

OFFICE OF SPECIAL MASTERS

No. 90-3576V

Filed: September 5, 1997

VINCENT L. SCOUTTO

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Petitioner,

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v.

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PUBLISHED

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SECRETARY OF THE DEPT. OF

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HEALTH AND HUMAN SERVICES,

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Respondent.

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Edward T. Dinna, Fort Lauderdale, Florida, for petitioner.

David Terzian, Washington, D.C., for respondent.

ATTORNEY'S FEES DECISION

GOLKIEWICZ, Chief Special Master

Petitioner's counsel filed a Petition for Attorney's Fees and Costs on October 17, 1996. Respondent filed their objection on October 31, 1996, questioning Mr. Dinna's hourly rate and the hours expended, Dr. Marcel Kinsbourne's expert fees, Mr. Dinna's travel costs to New York, and copying costs. In response to the objections presented by respondent's counsel, petitioner filed additional documentation between October 28, 1996 and February 20, 1997, and filed a reply on December 10, 1996. The court has reviewed the entire record and awards \$12,030.35 for fees and costs for the following reasons.

Hourly Rate

Petitioner's counsel requests fees in the amount of \$12,372.50 for 70.7 hours of work billed at the hourly rate of \$175.00. Fee Petition, filed 10/17/96 at 9. Respondent opposes this hourly rate on the basis that \$175.00 is considered the premiere rate for attorney's practicing under the Vaccine Program and that Mr. Dinna "has not demonstrated that he is deserving of this high hourly rate." R Objection, filed 10/31/96 at 1. Respondent further notes that in 1990, Mr. Dinna charged only \$100/hour for another vaccine case and was ultimately awarded only \$75/hour. Respondent suggests an hourly rate not exceeding \$115.00 would be reasonable under the circumstances. R Obj. at 2.

Generally, reasonable attorney's fees are calculated by the "lodestar method" which entails multiplying the hours reasonably expended by counsel by the reasonable hourly rate. An hourly rate is deemed reasonable based on the prevailing market rate for lawyers in the area where counsel practices. See Blanchard v. Bergeron, 489 U.S. 87, 109 (1989); Blum v. Stenson, 465 U.S. 886, 888 (1984). In any Vaccine Program case, the review of counsel's fee petition typically begins with the understanding that the hourly rate of \$175.00 is considered to be the premiere rate for experienced attorney's practicing under the program in high cost areas. See Betlach v. Secretary of HHS, No. 95-3V, 1996 WL 749707 (Fed. Cl. Spec. Mstr. Dec. 17, 1996); Scheuer v. Secretary of HHS, No. 90-1639V, 1992 WL 135577 (Cl. Ct. Spec. Mstr. May 21, 1992). See also Guy v. Secretary of HHS, No. 92-779, 1997 WL 381585, ___ Fed. Cl. ___ (June 23, 1997) (affirming the Special Master's reduction of petitioner's counsel's hourly rate from \$175.00 to \$150.00 based on counsel's lack of experience in the program and the cost of living in New Orleans). Petitioner's counsel indicates he has been practicing in Broward County, Florida, for the past 7½ years, and that he has been successful in obtaining multi-million dollar judgments in other vaccine cases and medical malpractice cases. Counsel also indicates that he stipulated to an hourly rate of \$150.00 in another vaccine case. However, Mr. Dinna provides no supporting affidavits from other attorneys indicating the market rate for similarly experienced lawyers practicing in Fort Lauderdale or Broward County. ⁽¹⁾

Mr. Dinna is very familiar to the court from his work in several cases. At least initially, this particular case largely rode on the tails of the omnibus proceedings in Mosely v. Secretary of HHS, No. 91-201V. The complexity of this IPV case, along with the others, was lessened not only by the efforts of the lead counsel in the omnibus proceedings, but by the court's own lengthy and detailed orders instructing counsel on what was required of them to prove their case. Thus, the efforts in this case do not support a high hourly rate. More persuasive are the attorney fees awarded Mr. Dinna in a recent case, Griggs v. Secretary of HHS, No. 90-2838 (Fed. Cl. Spec. Mstr. June 2, 1997)(unpublished), wherein Mr. Dinna requested \$175.00 per hour, but was only awarded a \$125.00 hourly rate. Considering Griggs, the absence of supporting affidavits, and that Mr. Dinna has not demonstrated that he has the extensive experience required to be awarded the \$175.00 premiere hourly rate, this court finds \$125.00 to be a reasonable hourly rate in this case.

