OFFICE OF SPECIAL MASTERS

No. 96-518V

(Filed: August 8, 2002)

MICHELLE D. HELMS, as Parent and Legal Representative of ZACHARY DAVID LEE HELMS, Deceased,	*
Petitioner,	*
v.	*
SECRETARY OF HEALTH AND HUMAN SERVICES,	*
Respondent.	*

Kirk McCarville, Esq., Phoenix, Arizona.
Michelle D. Helms, Pro Se, Lake Forest, California, for Petitioner.
Mark Rogers, Esq., U.S. Department of Justice, Washington, D.C., for Respondent.

ATTORNEY'S FEES & COST DECISION

ABELL, Special Master:

I. Introduction

In this tragic case, Zachary's mother found him dead in his crib on the morning of 27 January 1995. She attributed Zachary's death to the diphtheria-pertussis-tetanus (DPT) vaccination that Zachary received two days earlier. To pursue her claim, Mrs. Helms hired an Arizona attorney, Kirk McCarville, Esq. He was not successful. Ruefully, this Court decided on June 1, 1999, that Petitioner had not carried the burden of proof due to the failing of her medical expert's testimony. Entitlement was therefore denied. Mr. McCarville filed an appeal with the United States Court of Federal Claims and the decision was remanded for the purpose of clarification. On June 28, 2000, again setting out its denial of entitlement, this Court made very clear that it was Petitioner's expert who did not carry the day in credibly explaining how the literature applied to the case, and why certain facts required certain inferences in the context of the medical theory. An appeal was again filed and this time, the

Court of Federal Claims upheld the decision of this Court. Mrs. Helms attempted to prosecute subsequent appeals *in propria persona*. Those appeals were unfruitful.

This is the brief history that brings us to the last and the only remaining issue over which this Court now has jurisdiction, the issue of reasonable attorney's fees and costs. To that end, Mr. McCarville filed his petition for attorney's fees and costs requesting an award of $75,172.03[1] and an additional cost statement representing Mrs. Helms's expenditure in the amount of $11,551.59. While Respondent did not file any objections, Mrs. Helms did. In her filed statements supported with a number of evidentiary exhibits, she requested the following relief: that the Court (1) "address Kirk McCarville's professional misconduct" in the fee decision; (2) that the fee decision be made public; (3) that the fee application submitted by Mr. McCarville be "reduced and/or rejected" because of the use of the medical expert; and (4) that Petitioner be granted a "new trial within the Program." Mr. McCarville filed a nine-page response. Mrs. Helms then filed a reply letter to that response on 3 April 2002.

To set the tenor and tone of this decision, it is necessary for the Court to state at the outset that this is not the typical attorney's fee and cost decision. The issues are whether the Vaccine Act afforded Mrs. Helms a statutory suspension benefit, whether that benefit was denied to her by her attorney, and whether the value of that benefit was exposed by failing to move for a new trial or a new medical expert at trial or upon appeal. As shall become apparent in the analysis below, this Court was sufficiently disquieted by the issues raised herein that it sent a draft version of this decision to the parties for discussion in a telephonic status conference.[2] In the interests of fairness, the Court's purpose was to insure accuracy with respect to facts and clarity with respect to legal issues. While the Court has concluded that the Vaccine Act affords the Court the *discretionary* power *not to award* attorney's fees *at all* in an extreme case where entitlement is denied, it does award a substantial amount of fees in this case because the Court is concerned, *inter alia,* that a no fee award will appear draconian. This is especially important given that Respondent lodged not one objection to the original fee application and conceded to the entire amount requested by Petitioner's attorney.[3] A further purpose is that the issue of a penalty should not take center stage over the more important legal issues raised by this case. In reaching the merits of this decision, the Court has considered its own recollection of this case and the entirety of the record to date.

---

[1] A note here is worthwhile. Under the former Rules of the Claims Court, an attorney who no longer represented his client filed a Motion to Intervene before filing a petition for fees. The rules have now changed and pursuant to RCFC Rule 15, the proper procedure requires an attorney to file a *notice* of intervention. In this case, however, the docket reflects that Mr. McCarville is still the attorney of record along with Mrs. Helms even though he has indicated that he has withdrawn in the appellate courts. Accordingly, though Mr. McCarville is still technically attorney of record in this Court (per the staff attorney of the U.S. Court of Federal Claims), given the fact that Mrs. Helms is under the impression that Mr. McCarville no longer represents her, the Court treats his fee petition as a Notice to Intervene.

