim Fees Decision (i.e.,  $\$38,094.60 / 35,932.00 = 1.0602$ ). This factor is used to increase the original Final Fees Decision to \$20,181.17 (i.e.,  $\$19,035.25 \times 1.0602 = \$20,181.17$ ). The prior award is then subtracted from the corrected award, resulting in an additional award of **\$1,145.92** in attorneys' fees (i.e.,  $\$20,181.17 - \$19,035.25 = \$1,145.92$ ).

For the First Supplemental Fees Decision, the corrected lodestar calculation is  $\$240 \times 129.3 = \$31,032.00$ . As was done previously, the value is reduced by 10 percent, resulting in a corrected award of  $\$27,928.80$ . The prior award is then subtracted from the corrected award, resulting in an additional award of **\\$2,327.40** in attorneys' fees (i.e.,  $\$27,928.80 - \$25,601.40 = \$2,327.40$ ).

**V. Conclusion**

Accordingly, petitioner is awarded an additional **\\$5,635.92** in attorneys' fees. This amount includes  $\$2,162.60$  from the Interim Fees Decision,  $\$1,145.92$  from the Fees Decision, and  $\$2,327.40$  from the First Supplemental Fees Decision. **Specifically, petitioner is awarded a lump sum of \\$5,635.92 in the form of a check payable jointly to petitioner and petitioner's attorney, Robert T. Moxley.**

In the absence of a motion for review filed under RCFC, Appendix B, the clerk is directed to enter judgment according to this order. Pursuant to Vaccine Rule 28.1, the clerk is instructed to provide a copy of this decision to the presiding judge. Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

**IT IS SO ORDERED.**

Christian J. Moran  
Christian J. Moran  
Special Master

## APPENDIX

<b>Table 1: Corrected Hourly Rates for Mr. Moxley</b>					
Year	Wy CPI	<u>Barnes</u>	<u>Hart</u>	<u>Hall</u> <sup>3</sup>	<u>Masias</u> Awarded Rate
1999	3.1	<b>\$160.00</b>			\$160.00
2000	3.2	\$165.12			\$165.00
2001	3.5	\$170.90			\$171.00
2002	3.7	\$177.22			\$177.00
2003	3.6	\$183.60			\$184.00
2004	4.3	\$191.50	<b>\$200.00</b>		\$196.00
2005	5.0	\$201.07	\$210.00		\$206.00
2006	4.4	\$209.92	\$219.24	<b>\$220.00</b>	\$216.00
2007	6.1	\$222.72	\$232.61	\$230.00	\$228.00
2008	2.6	\$228.52	\$238.66	\$240.00	\$236.00
2009	2.7	\$234.69	\$245.10	\$240.00	\$240.00

<sup>3</sup> These rates are taken from Hall v. Secretary of Health & Human Services, 2009 WL 3423036, at \*28 (Fed. Cl. Spec. Mstr. Oct. 6, 2009). The rates shown are not adjusted for inflation, but reflect the rates actually awarded by year in that case.

**Table 2: Corrected Lodestar Calculations for Mr. Moxley  
Interim Fees Decision**

<b>Time Period</b>	<b>Source of information</b>	<b>Number of Hours</b>	<b>Hourly Rate Awarded</b>	<b>Subtotal for Period</b>
9/30/1998 to 3/19/1999	Exhibit 52, Invoice 46, pg 1	1.0	\$160	\$160.00
6/2/1999 to 5/30/2000	Exhibit 52, Invoice 46, pg 1	11.4	\$165	\$1,881.00
6/30/2000 to 5/16/2001	Exhibit 52, Invoice 46, pg 2-3	9.4	\$171	\$1,607.40
7/2/2001 to 6/4/2002	Exhibit 52, Invoice 46, pg 3-4	7.8	\$177	\$1,380.60
7/18/2002 to 1/4/2004	Exhibit 52, Invoice 46, pg 4-6	14.2	\$196	\$2,783.20
1/9/2004 to 5/13/2004	Exhibit 52, Invoice 46, pg 6-8	7.7	\$196	\$1,509.20
8/23/2004 to 5/9/2005	Exhibit 52, Invoice 46, pg 9; Exhibit 52, Invoice 120, pg 1	5.0	\$206	\$1,030.00
6/16/2005 to 5/19/2006	Exhibit 52, Invoice 120, pg 23; Exhibit 52, Invoice 7, pg 1-2	57.6	\$216	\$12,441.60
8/1/2006 to 5/23/2007	Exhibit 52, Invoice 7, pg 2-4	22.5	\$228	\$5,130.00
6/4/2007 to 6/17/2008	Exhibit 52, Invoice 7, pg 4-7; Exhibit 76 at 1-3; Exhibit 78 at 1.	43.1	\$236	\$10,171.60
7/25/2008 to 6/12/2009	Exhibit 81 at 1; Exhibit 84 at 1	0.0	\$240	
<b>TOTAL</b>				\$38,094.60
<b>PREVIOUS AWARD</b>				(\$35,932.00)
<b>DIFFERENCE IN DOLLARS</b>				<b>\$2,162.60</b>
<b>DIFFERENCE IN PERCENT</b>				<b>6.02%</b>