Number of Hours Expended

Petitioner's counsel states he expended 70.7 hours in the handling of this case; no paralegal or law clerk hours are listed or requested. Respondent argues the request is excessive for several reasons: (1) this case was one of many IPV cases lumped together and addressed in an "omnibus fashion" with other attorneys acting as "lead counsels" in the matter, (2) Mr. Dinna inherited this case from another attorney who prepared the petition, (3) no formal proceedings or status conferences were conducted in this case, (4) the petition was ultimately dismissed by the court on September 12, 1996, due to petitioner's inability or unwillingness to comply with the court's Show Cause Order, (5) counsel lists numerous billings for routine tasks, and (6) counsel charges the attorney hourly rate for tasks more suitable for

paralegals/lower paid staff. R. Obj. at 2-5. Respondent did not suggest what amount of time would be reasonable.

In reviewing the hours expended, the court must "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). Mr. Dinna has been on this case since 1990; his earliest entry in the fee petition is 9/28/90 and his last entry is 8/30/96. Counsel's last known filing with the court occurred on February 20, 1997, with the filing of Dr. Kinsbourne's expert witness invoice. At the least, counsel has been on this case for six years, yet only requests reimbursement for 70.7 hours. This approximates to 11.78 hours expended per year on this case over a 6 year period. The court hardly finds this time unreasonable, despite respondent's arguments that this case involved limited formal or informal proceedings and that the medical issues were largely handled by the attorneys heading the omnibus proceedings. The respondent fails to acknowledge that in December 1995, counsel was instructed to pursue his IPV case on its individual merits, apart from Mosely. The court is also not inclined to "nit-pick", as respondent requests, which documents Mr. Dinna should or should not have been reviewing as they crossed his desk. An attorney is, after all, obligated to be informed about his cases.⁽²⁾ Given that only 70.7 hours are requested, the court doubts that the "sum total of all of these entries [relating to routine tasks] unnecessarily inflates the total number of hours billed to this case." R Obj. at 3-4.

However, in reviewing the petition in detail, the court agrees with respondent that there appears to be many instances where counsel charges the attorney rate for activities more suitably handled by a secretary or paralegal.⁽³⁾ Examples of these tasks include: cover letter(s) to the Clerk's Office, medical record request/authorization letters, calls from client regarding appointment dates/times or other simple matters, and letters or faxes to client/others simply enclosing copies of notices/orders/letters received. Consequently, the court is inclined to reduce counsel's fee request accordingly by granting the time spent by counsel on these administrative tasks, but at a rate acceptable for paralegals. See Arbuthnott v. Secretary of HHS, No. 90-1739V, 1994 WL 17926 (Fed. Cl. Spec. Mstr. Jan. 7, 1994)(wherein the court reduced the attorney's time for tasks which could have been performed by a paralegal). The court has found \$50.00 is an acceptable hourly rate for paralegals in Tucson, Sacramento, San Francisco, St. Petersburg, and Philadelphia; \$55.00 is an accepted hourly rate in vaccine cases in Chicago, Dallas, and Houston; and a \$60.00 hourly rate is charged in San Jose, Washington, D.C., Tampa, Boston, Dallas, and San Antonio. More persuasive, however, is that Mr. Dinna's firm was recently awarded hours expended by a paralegal at a rate of \$50.00 per hour. See Griggs v. Secretary of HHS, No. 90-2838V (Fed. Cl. Spec. Mstr. June 2, 1997)(unpublished). Consequently, the paralegal hourly rate this court will use is \$50.00, which is also in line with the rates generally accepted in numerous vaccine injury cases in high cost cities.

