

OFFICE OF SPECIAL MASTERS

No. 90-991V

Filed: February 14, 1997

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DEBRA WILCOX AND ROBERT WILCOX, \*
PARENTS AND NEXT FRIENDS OF \*
JARRED WILCOX, OR THE JARRED \*
WILCOX IRREVOCABLE TRUST, \*

Petitioners, \*

v. \*

SECRETARY OF THE DEPT. OF \*
HEALTH AND HUMAN SERVICES, \*

Respondent. \*

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Robert T. Moxley, Cheyenne, Wyoming, for petitioners.

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

ATTORNEYS' FEES DECISION

GOLKIEWICZ, Chief Special Master

Petitioners moved for an award for fees and costs in this compensated case. Petitioners requested a total of \$29,914.46(1) for fees and costs, which included \$11,354.40 for lifecare planning costs and \$942.65 for parental costs.(2)

Respondent filed in opposition to petitioners' request, objecting to the amount claimed for preparing the life care plan and to the lack of documentation for the parents' expenses.

After reviewing the parties' submissions, the court agreed in part with respondent regarding the deficiencies in substantiation of the life care planner's charges and ordered further explanation. Court

Order, July 16, 1996, as amended July 18, 1996. Petitioner filed a response to the court's Order, which consisted of a two page letter from the life care planner. Respondent thereafter replied, maintaining her original objections.

After reviewing the parties' supplemental submissions, it was clear to the court that petitioners' response to the court's Order, consisting of the life care planner's letter, failed to address the four specific questions asked by the court. The court conducted a conference call with the parties on November 5, 1996, to discuss this failure and to give the parties the court's view of the allowable compensation based upon the current record.<sup>(3)</sup> The court gave petitioners one last opportunity to respond to the questions set forth in the court's two July 1996 Orders. Petitioners did not respond. Thus, the record is closed and the court issues the following ruling.

## **ATTORNEYS' FEES**

Respondent did not question the requested fees. The court did an independent assessment and found the fees on the whole to be exceedingly reasonable given the amount of proceedings involved in this case. However, the court is compelled to eliminate .6 hours billed for faxing documents. Such a task is secretarial and is encompassed in overhead. Thus, counsel's fees are reduced by \$66.<sup>(4)</sup>

## **COSTS**

Respondent questioned two categories of costs: the life care planner's charges and the parents' costs. The court adds two additional items: telefax charges and Dr. Kinsbourne's hourly rate. These items are discussed in turn.

### Parents' Costs

Included with counsel's billings is a \$942.65 charge for parents' expenses. Respondent objected to this claim as undocumented. While respondent's point is well-taken, the court will allow \$671.32 for the cost of the hotel and airline ticket. Mrs. Wilcox attended the hearing in Washington on the dates listed and the costs claimed are patently reasonable. However, the court disallows the "Target" expense and telefax charge as unexplained and undocumented. The court also disallows the lost wages for attending the hearing as an unallowable cost item. Thus, the court awards a total of \$671.32.

### Telefax Charges

Petitioners billed for \$163 for telefaxes. Two issues arise: whether the telefaxes were reasonably necessary and whether the cost should be viewed as office overhead or as a separate cost item. Since petitioners failed to explain or substantiate either the necessity or the cost of the telefaxes, the court denies this request.

Petitioners provided no information, other than the charge itself, to support this cost item. While the court is cognizant that all parties, including the court, are extensively using telefaxes in processing Vaccine claims, for the most part this is done as a courtesy, not as a necessity. That is, the Rule for communicating with the court mandates filing documents with the Court's Clerk. RUCFC App. J., 17(a). Telefaxing does not comply with this Rule. Thus, generally, the cost of filing documents with the court and serving opposing counsel, not the cost of telefaxing a courtesy copy, is the necessary cost item. An exception to this general rule would be either if the court ordered telefaxed copies to speed proceedings

or if the parties agreed to communicate time sensitive documents by telefax, e.g., settlement papers.<sup>(5)</sup> Unless an exception is shown, however, this court cannot see why telefaxing is necessary given the court's Rule that all communications are made through formal filings with the Clerk.