[2] The Court conducted that status conference on 26 July 2002 and did not file that draft as part of the official record.

[3] Mr. McCarville requested $75,172.03. Respondent did object, however, to amounts contained in Mrs. Helms' cost requests in the amount of $11,822.03. *See Respondent's Response to Petitioner's Application for Attorney Fees and Costs* at 1.

II. Discussion

A. Matters Outside the Court's Jurisdiction

1. Professional Misconduct

There are two items in Petitioner's statement of objections to Mr. McCarville's application for attorney fees and costs that this Court cannot address. First, assuming *arguendo* that what Petitioner writes about Mr. McCarville's professional conduct is true, this Court has a limited jurisdiction and has no power to punish his alleged conduct and decisions as a separate cause of action. That issue is one for bar associations to address and Mrs. Helms *must* file her complaints with the appropriate forum. However, to the extent that Mr. McCarville's conduct impacts the benefits and remedies available under the Vaccine Program, that conduct is relevant not only to this Court's bar but to an award of attorney's fees. This is discussed in-depth later in this decision.

2. New Trial

The second issue raised by Petitioner is a request for a new trial. In short, this Court no longer has statutory jurisdiction to entertain a request for a new trial even if it made findings that attorney malpractice were present, that there were grounds for a new trial, that new evidence existed, or because of the inequity of an expert's incapacity. In order for such a request to have been considered, Petitioner, who was represented by Mr. McCarville at the relevant times, should have moved the Court on the appropriate grounds either before, during, or after the expert hearing or the final entitlement decision of this Court on remand. This conclusion may be difficult for Mrs. Helms to accept given the fact that she was not in charge of her case at this point–it was Mr. McCarville. Again, to the extent that such decisions impacted her case adversely, this Court will factor them into the attorney's fee request.

B. Matters Within the Court's Jurisdiction

The issue that is within this Court's jurisdiction–this Court's power–is the matter of a reasonable attorney's fee and costs award. The provision for attorneys' fees in the National Vaccine Program codified at 42 U.S.C. § 300aa–15 (e) (West 2001), is instructive in this case:

> In awarding compensation on a petition filed under section 300aa–11 of this title the special master or court *shall also award as part of such compensation* an amount to cover–
>
> (A) reasonable attorneys' fees, and
> (B) other costs,
>
> incurred in any proceeding on such petition.

(Emphasis added.) The express sense in which the affirmative word "shall" is used in the foregoing

passage is non-discretionary. It is a mandate that requires this Court to award attorney fees in cases that reach a finding of entitlement and therefore compensation. It is the fruit of success. On the contrary, the second sentence in that section of the Act tells the special master otherwise in a case not reaching a finding of entitlement:

> If the judgment of the Unites States Court of Federal Claims on such a petition does not award compensation, the special master . . . *may award* an amount of compensation to cover petitioner's *reasonable* attorneys' fees and other costs incurred in any proceeding on such petition *if the special master . . . determines that the petition was brought in good faith and there was a reasonable basis for the claim* . . . .

Id. (Emphasis added.) In other words, where there is no finding of entitlement, the special master does not have to award fees. He *may* award attorney fees, provided that the petition was brought in good faith and there was a reasonable basis for the claim. The word "may", as it is contextually used in the statute, means permitted to and reflects a permissive or discretionary ability of the Court to award fees.[4] It is clear that the statute does not use the word "may" narrowly so as to render an interpretation that the Court must award fees in cases that have seen a denial of entitlement though meet the standards of a good faith reasonable basis. The word "may" is inappropriate for that sense. As plainly used, the meaning is broad. And so, in cases where entitlement is denied, the special master may decide whether to award fees in whole or in part as long as good faith and reasonable basis are present. To restate, if the Act required the Court to award fees and costs where entitlement is denied though a reasonable basis and good faith were present upon inception of the petition, Congress would have used a word more appropriate to that sense such as the word "shall" or must. If the meaning of the word "may" was intended to connote this restriction, Congress' attempt to restrict it comes too late for the plain reading in the second sentence is otherwise.