The total number of hours billed by Mr. Dinna under the attorney's rate which are to be recalculated under the paralegal hourly rate of \$50.00 is 4.6 hours for a total award on those charges of \$230.00, thereby reducing counsel's fee request by \$575.00 (i.e., 4.6 hours x \$175.00 equals \$805.00 requested for these entries of which only \$230.00 will be reimbursed).⁽⁴⁾

The court further awards counsel for the remaining attorney's fees of \$7,887.50 (i.e., 60.1 hours x \$125.00 for a subtotal of \$7,512.50, thereby reducing counsel's fees on these hours in the amount of \$3,005.00 from the \$10,517.50 requested; and 6.0 hours multiplied by the reduced travel hourly rate of \$62.50., to be discussed below, for a subtotal of \$375.00, thereby reducing the fees on these hours by \$675.00).

Travel costs to New York

In counsel's fee petition, he requests \$644.00 for an airline ticket to New York and \$962.43 for the hotel room.⁽⁵⁾ Fee Pet. at 10. Respondent objects to these costs. First, respondent questions the need for counsel to personally travel to New York to obtain any records necessary for the claim; respondent notes there was no impending deadline for submission of such records and petitioner was granted an extension to file supplemental information until October 15, 1992--the trip to New York was conducted on September 3, 1992. Respondent also seriously questioned counsel's hotel bill; petitioner's counsel had initially failed to attach the bill to the original petition thereby providing respondent with no explanation of the amount requested. In reply to these objections, counsel explained that the trip to NYC "was absolutely necessary since after it was determined that a causation case cannot be established, the only remaining avenue for the Petitioner was to obtain the specific records absolutely necessary to establish the specific manufacturer, lot and determine whether or not there could have been a contamination in that specific lot." P Reply, filed 12/10/96, at 3-4. Counsel also notes that he is a quadriplegic and, therefore, requires the aid of another when traveling. In support of these costs, counsel submitted an itinerary from Union Tours, Inc. evidencing that four tickets were purchased for \$322.00 each for a round trip from Fort Lauderdale to New York; counsel is only requesting payment for two of these tickets--for his own and for his aide, Joan Dinna, at \$322.00 each for \$644.00 total. P filing of 12/4/96 at 2. In further support of his lodging costs, counsel filed an invoice from Holiday Inn at JFK Airport. The total charges are \$942.43⁽⁶⁾, and consist of room rates, taxes, and local and long distance telephone calls for a stay of five days and four nights from September 3-September 7, 1992. Counsel indicates he is requesting only 2 nights lodging, presumably for the evenings of September 3 and September 4. P filing 12/10/96 at 4.

Per the court's Order to Show Cause dated June 30, 1992, petitioner was directed to explain, by September 1, 1992, why his petition should not be dismissed for failure to substantiate his claim. Thereafter, petitioner filed a motion for an extension of time within which to respond to the court's show cause order; the motion was signed by counsel on September 2nd and filed with the court on September 8th. The court granted the motion on September 9th, giving petitioner until October 15, 1992, to file the requested support for his claim. In support of his motion, counsel indicated that he was planning a trip to NYC "to examine all of the Bureau of State and Services Communicable Disease Center records and other medical records that might contain the manufacturer and lot or either recipients by association to determine the specific information The undersigned believes that although the persons recording the information concerning the Petitioner, other individuals receiving the same shot on that day may have had the manufacturer and lot number recorded by the health center workers." P Motion, filed 9/8/92, at 3-4. Counsel indicates in his fee petition that he visited four health stations to review client records and to discuss with certain officials/employees where and how relevant information or additional records could be obtained. These health stations were Dr. Kanasky's office in Brooklyn, City Department of Health (Pat Caruso) in NYC, Baby Health Station in Brooklyn, and Maimonides Hospital in Brooklyn.

