

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

**OFFICE OF SPECIAL MASTERS**

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EMILY TARSELL, As the Executrix \*  
of the Estate of CHRISTINA TARSELL, \*  
\*  
Petitioner, \*

No. 10-251V  
Special Master Christian J. Moran

v. \*

Filed: March 30, 2012

SECRETARY OF HEALTH \*  
AND HUMAN SERVICES, \*  
\*  
Respondent. \*

Findings of fact

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Mark T. Sadaka, Englewood, NJ, for petitioner;  
Ann D. Martin, United States Dep't of Justice, Washington, DC, for respondent.

**FINDINGS OF FACT<sup>1</sup>**

Sadly, the petitioner's daughter, Christina Tarsell, died in June 2008. A very broad overview of the last few weeks of her life includes the following events:

In May 2008, Christina completed a semester of college in New York and returned to her parents' house in Maryland. While in Maryland, Christina received the third dose of the human papillomavirus ("HPV") vaccine on June 3, 2008. On June 12, 2008, Christina left Maryland and returned to her apartment in New York. Christina ate dinner with her apartment-mates on Thursday, June 19, 2008. Christina was found deceased on Monday, June 23, 2008.

This sketch presents most of what can be said about Christina's final few weeks with a high degree of certainty. Various other events are largely unknown.

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<sup>1</sup> 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.

For example, the medical examiner did not determine precisely when Christina died.

Despite this uncertainty, the petitioner, Emily Tarsell, claims that the June 3, 2008 dose of the HPV vaccine caused Christina's death. She seeks compensation through the National Childhood Vaccine Injury Compensation Program. In this litigation, Ms. Tarsell has gathered about as much information as possible about Christina's last few weeks. Even so, there is only a meager amount of evidence.

With the conclusion of the submission of evidence, Ms. Tarsell has proposed findings of facts. The Secretary generally argues that a preponderance of evidence does not support the proposed finding. The purpose of this ruling is to resolve the factual disputes.

### **Procedural History**

Ms. Tarsell filed her petition in April 2010. For approximately the next 18 months, Ms. Tarsell submitted evidence relating to Christina's life and death. Simultaneously, Ms. Tarsell's attorney has been working with Dr. Eugene Spitz. Dr. Spitz is a pathologist and he has opined, in other cases in which Mr. Sadaka represents the petitioner, that the HPV vaccine caused a person's death.

Ms. Tarsell filed a set of medical records on June 16, 2010. The Secretary reviewed them in her report filed pursuant to Vaccine Rule 4. The Secretary commented that the petition contained allegations, such as Christina's hair began to fall out after the vaccination, that were not documented in the medical records. Resp't Rep't at 5 n. 4.

After the Secretary questioned the evidentiary basis for many of Ms. Tarsell's assertions, Ms. Tarsell placed additional information in the record. For example, Ms. Tarsell filed an affidavit from Christina's father, Richard Heyman, and Christina's aunt, Thomasine "Tommie" Tarsell. Exhibit 14; exhibit 15.

In April 2011, the parties planned for a hearing during which Ms. Tarsell would call percipient witnesses. See Pet'r Status Rep't, filed May 11, 2011. That hearing was cancelled in part because Ms. Tarsell had not submitted her own affidavit.

Ms. Tarsell filed her affidavit on Sept. 12, 2011. Exhibit 18. This affidavit showed that Ms. Tarsell had no first-hand knowledge about Christina after June 12,

2008, when she left Maryland and returned to New York. Ms. Tarsell's lack of knowledge, in turn, would diminish the usefulness of conducting a hearing because she did not present any basis for believing that a hearing would produce additional relevant evidence.

In addition to her affidavit, Ms. Tarsell filed other evidence as well. She submitted a more legible copy of a form submitted to the Vaccine Adverse Events Reporting System. Exhibit 19. Ms. Tarsell submitted DVDs of televised news stories in which she stated that the HPV vaccine caused Christina's death. Exhibit 23; exhibit 26. She also filed timesheets from CCS Bard Hessel Museum, which showed Christina's work schedule in June 2007. Exhibit 22.