In addition, this court does not understand the cost attached to the telefax. Petitioners charged \$1 per page to send and receive telefaxes. Thus, the court telefaxed a courtesy copy of the May 23, 1995, Decision to counsel and counsel billed costs of \$14 for receiving that copy. The court operates its own telefax machine and after considering the supplies cost with a rough allowance for depreciation of the fax machine, the court does not calculate a \$1 per page cost. Thus, the court can only conclude as previously stated that:

The court is willing to consider telefaxes as a cost item, as opposed to overhead, but without justification the court cannot understand why a significant cost component is involved in sending [and receiving] telefaxes. In addition, petitioner would have to establish the need for such item . . . .

Thomas v. Secretary of DHHS, No. 92-46V, slip op at 12, (Fed. Cl. Spec Mstr. Feb. 3, 1997). Petitioners failed to make any convincing showing here, thus this request is denied.

#### Dr. Kinsbourne's Expert Fees

Dr. Kinsbourne billed his time at \$300 per hour. No justification was submitted to support this hourly rate. Dr. Kinsbourne has been challenged in the past to support an hourly rate greater than \$200 per hour, but has failed to do so. The court has recently faced this exact problem stating that:

The court is vexed by Dr. Kinsbourne continuing to bill counsel at \$300 per hour knowing full well that the court awards \$200 per hour **because Dr. Kinsbourne, despite numerous opportunities, has failed to justify a higher fee.**

Hodges v. Secretary of DHHS, No. 90-2747V, slip op. at 3 (Fed. Cl. Spec. Mstr. Feb. 10, 1997) (emphasis in original); see also, Thomas at 12. Accordingly, petitioners are awarded \$200 per hour for Dr. Kinsbourne's time.

#### Life Care Planner's Fee

Petitioners submitted charges for \$11,354.40 for preparation of their life care plan. Respondent objected to this claim as unreasonably high based upon court established cost guidelines of \$3,000 for average cases and \$4,000 for difficult cases, citing Cousins v. Secretary of DHHS, No. 90-2052V, slip op. (Cl. Ct. Spec. Mstr. Mar. 2, 1992). Respondent also challenged the billing itself noting that eight different hourly rates were claimed without explanation of who billed at what rate, time was billed in quarter hour increments, and time was billed in vaguely stated blocks which prevented any scrutiny.

The court issued Orders on July 16 and 18, 1996, addressing these issues. As stated in those Orders and restated herein for publication, the cost guidelines set by the court for life care planners over six years ago **are no longer valid.** Beyond the effects of inflation, which the court calculates would adjust the numbers to \$4,100 and \$5,500 respectively (applying a 4% growth factor), the manner in which damages are processed currently has so changed that general cost comparisons are virtually meaningless. During a status conference, respondent's counsel agreed that the \$3-4,000 cost range was no longer valid. In short, the amount of process involved in resolving the damages in a Vaccine case has increased dramatically from six years ago when the court set the \$3,000 to \$4,000 standard, which in turn has increased the fees and costs claimed by life care planners.

Six years ago, damages were routinely resolved through a process of the parties filing competing life care plans, the court conducting an evidentiary hearing and subsequently issuing an opinion. While those decisional components remain today, additional burdens have been added. First, with a much more active and aggressive respondent, petitioners' planners are required to submit detailed supporting information with their life care plans. The court formalized this requirement in a standard, detailed damages Order. Sources for each requested item of compensation must be provided. Obtaining information takes time, which costs money. Moreover, lengthy settlement negotiations have become the rule. As part of this process, information is challenged, re-checked and alternatives are explored. Life care planners are integral to this process. If settlement is not possible, an evidentiary hearing is conducted. In preparation for this hearing, information must be updated as any significant passage of time, especially for a young injured child, results in a change in condition and thus a change in need. In addition, updated records are always required. The bottom line is that petitioner's life care planner is the lead individual in the damages phase of the Vaccine case. As such, the planner is called upon to provide the initial information, to continually update that information, and to support every item requested through a combination of their own experience and supporting information from a care provider. All in all, a much greater burden has been placed upon this professional. Accordingly, with this increased role, the court and respondent cannot complain when faced with the billings from a quality professional who spent the necessary time providing the information ordered by the court and expected by respondent.