The court will accept counsel's trip to New York as reasonable for the purposes outlined above and for the reasons which follow. First, while respondent is correct that petitioner received an extension within which to file the information required by the court's Show Cause Order, the extension was only for 45 days and petitioner was directed to comply by October 15, 1992. The "unconventional" means of obtaining information, by searching the records oneself instead of waiting for an office employee to do so, may seem excessive to respondent but was reasonable in light of the pending dismissal facing

petitioner's claim. Second and more importantly, counsel's personal efforts were reasonable given that doctors' and public health offices are not the most efficient in responding to written or oral telephone requests for medical records or information. It must be remembered that petitioner sought thirty-year old information which was likely buried, if at all available, in office storage spaces. Counsel simply engaged in efforts to speed the process of reviewing the records for any useful information which could either provide the basis or some direction for the prosecution of his claim; that he took these duties upon himself rather than burdening some employee, unfamiliar with the case, with this research task does not make counsel's efforts unwarranted. Third, per petitioner's motion for extension of time, it appears counsel intended to review some records not specific to Mr. Scuotto. Indeed, counsel's entries in the fee petition state he reviewed various client files, implying not just those relating to his client. It is possible, if not likely, that had counsel made only written requests for information, documentation relating to other vaccinees would not have been provided. Lastly, counsel accomplished four health station visits in minimal time and discussed with officials/employees other avenues to pursue for the collection of relevant vaccination information. In at least one instance, counsel's visit prompted the city official to contact other officials for relevant information. P filing of 12/14/92 (see Patricia J. Caruso's Memorandum to Dr. Carmen Ramos and Elliott Jager. Ms. Caruso was the Secretary for the Board of Health/Department of Health.). Therefore, the court finds counsel's travel to New York reasonable. Consequently, the court awards Mr. Dinna for the airfare requested in the amount of \$644.00 (for himself and his aide); however, the court does not award Mr. Dinna for the full amount of the hotel bill as requested in the fee petition, nor for the full amount of the attorney's fees associated with the travel time to and from New York. What will be awarded is discussed below.

As previously noted, the bill submitted from Holiday Inn lists a stay of five days and four nights. Mr. Dinna indicates he is seeking only the costs associated with two nights worth of lodging, presumably September 3rd and September 4th. Thus, calculating in the room rate, taxes and telephone calls⁽⁷⁾ associated with those dates, the court determines that counsel shall be awarded \$460.21 in lodging costs, which is \$502.22 less than the amount requested in the fee petition.⁽⁸⁾

In vaccine cases, travel time is typically awarded at a rate which is 50% that of the hourly rate charged by the attorney. See LeBlanc v. Secretary of HHS, No. 90-1607V, 1995 WL 695202 (Fed. Cl. Spec. Mstr. Nov. 8, 1995); Mains v. Secretary of HHS, No. 90-992V, 1993 WL 69724 (Fed. Cl. Spec. Mstr. Feb. 26, 1993). As previously discussed, Mr. Dinna's hourly fee has been reduced from \$175.00 to \$125.00. The total travel time requested, as evidenced in the fee petition at page 6, is 13.6 hours for the New York visit. Because 7.6 hours of the time involved both travel time and record review time, and because no apportionment was made between the two, the court will only concentrate on the 6.0 hours listed as air travel time to and from New York. Consequently, the court awards \$375.00 for 6.0 hours of travel time (as multiplied by ½ of Mr. Dinna's \$125.00 hourly rate), thereby reducing counsel's fee request by \$675.00.

Dr. Marcel Kinsbourne's expert fees

The fee petition requests a total of \$2,725.00 for Dr. Kinsbourne's charges. The first entry on 1/16/91 indicates a firm check was paid to Dr. Kinsbourne in the amount of \$1,000.00; the second entry is on 2/17/95 for \$1,725.00. Fee Pet. at 11. In further support of this request, counsel submitted Dr. Kinsbourne's bill for services rendered which indicates he spent 5.75 hours at \$300.00 per hour to review medical records, statements, literature, and to confer with counsel. P filing 2/20/97 at 1. Respondent objects to the awarding of any fees for Dr. Kinsbourne. Respondent notes this case never resulted in a hearing or any proceedings requiring expert participation, and no expert report was ever filed. Respondent was aware, however, that counsel was discussing the case with Dr. Kinsbourne.

