

# In the United States Court of Federal Claims

## OFFICE OF SPECIAL MASTERS

No. XX-XXXV

(E-Filed: June 9, 2009)

JOHN DOE/11 and JANE DOE/11,	)	
as Representatives of the Estate of	)	
CHILD DOE/11, Deceased,	)	
Petitioners,	)	TO BE PUBLISHED
	)	
v.	)	Interim Petition for Attorneys’
	)	Fees and Costs; Partial Grant of
SECRETARY OF HEALTH AND	)	Requested Amount; Deferred
HUMAN SERVICES,	)	Consideration of Contested Portion
	)	of Request
Respondent.	)	
_____	)	

Richard Gage, Cheyenne, WY, for petitioner.

Glenn McLeod, Department of Justice, Civil Division, Torts Branch, Washington, DC, for respondent.

### **INTERIM ATTORNEYS’ FEES AND ATTORNEYS’ COSTS DECISION<sup>1</sup>**

Pending before the undersigned is Petitioners’ Application for Award of Interim Attorneys’ Fees and Reimbursement of Costs (Ps’ App.). Petitioners seek interim fees and costs pursuant to 42 U.S.C. § 300aa-15(e) of the National Childhood Vaccine Injury

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<sup>1</sup> Because this document contains a reasoned explanation for the action of the undersigned, the document shall post on the website of the United States Court of Federal Claims in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has fourteen days within which to request the redaction “of any information furnished by that party (1) that is trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Rules of the United States Court of Federal Claims (RCFC), Appendix B, Vaccine Rule 18(b). In the absence of timely objection, the entire document will be made publicly available.

Act of 1986, as amended (the Vaccine Act), and Rule 13 of the United States Court of Federal Claims Vaccine Rules, and further to the guidance provided in Avera v. Secretary of the Department of Health and Human Services, 515 F.3d 1343 (Fed. Cir. 2008).

Based on the cited authority, petitioners request interim attorneys' fees in the amount of \$167,291.75. Ps' App. at 4. The requested interim attorneys' fees contemplate an award of fees to Richard Gage, P.C., in the amount of \$159,985.75, and an award of fees to the Gage & Moxley firm in the amount of \$7,306.00. Id. at 4. Petitioners also request interim attorneys' costs in the amount of \$16,244.08. Id. The requested costs contemplate an award to Richard Gage, P.C., in the amount of \$14,422.92, and to Gage & Moxley, in the amount of \$1,821.16. Petitioners have not requested an interim award of petitioners' costs pursuant to General Order No. 9. Id. The total interim fees and costs request is \$183,535.83. Id.

Respondent filed an objection to petitioners' request. Respondent's Response to Petitioners' Application for Award of Interim Attorneys' Fees and Reimbursement of Costs (R's Opp.). For the reasons detailed below, the undersigned grants an interim award of fees and costs in the amount of \$12,985.48.

## **I. DISCUSSION**

### **A. An Award of Fees**

Section 15(e)(1) of the Vaccine Act permits a special master to award reasonable attorneys' fees and costs incurred in a proceeding on vaccine petition. 42 U.S.C. § 300aa-15(e)(1). Vaccine Rule 13 authorizes the Clerk of the Court to forward a filed request for attorneys' fees and costs to the special master to whom the case was assigned for consideration and decision. Vaccine Rule 13, Rules of the Court of Federal Claims, Appendix B. Reasonable attorneys' fees are determined using a lodestar calculation that involves "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." See Avera, 515 F.3d at 1347-1348 (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)). Once the court makes that initial calculation, the determined fee award may be adjusted upward or downward based on other specific findings. Id. at 1348.

The Supreme Court has provided guidance regarding what factors may be considered in making a fee determination. Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). The quality of counsel's representation, the complexity of the case and novelty of the subject matter should be reflected in the reasonableness of the hourly rates and hours expended by the attorney and should not alone be the basis for an adjustment. Id. at 898-899. Any

adjustment to the fee award must be supported by specific evidence regarding the quality of counsel's service and the relationship of that service to the results obtained for the client. Blum, 465 U.S. at 899; see also Hensley at 434.