Once it became evident that Ms. Tarsell had obtained all the readily available information,<sup>2</sup> I directed Ms. Tarsell to propose findings of fact. Order, filed Oct. 28, 2011. Ms. Tarsell could assert "facts" on which Dr. Spitz, her anticipated expert, would rely. Ms. Tarsell did file proposed findings of fact.<sup>3</sup> The Secretary addressed them and Ms. Tarsell filed a reply. With the submission of the reply, the matter is ready for resolution.<sup>4</sup>

### **Criteria for Findings Facts**

Petitioners are required to establish their cases by a preponderance of the evidence. 42 U.S.C. § 300aa-13(1)(a). The preponderance of the evidence standard requires a "trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has

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<sup>2</sup> Conceivably, Ms. Tarsell could have sought to depose Christina's apartment-mates. However, she declined to pursue this avenue. No adverse inference is drawn against Ms. Tarsell.

<sup>3</sup> Ms. Tarsell's proposed findings of fact include assertions that are not about Christina, such as "dizziness and feeling faint at times are signs and symptoms of arrhythmia." I decline to make any findings on the existing record about "medical" facts. Adjudication of those facts is appropriate after the parties have presented testimony from doctors.

<sup>4</sup> Ms. Tarsell has not requested a further opportunity to testify at a hearing. If Ms. Tarsell had proposed a hearing and explained why a hearing would be useful, I would have considered such a request. I am not required to hold a hearing because a "special master may decide a case on the basis of written submissions without conducting an evidentiary hearing." Vaccine Rule 8(d).

the burden to persuade the judge of the fact's existence.” Moberly v. Sec’y of Health & Human Servs., 592 F.3d 1315, 1322 n.2 (Fed. Cir. 2010) (citations omitted).

The process for finding facts in the Vaccine Program begins with analyzing the medical records, which are required to be filed with the petition. 42 U.S.C. § 300aa–11(c)(2). Medical records that are created contemporaneously with the events that they describe are presumed to be accurate. Cucuras v. Sec’y of Health & Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993).

Appellate authorities have accepted the reasoning that medical records created contemporaneously with the events being described are accurate and complete. A notable example is Cucuras in which petitioners asserted that their daughter, Nicole, began to have seizures within one day of receiving a vaccination, although medical records created around that time suggested that the seizures began at least one week after the vaccination. Cucuras, 993 F.3d at 1527. A judge reviewing the special master’s decision stated that “In light of [the parents’] concern for Nicole’s treatment . . . it strains reason to conclude that petitioners would fail to accurately report the onset of their daughter’s symptoms. It is equally unlikely that pediatric neurologists, who are trained in taking medical histories concerning the onset of neurologically significant symptoms, would consistently but erroneously report the onset of seizures a week after they in fact occurred.” Cucuras v. Sec’y of Health & Human Servs., 26 Cl. Ct. 537, 543 (1992), aff’d, 993 F.2d 1525 (Fed. Cir. 1993).

Decisions by judges of the Court of Federal Claims have followed Cucuras in affirming findings by special masters that the lack of contemporaneously created medical records can contradict a testimonial assertion that symptoms appeared on a certain date. E.g. Doe v. Sec’y of Health & Human Servs., 95 Fed. Cl. 598, 607-08 (2010); Doe/17 v. Sec’y of Health & Human Servs., 84 Fed. Cl. 691, 711 (2008); Ryman v. Sec’y of Health & Human Servs., 65 Fed. Cl. 35, 41-42 (2005); Snyder v. Sec’y of Health & Human Servs., 36 Fed. Cl. 461, 465 (1996) (stating “The special master apparently reasoned that, if Frank suffered such [developmental] losses immediately following the vaccination, it was more likely than not that this traumatic event, or his parents’ mention of it, would have been noted by at least one of the medical record professionals who evaluated Frank during his life to date. Finding Frank’s medical history silent on his loss of developmental milestones, the special master questioned petitioner’s memory of the events, not her sincerity.”), aff’d, 117 F.3d 545, 547-48 (Fed. Cir. 1997).