The above stated, this is not to say that a blank check is being made available to pay for the services. The standards of reasonableness still apply. But how will reasonableness be determined? The beauty of stated cost guidelines is the ease of measuring the claimed cost to the guidelines, adjusting when necessary for any exceptional circumstances. However, it is clear to this court that cases are now proceeding differently, either in terms of how much information must be gathered or the length and type of proceedings used to resolve the dispute. Therefore, broad based, generalized comparisons are no longer valid. Instead, individualized attention must be paid to the circumstances of each case and to their respective cost claims.<sup>(6)</sup> To assist the court in measuring the reasonableness of cost claims, the court searched for

guidance from other courts. The court was surprised with the paucity of case law.

The court's research of other fee shifting statutes, most notably the Civil Rights' cases, revealed much discussion of plaintiff's obligation to document the claimed costs, but little regarding what standards to apply in determining the reasonableness of documented costs. However, the court did uncover some useful guidance in an analogous arena, the award of expert fees as part of the discovery process pursuant to Fed. R. Civ. P. 26(b)(4)(C).<sup>(7)</sup> Ironically, those cases relied upon, by analogy, fee shifting statutes, such as the Civil Rights statutes, for guidance in formulating standards for measuring expert fees. See Jochims v. Isuzu Motors, LTD., 141 F.R.D. 493, 496 n. 3, (S.D. Iowa 1992). Those courts instruct us as follows:

Although there is a scarcity of authority on the subject of what constitutes a reasonable fee for an expert [citations omitted], those cases addressing the issue have considered the following factors: (1) the witness' area of expertise; (2) the education and training required to provide the expert insight that is sought; (3) the prevailing rates for other comparably respected available experts; (4) the nature, quality and complexity of the [life care plan information] provided; (5) the cost of living in the particular geographic area; and (6) any other factor likely to be of assistance to the court in balancing the interests implicated by the [Vaccine Act]. [Citations omitted] In addition, courts may also look to (1) the fee actually charged the party who retained the expert; and (2) fees traditionally charged by the expert on related matters. [Citations omitted]

McClain v. Owens-Corning Fiberglass Corp., 1996 WL 650524, \*3 (N.D.Ill.).

While standards provide the framework for measuring costs, the final award results from the information supplied to meet each standard. The burden of providing that information falls on petitioners' shoulders. Caselaw clearly and uniformly shows that the failure to document the claimed costs results in denial of that claim. See Fritz v. White, 711 F.Supp. 1350,1357, (E.D. Pa. 1989); Vitug v. Multistate Tax Comm., 883 F.Supp. 215, 222, (N.D.Ill. 1995); Fietzer V. Ford Motor Co., 454 F.Supp 966, 968, (E.D. Wis. 1978)(defendant's refusal "to comply with the plaintiff's inquiry as to how that rate was arrived at and as to what the employee's usual rate of pay is" along with other discrepancies, resulted in denial of fees). Petitioner need not submit evidence on each of the factors in support of their request, McClain at \*3, and "reasonably specific documentation" is all that is required. Comm. Heating & Plumbing Co., Inc. v. Garrett, III, 2 F.3d 1143, 1146 (CA Fed. Cir. 1993).

In applying these standards to Vaccine cases, petitioners must substantiate the hourly rates claimed by their experts and the number of hours spent in providing services. The above standards offer some practical measures for determining hourly rates, measures that have been used in the past under the Vaccine Act. Regarding the number of hours spent on the case, as stated supra, that can vary case by case depending on how the case progressed. It is incumbent upon petitioner to explain to the court why the hours spent on the case were reasonable. As part of this explanation, petitioner must address the degree of difficulty of the damages claim, problems in obtaining court ordered information, length of time spent in negotiating a settlement and any other fact that impacted the expert's time spent on the case. It must be remembered that many of the hours spent by the expert are outside of the court's purview, such as involvement in settlement negotiations. Thus, a clear and complete picture must be painted to enable the court to see and understand how and why the expert spent the claimed hours.

The above statement should not be read as an increased or onerous burden on petitioners in proving the reasonableness of expert fees. Instead, it should be viewed from the practical standpoint of giving the court a clear understanding of how the damages process unfolded, which in turn explains why the requested number of hours were spent. Since respondent as a participant knows first-hand what was involved in resolving the damages, the court is certainly hopeful that the parties continue their cooperative and highly successful efforts in resolving informally the fees and costs issues. As the Supreme Court counseled us "[a] request for attorney's fees should not result in a second litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). However, where settlement is not possible, the court must have the requisite information to resolve the dispute fairly and quickly.