## **B. Authority to Award Interim Fees**

In Avera, the Federal Circuit determined that the Vaccine Act permits the award of interim fees, but does not require an interim award in every case. 515 F.3d at 1352. Relevant factors in determining when an interim fee award might be appropriate include whether the case involved protracted proceedings, whether costly experts were retained, and whether petitioner would suffer undue hardship. See Avera, 515 F.3d at 1352.

## **C. The Pending Fee Request**

Petitioners' request for interim fees and costs drew a number of objections from respondent. The specific objections are addressed in turn.

### **1. Respondent argues that the fee request is not an interim one but a final one**

Petitioners filed the pending fee request prior to the entry of judgment dismissing the petition seeking compensation for an alleged vaccine-related injury. Respondent posits that petitioners' application for an interim award of fees and costs is mooted by the recent entry of judgment dismissing the petition. Because the proceedings before the United States Court of Federal Claims are now concluded, respondent argues that the undersigned should "consider petitioners' request for interim fees and costs as a final application for an award of compensation under 42 U.S.C. §300aa-15(e)(1)(B)." R's Opp. at 4. For the reasons addressed in the May 22, 2009 Order, however, the undersigned views the petition as an interim one.<sup>2</sup>

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<sup>2</sup> See May 22, 2009 Order. As stated in May 22, 2009 Order, the interim fee petition was filed while petitioners' motion for review was pending. The motion for review has been resolved and judgment has entered in respondent's favor. Petitioners' counsel has indicated that whether or not the merits of the case were to be appealed, the fee decision would be appealed to address the dispute concerning petitioners' counsel's requested hourly rate. Accordingly, petitioners' counsel asserts that the fee petition is in fact an interim one. Based on representations of petitioners' counsel and the time of filing of the pending fee request, the undersigned treats the petition as an interim fee request.

**2. Respondent challenges the requested hourly rates for Julie Hernandez, a paralegal**

Petitioners have requested \$7,306.00 in attorney and paralegal time billed by the law firm of Gage and Moxley for work on the petition during the period of time between November 23, 1996 and December 29, 2005. See Ps' App., Tab E. Respondent does not object to the litigation costs claimed by the law firm of Gage & Moxley, or to the number of attorney and paralegal hours requested by that firm for proceeding on the petition in this case. Respondent does object, however, to the hourly rates requested for the firm's paralegal, Julie Hernandez. R's Opp. at 5. The pending fee petition reflects that during the period of time between November 1996 and December 2005, Ms. Hernandez was billing at a rate of \$100.00 per hour. In the last two months of 2005, however, Ms. Hernandez's billing rate increased to \$130.00 per hour according to the fee petition. Respondent objects to the requested hourly rates for Ms. Hernandez because she has not been compensated at those rates in prior Program proceedings. Rather, she has been compensated by the Program at rates ranging between \$80.00 to \$95.00 per hour for work that she performed between October 17, 2000, and May 23, 2004. R's Opp. at 6 (citing Masias v. Sec'y of HHS, No. 99-697V, 2009 WL 899703, \*5 (Fed. Cl. Spec. Mstr. Mar. 12, 2009)). Respondent argues that the undersigned should award Ms. Hernandez an hourly rate that is commensurate with the rates awarded for her work in Masias. Because the hours are not contested and the undersigned finds that the requested hours are reasonable, the undersigned compensates Ms. Hernandez at the undisputed portion of the requested hourly rates.

**3. Respondent challenges the requested hourly rates and the reasonableness of the number of hours expended by petitioner's counsel, Richard Gage, on this case**

Respondent also challenges the hourly rates of \$360.00 to \$410.00 per hour requested by Mr. Gage for his services between January 18, 2006, and March 2, 2009. R's Opp. at 5. Respondent argues that Mr. Gage is not entitled to receive these rates nor

is he entitled to receive compensation under the “Laffey matrix.”<sup>3</sup> Id. Respondent argues that petitioners must provide additional evidence to establish that the requested hourly rates for Mr. Gage are commensurate with those prevailing in his community for similar services by lawyers of reasonably comparable skill, experience, and reputation. Id. Respondent points to a recent program case where Mr. Gage was awarded a rate of between \$175.00 and \$200.00 per hour. R’s Opp. at 5 (citing Hart v. Sec’y of HHS, 2004 WL 3049766, \*9-10 (Fed. Cl. Spec. Mstr. Dec. 17, 2004)).

