OFFICE OF SPECIAL MASTERS

No. 91-643V

(Filed: July 10, 1998)

* *		
TAWNYA HAYDEN, as natural mother and legal representative of WHITTNEY LORRAINE HAYDEN,	*	
Petitioner,	*	**TO BE PUBLISHED**
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	
* *		

Joseph W. Elliott, St. Joseph, Missouri, for petitioner.

Elizabeth F. Kroop, Department of Justice, Washington, D.C., for respondent.

DECISION (ATTORNEYS' FEES)

HASTINGS, *Special Master*.

In this case brought under the National Vaccine Injury Compensation Program (hereinafter "the Program"), petitioner seeks, pursuant to § 300aa-15(e)[(1)], an award for attorneys' fees and costs incurred in her attempt to obtain Program compensation. Respondent has filed an opposition challenging the amount of petitioner's request in several respects. Petitioner filed a "Reply" on May 5, 1998, altering petitioner's fee request on certain points.

I

ENTITLEMENT TO FEES AND COSTS GENERALLY

Pursuant to § 300aa-15(e)(1), a special master may make an award of attorneys' fees and costs even when, as in this case, the petitioner does not qualify for a Program award, if the petition was filed in "good faith" and upon a "reasonable basis." I find that this petition was filed in good faith and upon a reasonable basis, so that an award of fees and costs is appropriate.

II

FEES

A. "Secretarial tasks" issue

Respondent first asserts that I should deny compensation for hours spent by the paralegal employed by petitioner's counsel on tasks that are allegedly "secretarial" in nature. Petitioner's Reply adequately explained most of the time entries challenged by respondent. I will, however, deduct .1 hours claimed for 11-4-97 (reduction of $5.00), and also deduct the 3 hours spent on indexing and binding on 3-18-97 and 3-19-97 (see p. 2 of the reply) (deduction of $150.00).

B. "Travel time" issue

I found the explanation contained in the Reply to be persuasive, and will make no deduction of hours in this regard.

C. "Interoffice conferences" issue

When a paralegal is used extensively, time spent on interoffice conferences is inevitable, and often ultimately *decreases* the total legal bill by reducing the attorney hours. I found the explanation on this point to be persuasive, and therefore I will not make a reduction.

D. "Investigation" issue

I found the Reply's explanation to be adequate.

E. Issue of entries for June 4, 1997

Petitioner's altered request in the Reply deletes the mistaken duplicate entry for this date.

III

COSTS

A. "Documentation" issue

With respect to costs, respondent seemed first to suggest that I should deny compensation for any cost item that is not specifically supported by receipts or canceled checks. I cannot agree. I do require documentation for major cost items. However, as to minor items that appear reasonable on their face, I do not feel that it is always necessary to submit a receipt for each item. Moreover, petitioner's Reply has provided documentation for most items. Accordingly, I will allow the claimed costs, except as to those items discussed specifically below.

B. "Interest" issue

The "interest" request has been withdrawn.

C. Expert fees

Respondent questioned the expert fee expense, noting that originally, petitioner did not explain how the expense was computed. Petitioner supplied such an explanation in Tab 3 of the Reply, with Dr. Mark Geier's bill at page 9 and Dr. Marcel Kinsbourne's bill at p. 33 thereof. Respondent did not thereafter further contest this item. Respondent did, however, seem to assert in her Response a general opposition to expert fees of more than $200 per hour. Because the cost request here includes a claim for $1500 for five hours of work by Dr. Kinsbourne, I will address this contention of respondent.

As I explained recently in *Mandel v. Secretary of HHS*, No. 92-260V, 1998 WL 211914 (Fed. Cl. Spec. Mstr. April 2, 1998), the issue of how much to allow for reasonable compensation of petitioners' expert witnesses in Program cases has been a difficult one. As noted in *Mandel*, in many earlier Program decisions, such as *Mandell v. Secretary of HHS*, No. 90-2853V, 1995 WL 715511 (Fed. Cl. Spec. Mstr. Nov. 21, 1995), I declined to award more than $225 per hour for the services of expert witnesses, indicating generally that I saw no justification for expert hourly rates exceeding the $225-per-hour figure. However, my reasoning concerning this general issue has changed since that time. One reason for this change concerns the fact that at the time of such decisions as *Mandell*, respondent supplied affidavits asserting that respondent routinely paid her medical experts, including many very distinguished pediatric neurologists, $200 per hour. Based on this assumption, my reasoning was that if the respondent could obtain competent expert assistance for $200 per hour, petitioners probably could do so as well. My perception since that time, however, has changed; I now believe that in fact it is an exceedingly difficult task for petitioners to obtain expert assistance with respect to Program cases. It appears that relatively few qualified medical experts are willing even to *consider and evaluate* these cases for petitioners. And some of those few experts who are willing to do so have consistently charged petitioners well in excess of $225 per hour for their services. Some of those experts have represented that they routinely receive $250 or $300 per hour for their services in non-Program settings. This is true of the expert here in question, Dr. Kinsbourne, who in a number of Program cases before me has provided affidavits indicating that he routinely receives $300 per hour in non-Program litigation. In these circumstances, it now seems to me that it is reasonable for Program counsel to pay such rates for medical expert services, even though such hourly rates still strike me intuitively as very high. Indeed, I have come to worry that in declining in the past to compensate petitioners for more than $225 per hour for expert assistance, in some cases I have restricted the ability of petitioners to obtain competent expert assistance, and in others I have simply forced petitioners' counsel to pay for the additional amounts to

these experts out of their own pockets.[(2)]

A second factor is closely related to the first. That is, while in earlier Program cases the respondent provided affidavits asserting that respondent routinely paid medical experts $200 per hour, no such affidavits have been provided by respondent in this case, or (to my knowledge) in any Program case over the last several years. Indeed, in one recent case (*i.e., Lincoln v. Secretary of HHS*, No. 90-2046V) the respondent *specifically declined* to provide information as to what respondent's medical experts have been paid in recent years, despite my specific request that respondent do so. Therefore, another chief premise upon which I based my reasoning in earlier decisions, such as *Mandell*, has been called into serious question.