Turning now to the specifics of this case, ReEntry billed \$11,354.40 for their services. With that billing, ReEntry submitted a three page letter justifying the relatively large billing in this case. ReEntry's statement is actually what the court envisions as part of petitioners' support for the hours spent on the life care plan. However, ReEntry failed to provide some rather basic information. Thus, the court asked four specific questions in its July 1996 Orders. That information was not provided.

ReEntry is not new to this Vaccine Program; nor are the problems with their billings. As early as 1991, Ms. Woodard's billings were questioned. Knox v. Secretary of DHHS, No. 90-33V, slip op at 15-16 (Cl. Ct. Sp. Mstr. Feb. 22, 1991). In Knox, "the court issued an Order requesting detailed information concerning the hours worked, the hourly rates charged, who worked the hours and the qualifications for those individuals." Id. The court evaluated petitioner's response to the court's Order as follows:

Despite the court's Order, there is no explanation of why there are different rates, who worked the hours and the qualifications for those individuals. Second, broad groupings of hours make it impossible to scrutinize the request to determine how much time was spent on actual work and how much was charged for travel . . . . In addition, given the similarities seen in Ms. Woodard's life care plans from case to case,

there are obvious efficiencies resulting from the numerous plans Ms. Woodard is preparing. Given the paucity of information submitted, however, it is impossible to determine if such efficiencies are reflected in the submitted costs.

Id.; see also, Johnson v. Secretary of DHHS, No. 90-813V (Cl. Ct. Sp. Mstr. Oct. 17, 1991), 1991 WL 225084, (Ms. Woodard increased her hourly rate without justification); Veasey v. Secretary of DHHS, No. 90-776V (Cl. Ct. Sp. Mstr. Jan. 31, 1992), 1992 WL 30440, (Special Master Baird found ReEntry's request unreasonably high, noting that ReEntry "billed at hourly rates varying from \$60 to \$125, without any explanation of who performed the work or what the basis for the requested rates was."); Yee v. Secretary of DHHS, No. 90-875V (Cl. Ct. Sp. Mstr. Feb. 14, 1992) 1992 WL 42925 ("There is no explanation, even for the itemized entries, of who performed what work or what the basis for the requested hourly rate is.")

Despite several opportunities to do so, petitioners have failed to substantiate their life care planners' fees. The court could deny the request in total, see, e.g., Fietzer at 968, or as was done in Knox, the court could reduce the request by a straight percentage. The court believes, however, that in the interests of justice, the better course is to rely upon the court's experience in like matters, the court's experience with the handling of this particular case, and the information in the record to determine a reasonable award for ReEntry's services.

ReEntry's billing was for three separate phases of the case: initial preparation - \$5,557.59; reacting to respondent's life care plan - \$2,854.81; and responding to the court's concerns with additional information after the hearing - \$2,942.00. The bulk of the time and cost involved the initial plan preparation. It is also in this category where questions arise regarding the hourly rates and the vague explanations regarding how the time is spent. To determine a reasonable fee for preparing this initial plan, the court relies upon ReEntry's letter to counsel accepting this case. In that letter, ReEntry states that "The life care plan research and preparation time are billed at a flat rate of \$1500, as part of the total."<sup>(8)</sup> Therefore, as stated to counsel at the November 5, 1996, status conference, without explanation or justification, the court saw no reason why it should award ReEntry more than the \$1500 they stated was a flat rate for preparing a life care plan. Petitioners provided no explanation to the court. As stated to the parties during the November 5, 1996, conference call, the court determined that 42.5 hours, representing \$3,657.50 of billings, were spent on "life care plan research and preparation." The court allows \$1,500 for this time for a reduction of \$2,157.50. The remainder of the time and costs is allowed. Thus petitioner is awarded \$3,400.09 for this period of ReEntry's services.

The second billing was for \$2,854.81 for time spent reacting to respondent's plan. The question raised by the court regarding this billing was why a second home visit was necessary as opposed to collecting the updated information telephonically. Court's July 16, 1996, Order at 2. The court informed counsel that absent an explanation, the court would award petitioners \$1000 for this billing. Petitioners provided no explanation, and therefore are awarded \$1,000.