Though rare, the statutory logic that an attorney may not receive part of or *any* of the compensation requested in a case where entitlement is denied should not be new. *See, e.g., Gallagher v. Secretary of HHS,* No.95-191v, 2002 WL _____ (Fed. Cl. Spec. Mstr. May 22, 2002) (appeal fees not awarded where special master found the appeal frivolous.) Reasonable basis and good faith are merely the threshhold requirements *if* the special master deems that fees should be awarded at all. Upon that finding, the issue of fees implicates the adequacy or quality of representation and, to borrow a phrase from other federal attorney award statutes and cases, whether a petitioner has "adequately prevailed."[5] In this sense, quality is that nature, character, or trait that

---

[4] *See* BLACK'S LAW DICTIONARY, 993 (7th ed. 1999).

[5] A number of statutes allowing for attorney's fees provide limits upon the fees that may be recovered in an action against the United States and they look to the prevailing success of the attorney's work. *See, e.g.*, 38 U.S.C. § 784 (g) (National Service Life Insurance); 29 U.S.C. § 2678 (Federal Tort Claims Act); *cf. Nesbit v. Frederick Snare Corp*., 96 F.2d 535, 537-39 (D.C.Cir.), *cert. denied*, 305 U.S. 608 (1938).

> In certain suits under the Privacy Act of 1974, for example, "the costs of the action together with reasonable

(continued...)

describes the degree of representation and how far that representation made the claim successful. This involves looking at the advice and decisions made by a lawyer during representation and to evaluate the success of those decisions. For a lawyer, the excellence of his advice is his stock and trade. Indeed, it is the reason he is paid. And, it is the very reason that the free market pays some attorneys more and some less.

Most often, the issue of whether to award fees in a vaccine case not reaching a favorable result is easy. If the attorney does an excellent job of litigating the worst case known, he ought to be paid but only for that part that can be objectively seen as having a *continuing* reasonable basis for the claim. The lodestar analysis would ensue. If the case is a close case, fees ought to be objectively paid in an objective manner, again through a lodestar analysis. Fees in such a situation would naturally include payment for decisions by an attorney that equate to errors of judgment. Such errors are understandable. They are expected to occur in standard practice but one tries to avoid them. So it is that an attorney is not faulted for these routine errors. However, in a situation in extremis, one that is not the "run of the mill" error in judgment case, the analysis is far more complex because it calls for an evaluation of the attorney's decisions, decisions that may have insured a denial of the claim by failing to shore up an essential and fundamental right in a vaccine case. This is not a critique of an attorney's strategy. In fact, it has nothing to do with strategy but rather the overt and explicit error in judgment concerning a condition or event that an attorney knew or should have known to address but failed to do so. One example that rises above a mere error in judgment is the failure to meet the *prima facie* requisite of timely filing a petition to secure a statutory suspension benefit under the Vaccine Act. No attorney should be making that error, especially an experienced attorney. Further, because there is no attorney strategy associated with this

---

(...continued)
attorney fees as determined by the court" are recoverable by the prevailing plaintiff. 5 U.S.C. § 552a (g) (4) (B). Such an award is not discretionary. See OMB Guidelines, 40 Fed. Reg. 28,948, 28,970 (1975). However, in other types of suits known as access suits, attorney fees and costs that are "reasonably incurred" are recoverable, in the court's discretion, if the plaintiff "has substantially prevailed." 5 U.S.C. § 552a(g) (2) (B) (amendment), (g) (3) (B) (access).

Illustrations in numerous other types of cases reveal that reasonably incurred litigation costs can be recovered by all plaintiffs who "substantially" prevail. *See Parkinson v. Commissioner*, No. 87-3219, 1988 WL 12121, at *3 (6th Cir. Feb. 17, 1988); *Young v. CIA*, No. 91-527-A, *slip op.* at 2 (E.D. Va. Nov. 30, 1992), *aff'd*, 1 F.3d 1235 (4th Cir. 1993) (unpublished table decision). *Cf. Herring v. VA*, No. 94-55955, 1996 WL 32147, at **5-6 (9th Cir. Jan. 26, 1996) (although ruling in favor of VA on plaintiff's access claim, nonetheless finding that plaintiff was "a prevailing party with respect to her access claim" because "the VA did not provide her access to all her records until she filed her lawsuit"), *with Abernethy v. IRS*, 909 F. Supp. 1562, 1567-69 (N.D. Ga. 1995) ("[T]he fact that records were released after the lawsuit was filed, in and of itself, is insufficient to establish Plaintiff's eligibility for an award of attorneys' fees."), *aff'd per curiam*, No. 95-9489 (11th Cir. Feb. 13, 1997).