The presumption that contemporaneously created medical records are accurate and complete, however, is rebuttable. For cases alleging a condition found in the Vaccine Injury Table, special masters may find when a first symptom appeared, despite the lack of a notation in a contemporaneous medical record. 42 U.S.C. § 300aa-13(b)(2). By extension, special masters may engage in similar fact-finding for cases alleging an off-Table injury. In such cases, special masters are expected to consider whether medical records are accurate and complete.

In weighing divergent pieces of evidence, contemporaneous written medical records are usually more significant than oral testimony. Cucuras, 993 F.2d at 1528. However, compelling oral testimony may be more persuasive than written records. Campbell v. Sec'y of Health & Human Servs., 69 Fed. Cl. 775, 779 (Fed. Cl. 2006) (“like any norm based upon common sense and experience, this rule should not be treated as an absolute and must yield where the factual predicates for its application are weak or lacking”); Camery v. Sec'y of Health & Human Servs., 42 Fed. Cl. 381, 391 (1998) (this rule “should not be applied inflexibly, because medical records may be incomplete or inaccurate”); Murphy v. Sec'y of Health & Human Servs., 23 Cl. Ct. 726, 733 (1991), aff'd, 968 F.2d 1226 (Fed. Cir. 1992).

The relative strength or weakness of the testimony of a fact witness affects whether this testimony is more probative than medical records. An assessment of a fact witness’s credibility usually involves consideration of the person’s demeanor while testifying. Andreu v. Sec'y of Health & Human Servs., 569 F.3d 1367, 1379 (Fed. Cir. 2009); Bradley v. Sec'y of Health & Human Servs., 991 F.2d 1570, 1575 (Fed. Cir. 1993).

A final point is that special masters consider the record as a whole. 42 U.S.C. § 300aa—13(a). The record in cases in the Vaccine Program always contains medical records created from more than one provider of medical care. Special masters’ consideration of multiple sources promotes fact-finding that is in accord with the weight of all the records.

These criteria are used in the analysis below.

### **Findings of Fact**

This case’s critical period starts on June 3, 2008, when Christina received a third dose of HPV vaccine. Earlier events in Christina’s life are presented for context.

Christina was born in November 1986. Exhibit 18 ¶ 3. In 2004, she was seen for weight gain, fatigue, and potential hypothyroidism. Exhibit 1 at 9-13. In February 2005, tests of Christina's thyroid were normal. Id. at 53.

In September 2005, Christina started attending Bard College. She periodically was seen for minor illnesses and injuries. Exhibit 2 at 82-85. In the fall 2007, Christina was starting her third year of college.

On November 20, 2007, Christina saw a doctor for chronic sinus congestion. The doctor detected an irregular pulse rate. Exhibit 4 at 136. An EKG was abnormal, indicating premature atrial contractions and that Christina's heart was beating in pairs. Id. at 142.

Approximately one month later, the EKG was repeated. It appears unchanged from the previous one. Id. at 135 and 141. In February 2008, Christina had a transthoracic echocardiogram. It produced normal results. Exhibit 4 at 139.

At the end of May 2008, Christina completed her term of study at college and went to Maryland where her parents live. Ms. Tarsell was in Europe when Christina returned. Exhibit 18 ¶ 6.

On June 3, 2008, Christina received the third dose of the HPV vaccine. Exhibit 3 at 99. Ms. Tarsell maintains that this vaccination caused Christina's death.

On June 5, 2008, Christina developed 2-12 dots on the right side of her neck under her ear. Exhibit 15 (affidavit of Tommie Tarsell) ¶ 4. These dots persisted until June 19, 2008. Exhibit 16 (emails between Christina and her father). These dots were not noted in Christina's autopsy. See exhibit 8.<sup>5</sup>

On June 7, 2008, Christina told her mother that she felt dizzy when she stood up. Exhibit 18 ¶ 9; exhibit 23. Christina also complained of feeling faint, according to the VAERS report Ms. Tarsell completed on July 22, 2008. Exhibit 21.

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<sup>5</sup> Ms. Tarsell's proposed findings characterize those red dots as a "rash." A group of 2-12 dots may make a rash to people who are not doctors. A doctor may wish to draw an inference that the dots were a rash. Whether that inference is reasonable will depend upon the doctor's explanation.