In the court's Order dated December 21, 1995, petitioner, along with 45 others and in light of the developments in the omnibus proceedings conducted in Mosely was directed to proceed on the individual merits of his case and begin compliance with the court's April 2, 1992 Order. See Order, filed 12/21/95. The April 2, 1992 Order required petitioners to submit expert affidavits in support of their case-in-chief, and more importantly, in support of any causation-in-fact theory. See Order, filed 4/2/92, at 17-19. In light of the court's own requirements and regardless of the fact that no expert report was ultimately filed or that the case never proceeded to the point where Dr. Kinsbourne's testimony was necessary, the court finds counsel's retention of Dr. Kinsbourne and the hours expended by the expert to be reasonable.

The court notes that the \$1,000.00 listed on 1/16/91 was paid to Dr. Kinsbourne as a retainer. Pursuant to Mr. Scuotto's affidavit, filed 10/28/96, it is clear petitioner sent a check in the amount of \$1,000.00 to Mr. Dinna whereby counsel then paid Dr. Kinsbourne with a firm check (#1266). Thus, although counsel lists this \$1,000.00 as costs incurred by his firm, the reimbursement shall be awarded to Mr. Scuotto instead.

This court has repeatedly questioned Dr. Kinsbourne's \$300 per hour rate as being excessive. See Thomas v. Secretary of HHS, No. 92-46V, 1997 WL 74664 (Fed. Cl. Spec. Mstr. Feb. 3, 1997); Mandell v. Secretary of HHS, No. 90-2853V, 1995 WL 715511 (Fed. Cl. Spec. Mstr. Nov. 21, 1995); Connor v. Secretary of HHS, No. 90-388V, 1992 WL 176484 (Cl. Ct. Spec. Mstr. July 6, 1992). In the court's February 28, 1997 Order, the court notified counsel that it would be inclined to award only \$200.00 per hour for Dr. Kinsbourne's services, "absent a compelling reason to award the \$300.00 rate requested." Petitioner failed to submit any argument for awarding the \$300.00 rate. Therefore, based on precedent, the court awards \$1,150.00 (5.75 hours x \$200) for Dr. Kinsbourne's expert fees, thereby reducing counsel's request for costs by \$575.00.

Filing fee

Counsel requests reimbursement in the amount of \$120.00 for the filing fee in this case. It appears from petitioner's affidavit that this fee was forwarded to Mr. Dinna; counsel then paid the clerk's office through a firm check (#1098). Mr. Scuotto's affidavit indicates \$125.00 (versus \$120.00) was advanced for the filing fee, but he failed to submit a copy of the check supporting payment. Nevertheless, the filing fee was obviously incurred and counsel does not dispute that petitioner himself advanced the fee. Thus, the \$120.00 filing fee is awarded and shall be paid directly to petitioner.

Copy costs

Counsel requests reimbursement for copies made at the rate of \$0.25 per page and indicates that this amount includes paralegal and accounting time which was not separately billed for in the petition. P Reply at 4. Because copying documents is an unreimbursable secretarial task, see LeBlanc v. Secretary of HHS, No. 90-1607V, 1995 WL 695202 (Fed. Cl. Spec. Mstr. Nov. 8, 1995), the court considers the \$0.25 rate representative of copying charges only, and therefore, finds this rate excessive. Instead, counsel is awarded \$0.10 per copy.⁽⁹⁾ As a result of this downward departure and after a calculation of the copies made, counsel is awarded \$140.60 in copy costs (1406 copies x \$0.10 per page), rather than the \$263.30 requested (i.e., 524 copies x \$0.25 per page; 882 copies x \$0.15 per page), thereby reducing counsel's request for costs by \$122.70.

Other costs

The court finds all other costs not specifically addressed above to be reasonable; they are awarded without reduction.