Respondent also objects to the total time that Mr. Gage expended on this case. See Ps’ App., Tab C; R’s Opp. at 11-14. Mr. Gage billed petitioners for 419.4 hours of attorney time expended on this case. Ps’ App., Tab C. Respondent contends that the expended time is unreasonable. R’s Opp. at 12.

Because counsel’s requested hourly rates and the time counsel expended on the case are contested and require further examination, the undersigned defers consideration of this issue until the final fee petition is submitted.

**4. Respondent challenges both the hourly rate requested by Dr. Levin and the hours for which he charged**

Finally, respondent objects to petitioners’ counsel request of \$14,048.00 in litigation costs billed by the law firm of Richard Gage, P.C., on the petition between January 18, 2006 and March 2, 2009. See Ps’ App., Tab D. In particular, respondent objects to the portion of the requested costs that pertains to the costs associated with the work of petitioners’ immunology expert, Alan Levin, M.D. Dr. Levin charged \$10,000.00 for 25 hours of work in this case at a rate of \$400.00 per hour. See Ps’ App.,

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<sup>3</sup> Created to reflect the hourly rates allowed by the District Court in Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354, 371 (D.D.C. 1983), aff’d in part, rev’d in part on other grounds, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985), the matrix is commonly referred to as the “Laffey matrix.” The matrix is intended to be used in cases in which a “fee-shifting” statute permits the prevailing party to recover “reasonable” attorney’s fees. It is a matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks that was prepared by the Civil Division of the United States Attorney's Office for the District of Columbia for work done principally in the years 1981 and 1982. Hourly rates for subsequent years are determined by adjusting the rates established in the Laffey matrix by the applicable cost of living increases in the area. Petitioners’ counsel provided a copy of the Laffey matrix in effect from 2003 through 2009 at Ps’ App, Tab G. See also Laffey Matrix 2003-2014 at United States Attorney’s Office for the District of Columbia, [http://www.usdoj.gov/usao/dc/Divisions/Civil\\_Division/Laffey\\_Matrix\\_3.html](http://www.usdoj.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_3.html).

Tab D at 40. Respondent objects to the number of hours requested as excessive. Respondent also objects to the requested rate of \$400.00 per hour for Dr. Levin's work as excessive. Respondent asserts that the undersigned should award Dr. Levin an hourly rate that is commensurate with the rate awarded to Dr. Levin in the case of Isom v. Department of Secretary of Health and Human Services, No. 94-770V, 2001 WL 101459 \*4 (Fed. Cl. Spec. Mstr. Jan. 17, 2001). In that case, Dr. Levin was awarded \$300.00 per hour.

Because the parties dispute the number of hours Dr. Levin reasonably should have expended on this case and for which Dr. Levin could be compensated now at an undisputed portion of the requested hourly rate, the undersigned defers further consideration of this issue until the final fee application is filed.

**D. Resolution of the Uncontested Portion of the Pending Fee Request that is Found to be Reasonable**

As indicated in the undersigned's Order issued on May 22, 2009, the undersigned informed counsel that she would be amenable to awarding the portion of the interim fees and costs request that is not in dispute by the parties and that she finds reasonable. May 21, 2009 Order at 1. The undersigned further informed counsel that she would defer consideration of the disputed portions of the interim fees and costs request until a final petition for fees and costs is submitted. See Order of 5/22/09.