I find that Christina was feeling both dizzy and faint from June 7, 2008 to June 12, 2008. Although “dizziness” and “fainting” connote different problems to a doctor (see Dorland’s Illustrated Medical Dictionary (32nd ed. 2012) at 559, 678 (defining “faint” as “syncope”), and 1818 (defining syncope), the two terms may be used similarly in common usage. Further, I find that Christina experienced episodes of dizziness/near fainting frequently enough that Ms. Tarsell recalled them yet not so frequently that Christina sought medical attention.

It is important to note that Ms. Tarsell has not produced any evidence to support a finding that the dizziness/fainting extended beyond June 12, 2008. Ms. Tarsell’s observations of her daughter stopped when Christina returned to Bard College on June 12, 2008. Additionally, Ms. Tarsell’s affidavit does not relay any information – even on a second-hand or third-hand basis – that could be the basis for finding that Christina had dizziness after she returned to New York.

Next, Ms. Tarsell proposes that Christina “developed unusual fatigue one to two days after June 3, 2008, that continued until the time of her death.” Evaluating a second-hand report of “fatigue” (or “unusual fatigue”) is difficult because of the inherent subjectivity. “Fatigue” suggests something more than ordinary day-to-day tiredness. It would not be unusual for a 20 year old college student who has just completed a semester at college to report that she felt “tired.” Determining whether this tiredness is so extreme that it would constitute “unusual fatigue” is complicated by the unfortunate need to rely on second-hand reports of Christina’s activities and the passage of time that inevitably affects the accuracy of those recollections.

The evidence supports a finding that Christina was “tired,” in the usual sense, from June 6, 2008 to June 12, 2008. Supporting evidence includes the VAERS report, exhibit 21, and statement Ms. Tarsell gave during interviews. See exhibit 23 and 26. However, there is no evidence suggesting that Christina was so tired (or fatigued) that her health affected her daily activities. For example, none of the affiants who observed Christina while she was in Maryland (her father, her aunt, and her mother) asserts that she changed plans due to tiredness.

Again, the quality of the evidence about Christina after she returned to New York is less than the already relatively weak evidence from when Christina was in Maryland. While in New York, Christina worked her part-time job for 18.75 hours. On Thursday, June 17, 2008, Christina stayed up until midnight or 1:00 A.M. having dinner with her apartment mates. Her apartment mates did not tell the police officers investigating Christina’s death that she appeared unusually tired.

Her apartment mate's recollections suggest that, to their knowledge, Christina was normal.

To support her proposed finding that Christina had "unusual fatigue," Ms. Tarsell points to affidavits from people who spoke to Christina. However, these affidavits are not very helpful. For example, one affiant says that Christina sounded "tired" when they talked on the telephone on June 22, 2008. Exhibit 12 ¶ 5. According to telephone records, this conversation actually happened on June 20, 2008 (not June 22, 2008) at approximately 6:00 A.M. Exhibit 28 (phone records); see also exhibit 18 (Ms. Tarsell's affidavit) ¶ 17. Another affiant describes a conversation with Christina on June 16, 2008, in which she sounded "congested and incredibly tired," yet she wanted to visit him in New York City. Similarly, another friend told the police investigating Christina's death that she and Christina talked on June 19, 2008, and they "made plans to go to Kingston, New York, sometime in the next few days." Exhibit 6 at 153.

Overall, Christina's activities seem more consistent with a lifestyle of an active twenty year old. Ms. Tarsell has not presented reliable evidence that permits a finding that Christina had "unusual fatigue" after the vaccination until her death.

Next, Ms. Tarsell proposes a finding that Christina's hands felt abnormally cold three days after June 3, 2008. She bases this proposed finding on her affidavit exclusively. She also relies upon her affidavit to support another proposed finding, that Christina developed hair loss approximately three days after June 3, 2008. See exhibit 18 at 2, ¶¶ 10, 11.

As noted by the Secretary, Ms. Tarsell's 2011 affidavit is the only place in the record where comments about hair loss and cold hands appear. See Resp't Resp. at 8-9. When Ms. Tarsell submitted a VAERS report in July 2008, Ms. Tarsell did not mention these problems. See exhibit 21. Similarly, when Ms. Tarsell described Christina in television interviews, she also did not mention hair loss or cold hands. It appears likely that Ms. Tarsell intended to provide accurate and complete information. The omission of these symptoms in this material tends to support a finding that Christina was not, in fact, losing hair or experiencing cold hands.