Third, in this case I am quite familar with the expert in question, Dr. Kinsbourne, who has testified before me in many Program cases. He is highly qualified to provide opinions in the area of pediatric neurology, and I have routinely found his testimony to be cogent and helpful. Also, the number of hours that Dr. Kinsbourne billed on this case, given the services that he performed, seems reasonable, as has routinely been the case with respect to his services.

Finally, I note that a number of my colleague special masters have reached similar conclusions. Published decisions awarding $300 per hour for the services of Dr. Kinsbourne himself include *Lindsey v. Secretary of HHS*, No. 90-2586V, 1995 WL 715513 (Fed. Cl. Spec. Mstr. French, Nov. 21, 1995); *Woodcock v. Secretary of HHS*, No. 90-1030, 1990 WL 329300 (Cl. Ct. Spec. Mstr. Baird, Oct. 23, 1992); and *Yeoman v. Secretary of HHS*, No. 90-1049V, 1994 WL 387855 (Fed. Cl. Spec. Mstr. Abell, July 11, 1994). Further, in *Plott v. Secretary of HHS*, No. 92-633V, 1997 WL 842543 (Fed. Cl. Spec. Mstr. Wright, April 23, 1997), [(3)] $300 per hour was awarded to another medical expert.

In short, for the reasons set forth above, I now conclude that it may be appropriate in some circumstances for the Program to reimburse petitioners for medical expert fees at hourly rates in excess of $225 per hour. I conclude that in this case, it is appropriate that I compensate petitioner at the rate of $300 per hour for the services of Dr. Kinsbourne.

IV

SUMMARY AND CONCLUSION

The following amounts are allowable for fees and costs:

Fees ($19,274.10 in amended claim less $155) $19,119.10

Costs 3,460.39

Total $22,579.49

Accordingly, my decision is that fees and costs are to be awarded in the total amount of $22,579.49 pursuant to § 300aa-15(e).

_____

George L. Hastings, Jr.

Special Master

1. The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (1994 ed.). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (1994 ed.).

2. In this regard, consider the following testimony, by an attorney who has represented many Program petitioners, before the Advisory Commission on Childhood Vaccines, a commission that reviews the administration of the Program:

* * * There are directives that are given to petitioner's counsel that you are unable to pay an expert witness more than $200 per hour. I do not know that they initially came from a Special Master or whether it was in the Department of Justice brochure that you put out in terms of applying for attorney's fees. I am not sure if it is in that handbook. But, at some point throughout the pendency of the litigation, there is a directive to a petitioner's counsel that you may only pay expert witnesses $200 per hour.

With regard to that provision, I cannot dictate, as a petitioner's counsel, to a treating pediatric neurologist that that neurologist may only bill me $200 per hour. I can get one of two responses. "Fine, I will bill you $200 per hour and keep my time accordingly," or "My rate is $300 an hour," or "My rate is $1,000 per day of testimony whether I am there one hour or all day because I have to cancel all my patients to be there to listen to the testimony that goes on." So, if I have an expert witness that charges me $350 an hour and the Department of Justice takes the position that I should only be able to be reimbursed for that expense at a rate of $200 per hour, the additional $150 per hour has to come from somewhere. It cannot come from the petitioner's award, so it comes out of my pocket. If a family has

advanced the money, it comes out of their pocket. So, what this recommendation with respect to expert witnesses hopes to accomplish is that there is an ability by expert witnesses contacted and utilized either by respondent or petitioner to charge what is reasonable and appropriate in their locality and given their practice, so that we are not bound by a $200 per hour rate. Certainly, some doctors charge less than that. But to pick an arbitrary rate of $200 per hour for any specialist, with any type of practice, in any locality in the country, or every case the petitioners file, is not workable. With all due respect to you, Mr. Euler, I do not know that you only pay your experts $200 per hour because we are not privy to receipts and canceled checks that the Department of Justice writes the way the Department of Justice is privy to my receipts and my canceled checks.

See the transcript of Commission proceedings on September 11, 1996, pp. 80-82.

3. On the other hand, the most recent published opinions of two other of my colleague special masters indicate that they may continue to adhere to a general limit of $200 per hour for the services of medical expert witnesses. *See* opinions of Chief Special Master Golkiewicz (*Knox v. Secretary of HHS*, No. 90-33V, 1991 WL 33242 (Cl. Ct. Spec. Mstr. Feb. 22, 1991); *Wilcox v. Secretary of HHS*, No. 90-991V, 1997 WL 101572 (Fed. Cl. Spec. Mstr. Feb. 14, 1997); *Scoutto v. Secretary of HHS*, No. 90-3576V, 1997 WL 588954 at *6 (Fed. Cl. Spec. Mstr. Sept. 5, 1997)) and Special Master Millman (*Sims v. Secretary of HHS*, No. 90-1514V, 1993 W 277090 (Fed. Cl. Spec. Mstr. July 9, 1993); *Pearson v. Secretary of HHS*, No. 90-998V, 1993 WL 346876 (Fed. Cl. Spec. Mstr. Aug. 27, 1993)). One recent decision of a judge of this court suggests the same. *Guy v. Secretary of HHS*, 38 Fed. Cl. 403, 407 (1997).