The undersigned now briefly addresses why, in her view, this is an appropriate case for an interim award of fees. The case is one of the earlier filed hepatitis B cases which was subject to a period of delay in prosecution while efforts were made to resolve the numerous filed cases through omnibus proceedings. Accordingly, the matter has been pending for a protracted period of time.<sup>4</sup> Once movement in the case resumed in 2006, supplemental medical records were obtained and filed, expert opinions and supporting medical literature were filed, and an entitlement hearing was held. Following the hearing, the undersigned issued a decision finding no entitlement to compensation. A motion for review ensued, and the case was remanded. A decision on remand issued, and petitioners filed another motion for review. The claim was dismissed on the ground that petitioners failed to establish entitlement to compensation and on April 24, 2009, judgment entered. The time for appeal of the decision dismissing the claim has not expired yet. And, based on the objections that respondent has raised regarding petitioner's interim fee request and

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<sup>4</sup> After the filing in 2000 of supplemental medical records and an initial expert from petitioners' expert pathologist, Dr. John Shane, a series of status reports were filed. A review of the docket sheet indicates that the case became more active again in 2006.

the intention expressed by petitioners' counsel to appeal a ruling on fees, the undersigned anticipates that the fee application will be contested vigorously and will further delay a decision on petitioners' petition for fees and costs. Because the proceeding has been a protracted one and is expected to continue for a period of time and because the parties have been able to identify several discrete aspects of the pending interim request to which respondent does not object and that the undersigned finds reasonable, the undersigned is persuaded that an interim fee award is appropriate in this case. Therefore, the undersigned exercises her discretion to make such award.

The portions of the request that are not in dispute, for purposes of an interim award, are summarized below. The summary of the requested fees and costs to be awarded also reflects the undersigned's adjustments to the requested sums:

- (1) Petitioners' counsel's requested fees of \$7,306.00 for attorney and paralegal time billed by the law firm of Gage and Moxley on the petition from November 23, 1996, until December 29, 2005, are reduced by \$337.50. The undersigned has adjusted Ms. Hernandez's requested hourly rates to reflect rates that are consistent with previously awarded rates for other Program work that she performed during the same time period,<sup>5</sup> see Ps' App., Tab E;
- (2) Petitioners' requested reimbursement of \$1821.16 in litigation costs billed by the law firm of Gage & Moxley on the petition are adjusted to account for discovered errors in the petition. The undersigned reduced the

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<sup>5</sup> The undersigned compensates Ms. Hernandez at rates that have been established by previous award for work done during the same time frame in the Program. In the Masias case, Ms. Hernandez was awarded \$80 per hour for work performed during the period of time from October 17, 2000, through May 23, 2001; \$85 per hour from July 3, 2001 through May 16, 2002; \$90 per hour from July 18, 2002, through March 13, 2003; \$95 per hour from June 16, 2003, through May 23, 2004, and \$100 per hour from June 18, 2004 through November 1, 2005; and \$130 per hour beginning on November 2, 2005. Accordingly, for hours billed by Ms. Hernandez between October 11, 2000, and June 28, 2001, Ms. Hernandez is compensated at a rate of \$80.00 per hour for 13.2 hours. This calculation includes 0.4 hours billed on October 11, 2000, and 0.2 hours charged on June 28, 2001. Because Masias does not directly address the rate at which Ms. Hernandez was billing on those dates, the undersigned compensates this time at the rate of \$80.00/hour. For the time period July 19, 2001, through May 16, 2002, Ms. Hernandez is compensated at a rate of \$85.00 per hour for 4.5 hours. For the time period of April 9, 2003, through March 15, 2004, Ms. Hernandez is compensated at a rate of \$95.00 per hour for 1.2 hours. The requested rates for Ms. Hernandez after May 15, 2004, through the end of the litigation are consistent with previously awarded rates under Masias and will stand.

requested sum by \$295.15 to account for a receipt reading error,<sup>6</sup> and the undersigned adjusted the requested sum upward by \$68.05 to account for unitemized, but incurred costs for which petitioners provided documentation;<sup>7</sup> see Ps' App., Tab F; and

- (3) Petitioners' requested reimbursement of \$14,422.92 in litigation costs incurred by Richard Gage, P.C., in connection with the petition are adjusted downward. The amount of the downward adjustment is equivalent to the contested expense of \$10,000 incurred for the expert report of Dr. Levin.