The third billing was for \$2,942.00 spent in providing information requested by the court. It could be argued that this information should have been provided in substantiation of petitioners' damages request. However, the court's view is that the complexity of the damages issues coupled with the number and array of services needed give rise to reasonably unanticipated questions and concerns from the bench. Stated another way, it is not unreasonable to have unanswered questions at the end of a damages' hearing. In fact, this court finds such to be the rule. The court reviewed this billing and found it reasonable. It is allowed in full.

After considering the record and for the reasons stated above, petitioners are awarded \$7,342.09 for

ReEntry's services.

## CONCLUSION

Petitioners are awarded the full \$30,000 provided for by the Act. The \$30,000 is apportioned as follows:

Parents \$ 671.32

Mr. Moxley 15,364.41

Dr. Kinsbourne 1,350.00

ReEntry 7,342.09

Jarred for pain and suffering 5,272.18

**Total \$30,000.00<sup>(9)</sup>**

The clerk shall enter judgment accordingly.

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Gary J. Golkiewicz

Chief Special Master

1. Counsel's presentation of its fees and costs is unnecessarily confusing, and potentially costly. Counsel's Application includes no summary page setting forth the total requested for fees and for costs. Instead, counsel submits separate billings, only some of which show the cumulative total of billings for the case. The court wasted an inordinate amount of time deciphering petitioners' request. This process was made more time consuming because the court's figures did not match respondent's. Respondent stated in its Opposition that petitioners requested a **total** of \$27,940.43 for fees and costs. Petitioners in its Reply and during a conference call with the court never questioned this figure. However, after a careful and redundant review, it is clear that petitioners' request is for a total of \$29,914.46. There is no excuse for this confusion.

Petitioners' counsel is **put on notice** that henceforth fees requests shall include a summary page which sets forth clearly and concisely the total fees claimed, the total costs claimed, the total costs advanced, and the total funds paid by the client. Fees requests not containing this basic summary sheet will not be acted upon by this court. **Respondent need not respond to such defective applications**, but should notify the court of such defects.

2. The total amount available to petitioner for fees and costs is \$30,000. 42 U.S.C. §300aa-15(b). This figure also covers any future lost wages and pain and suffering. The court will award the full \$30,000 to petitioners, apportioned as discussed in this decision.

3. Similar issues were raised in a second case involving the same petitioner's counsel and life care planner. Thus, the court discussed the issues and gave tentative findings in Hermann v. Secretary of DHHS, No. 90-1201V, as well.
4. The court is unwilling to take the time to total counsel's fees. Counsel's initial billing statement includes a combined running tally of both fees and costs. To determine counsel's fees would require a line by line addition of the allowable fees. The court will not waste its time. In the future, without a summary page, such a submission will not be accepted.
5. This general rule and the exceptions thereto apply equally as well to the use of express mail.
6. Where appropriate comparisons can be made to previously decided cases, the use of court experience in determining a reasonable level of compensation remains valid and is legally permissible. Saxton v. Secretary of DHHS, 3 F. 3d 1517, 1521 (Fed. Cir. 1993).
7. Rule 26(b)(4)(C) provides that "the court shall require that the party seeking discovery pay the expert a reasonable fee for the time spent in responding to discovery." Rule 26 authorizes fees at a level which does not burden plaintiffs' efforts to hire quality experts or prevent defendants from engaging in allowable discovery. McClain v. Owens-Corning Fiberglass Corp., 1996 WL 650524, \*3 (N.D.Ill.) (citations omitted).
8. Interestingly, ReEntry's complaint that the court's range of reasonable fees for life care planners established in 1990 of \$3-4,000 is "unreasonably low", is contradicted by the letter sent to counsel in 1990 wherein it states that "Our costs in these cases will range from \$2500 to \$3500, plus travel expenses and testimony." See also Veasy at \*1 (citing letter dated December 15, 1990, from ReEntry stating that its fee would "range from \$2,500 to \$3,500, plus travel expenses and testimony.") This does not surprise the court that ReEntry's letter is consistent with the court's range of reasonable rates, since the court constructed the range from billings received by the court as of that time. With ReEntry's extensive involvement from the outset of the Vaccine Program, ReEntry was undoubtedly part of that experience.
9. 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. § 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).