Based on the reasons presented above and the court's subsequent calculations, the court finds \$12,030.35 represents a reasonable award for fees and costs in this matter. Therefore, the court finds that petitioner's counsel is entitled to \$8,117.50 in attorney's fees and \$2,792.85 in costs, and petitioner shall be awarded \$1,120.00 for costs advanced.⁽¹⁰⁾

The Clerk shall enter judgment accordingly.

Gary J. Golkiewicz

Chief Special Master

1. See Higgins v. Secretary of HHS, No. 92-313V, 1993 WL 93920 (Fed. Cl. Spec. Mstr. Mar. 17, 1993) (quoting Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984), that "[T]he burden is on the fee applicant to produce satisfactory evidence--in addition to the attorney's own affidavits--that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.").
2. The court recognizes there's a thin line between the attorney's obligation to be informed about the case and the charging of time for simple and routine tasks. For instance, it appears Mr. Dinna charged for simple review of court orders, some of which were less than half a page in length. On the other hand, some orders, of various lengths, were extremely detailed and/or imposed strict requirements and deadlines on the petitioners, thereby requiring careful review and attention by the attorney. Counsel is advised to closely scrutinize future fee petitions to ensure that the attorney's charges listed do indeed demand action or attention by the attorney, instead of a lower paid staff member, and that all tasks listed warrant actual billing. This court could have been less lenient in reviewing Mr. Dinna's petition; instead, the court granted Mr. Dinna the benefit of doubt as to some charges.
3. Counsel charged no paralegal or secretarial time although he indicated that his copy charges of \$0.25 per page included the paralegal's time in completing the copying tasks. Why some tasks were not assigned to the paralegal remains unexplained.
4. The entries reduced to the paralegal rate are: 9/28/90 (.2), 10/1/90 (.3), 10/1/90 (.1), 10/5/90 (.2), 11/1/90 (.2), 11/26/90 (.1), 11/26/90 (.1), 11/26/90 (.1), 1/9/91 (.1), 4/16/91 (.2), 4/16/91 (.2), 5/29/91 (.2), 4/30/92 (.2), 9/15/92 (.2), 9/29/92 (.2), 6/10/93 (.2), 1/27/94 (.2), 8/4/94 (.2), 11/30/94 (.2), 1/11/95 (.2), 2/16/95 (.2), 11/27/95 (.2), 1/3/96 (.2), 6/18/96 (.2), and 6/18/96 (.2).
5. Petitioner's counsel also requests 6.0 hours in travel time to and from New York and 7.6 hours for travel to various offices within New York for the purposes of reviewing records and discussing record keeping procedures; these charges are billed for September 4, 1992. Fee Pet. at 6. At a requested rate of \$175 per hour, this amounts to \$2,380.00 in fees.
6. The fee petition requests \$962.43, although the hotel bill is only for \$942.43.

7. Although counsel did not clarify whether the local calls made on September 3rd and 4th were related to the case, the court will presume they were; the total for these calls was \$3.05.
8. The guest room rate at the Holiday Inn was \$190.00/night, within the rates listed by the American Automobile Association, and as discussed by respondent in his response at page 8, footnote 9.
9. Rule 39 of the Rules of Practice before the Federal Circuit allows only 8 cents per page, and such a rate has been upheld in other vaccine cases. See Schelhaas v. Secretary of HHS, No. 90-1654V, 1994 WL 317480 (Fed. Cl. Spec. Mstr. June 20, 1994). However, this court finds 10 cents per page more in line with today's typical copy costs. See Froelich v. Secretary of HHS, No. 90-676V, 1992 WL 75169 (Cl. Ct. Spec. Mstr. Mar. 20, 1992) and Smith v. Secretary of HHS, NO. 90-3728V, 1992 WL 54332 (Cl. Ct. Spec. Mstr. Mar. 3, 1992), both which awarded 10 cents per page.
10. This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C.A. §300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) which would be in addition to the amount awarded herein. See generally, Beck v. Secretary, 924 F.2d 1029 (Fed. Cir. 1991).