Ms. Tarsell's final proposed fact is that Christina "died sometime on June 20, 2008." There is little basis for finding that the date of death was June 20, 2008.

As the Secretary points out, Christina's apartment mates told the police that they talked with Christina at approximately 1:00 A.M. on Friday, June 20, 2008.

Exhibit 6 at 150-53. This information marks the last time that Christina was known to be alive. An apartment mate found Christina (already deceased) on June 23, 2008. The police report indicates that a 911 call was made at shortly after noon. Exhibit 6 at 146.

Between these two events, Christina died. There is no reliable evidence for a more specific date. The Secretary, accurately, notes that the death certificate lists Christina's date of death as June 23, 2008. Resp't Resp. at 10, citing exhibit 7 (box 3A). However, the basis for the death certificate is not clear because box 3B provides that the hour of Christina's death is 3:15 PM. Based on the police report and 911 call, this time cannot be correct because she was found, deceased, at noon. The autopsy does not specify a time (or date) of death. See exhibit 8.

The Secretary cites information from two VAERS reports. The manufacturer of the HPV vaccine submitted one report on November 25, 2008. This report states: "It was originally reported by the physician that on 20-JUN-2008, the patient was found dead in her bed. She had been dead for 48 hours." The report continues: "when she did not report to work on 23-JUN-2008, housemates went to her room and found her dead in bed. The initial autopsy, performed on 24-JUN-2008, showed that she was dead for at least 36 hours prior to being found, but could give no exact date or time of death. It was believed to have been between 20-JUN-2008 and 22-JUN-2008, probably the earlier date." Exhibit 11 at 177.

Sharon Kenyon from Maryland, whose relationship to Ms. Tarsell is not specified, submitted another VAERS report on July 17, 2008. This form recounts "Per mother patient was found dead, in bed on 6/22/08, in her dorm room at an out-of-state college. According to the autopsy, the patient had been dead for about 48 hours." Exhibit 11 at 180.

Both reports contain inaccuracies. In both reports, information has been passed from one person to another before being memorialized on the form. In both reports, the ultimate source of information about the date of death is the autopsy. However, the autopsy, itself, does not provide this information.

Considering the available evidence, I find that Christina died at on June 21, 2008 at approximately noon. The manufacturer's VAERS reports says that Christina had been dead for at least 36 hours before she was found, exhibit 11 at 177, and Christina was found at approximately noon on June 23, 2008. I extended "36 hours" to 48 hours to account for the statement that it was "at least 36 hours." The time of 48 hours also is consistent with Ms. Kenyon's VAERS

report, exhibit 11 at 148, even though that report erroneously states that Christina was found on June 22, 2008.

I realize that the basis for placing Christina's death on June 21, 2008 at noon is weak. However, it is abundantly clear that Christina must have died within a day or two days of this mark.

### **Conclusion**

Christina's death at such a young age was tragic and Ms. Tarsell deserves much sympathy. The fact that so little is known about Christina's health before her death makes understanding her death even more difficult.

Yet, in this litigation, to support her factual assertions, Ms. Tarsell bears the burden of presenting evidence. In evaluating the record, I have tried to give Ms. Tarsell the benefit of every reasonable inference. However, inferences must ultimately rest on some fact. See Star Scientific, Inc. v. R.J. Reynolds Tobacco Co., 537 F.3d 1357, 1368 (Fed. Cir. 2008) (stating "no inference can be drawn if there is no evidence, direct or indirect, that can support the inference."), on appeal after remand, 655 F.3d 1364 (Fed. Cir. 2011). Here, there are simply insufficient facts to support many of Ms. Tarsell's allegations.

The parties are instructed to provide these findings to any expert whom they retain to testify. A status conference will be held on April 26, 2012 at 10:00 A.M. Ms. Tarsell should be prepared to propose her next step.

IT IS SO ORDERED.

s/ Christian J. Moran

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Christian J. Moran  
Special Master