The sum of the requested amounts as adjusted and determined to be appropriate for award now is \$12,985.48. The disputed aspects of the interim fee petition will be addressed in the final decision on fees and costs. The awarded amounts are summarized in the following Table.

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<sup>6</sup> The undersigned notes that starting at page 100 of Tab F, petitioners' counsel has a section entitled "Gage & Moxley, additional costs: total \$309.80." The pages that follow are waybills for Federal Express that purport to support the requested additional costs. One of the waybills is for \$225.25, and the other is for \$84.55. A closer inspection of the receipts, however, reveals that the only relevant invoices here are the individual receipts for two packages. The first receipt is for a package delivered to Dr. Vera Byers on July 21, 2005, for which petitioners' counsel was charged \$23.78. This cost also appeared as a line item on the itemized invoice of costs for the Gage & Moxley firm and will not be reimbursed a second time. The second receipt is for a package delivered to respondent's counsel at the Department of Justice on February 9, 2006, for which petitioners' counsel was charged \$14.65. That cost does not appear to have been included elsewhere in the petition and will be reimbursed as an additional cost. Accordingly, petitioners' counsel's requested costs are reduced from \$309.80 to \$14.65.

<sup>7</sup> These costs include the itemized costs initially incurred by the Gage & Moxley firm totaling \$1,511.36 plus the unitemized, but documented costs for payment on 6/30/99 to Quadramed in the amount of \$18.05, and payment on 8/3/05 to the Sacramento County Coroner in the amount of \$50.00. Additionally, these costs include a portion of the requested additional costs (specifically \$14.65 of the originally requested \$309.80) based on the undersigned's determination that the Federal Express receipts that were submitted would only support this portion of the costs incurred by the Gage & Moxley firm. As addressed in footnote 6, the requested amount for sending a package by Federal Express to Vera Byers had already been included in the itemized costs submitted by the firm.

<b>Requested Amount</b>	<b>Awarded Now</b>	<b>Deferred/Contested</b>
Richard Gage, fees \$159,985.75	0.00	\$159,985.75
Richard Gage, costs \$14,422.92	\$4,422.92	\$10,000 (Dr. Levin's fee)
Gage & Moxley, fees \$7,306.00	\$6,968.50	\$337.50 in paralegal rates will not be awarded now as they exceed previously awarded Program rates for the same time frame.
Gage & Moxley, costs \$1,511.36	\$1,579.41 (\$1,511.36 + \$68.05 = \$1579.41)	None because petitioners' counsel included two additional receipts that were not itemized on his cost request which were both clearly identifiable as pertaining to the Doe 11 case. One was a check to the Sacramento County Coroner in the amount of \$50.00. The other was an invoice in the amount of \$18.05 for medical records from Sutter Memorial Hospital.
Gage & Moxley, costs \$309.80	\$14.65	\$295.15 will not be awarded because the supporting documentation provided by petitioners' counsel indicates that counsel had already included the receipt in the amount of \$23.78 to cover the shipping costs of a package sent to Dr. Vera Byers on 7/21/2005 in the general costs itemized by Gage & Moxley. The shipping costs in the amount of \$14.65 for the package sent to respondent's counsel on 2/9/2006 are, however, a reimbursable cost.

## II. CONCLUSION

It is the opinion of the undersigned that the circumstances of this case are appropriate for an interim award of petitioners' counsel's fees of \$6,968.50, and

petitioners' counsel's costs of \$6,016.98. No petitioners' costs were incurred. The undersigned determines that there is no just reason to delay the entry of judgment on an award of interim attorneys' fees and costs. Therefore, in the absence of a motion for review filed under Appendix B of the Rules of the United States Court of Federal Claims, the Clerk of the Court shall enter judgment in petitioners' favor for \$12,985.48 in interim attorneys' fees and attorneys' costs. Under 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.**

s/ Patricia E. Campbell-Smith

Patricia E. Campbell-Smith

Special Master