This Court finds that the prevailing standard is somewhat difficult to measure by general rule. It depends on the case and the presence of an objective fact that is dispositive of the degree of success. Under the Vaccine Act, cases that do not reach entitlement but do have a good faith and reasonable basis will practically all see an attorney's fee and costs award. Even in this case, the Court does award substantial fees though the measure of success truly hinges on what the attorney did to accomplish the result.

type of error, there is no need to discover what Mr. McCarville was thinking at this time. This is the context of the instant case and this will be discussed more in-depth.

To dispense with preliminary matters, the Court finds that the petition itself was initially brought in good faith and that there was a reasonable basis for the initial filing of the claim. Ergo, the *potentiality* for fees is present. The question is whether Mr. McCarville's decisions at critical stages yielded *some* benefit for his client, and therefore, whether the extant fees and costs application has itself a reasonable basis given those decisions and the effects thereof. The analysis necessarily requires the Court to review two events that occurred during the course of Mr. McCarville's representation, his action on those two events, and the impact they had in this case. As shall be explained, the lawyer's strategy has nothing to do with these events. First, however, one more word on clarifying Petitioner's (*i.e.*, Mrs. Helms's) objections.

Because the nature of Petitioner's objections raise legal malpractice issues, the Court makes it clear that this decision does not make any finding of malpractice *for it has no such jurisdiction to do so*. To restate, what this Court has jurisdiction to do in making a fee award is to evaluate the adequacy of Mr. McCarville's representation from the Court's recollection, take the objections of Petitioner into careful consideration, consider Respondent's position, and juxtapose them onto the entire record to the end of determining the just attorney's fee and costs award.

C. Whether to Award Attorney Fees and Costs in this Case.

As has been explained, a special master is authorized to award reasonable attorney's fees and other costs to petitioners bringing claims under 42 U.S.C. § 300aa-15 (e) (1) (West 2001) of the Vaccine Program. Whether in a case of favorable or unfavorable entitlement, the scope of this discretion is broad. *Hines on Behalf of Sevier v. Secretary of HHS*, 22 Cl. Ct. 750, 753 (1991). In determining the reasonableness of attorneys' fees and costs, the special master may rely on general experience and an understanding of the issues. *Slimfold Mfg. Co. v. Kinkead Indus. Inc*., 932 F.2d 1453, 1459 (Fed. Cir. 1991), *cited in Wasson v. Secretary of HHS*, 24 Cl. Ct. 482, 483 (1991); *see also Saxton v. Secretary of HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993) (Special master had discretion "to reduce the hours to a number that, in his experience and judgment, was reasonable for the work done.")

So, too, the principles governing whether to award fees are well established. Petitioner is "not given a blank check to incur expenses without regard to the merits of their claim. Nor does this court have a responsibility to compensate counsel in vaccine cases *after there no longer is a reasonable basis for their claim*." *Perreira v. Secretary of HHS,* 27 Fed. Cl. 29 (Fed. Cl. 1992), *aff'd,* 33 F.3d 1375 (Fed. Cir. 1994) (emphasis added). Once a party objects to a fee application, the Court has wide discretion in determining the amount of the fee. *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983). In addition, in determining the attorney's fees, the special master is not limited to the presence of Respondent's objections. *Moorhead v. United States*, 18 Cl. Ct. 849, 854 (1989). He may go beyond whether or not those objections are present.

To hone these principles further, the Supreme Court observed in *Hensley* that the most

critical factor in determining a fee award's reasonableness is the *degree of success* obtained, since a fee based on the hours expended on the litigation as a whole may be excessive if a petitioner achieves only partial, limited (*id.* at 436), or no success. Yet, success in part can be wiped clean by failure. Where there has been no successful result, the U.S. Supreme Court has awarded no fees though in a different context. *See Farrar v. Hobby*, 506 U.S. 103 (1992) (The Court affirmed circuit court's rejection of $280,000.00 attorney fee award where nominal success (*i.e.,* jury awarded $1.00 to the client) was wrought by failure to prove an essential element of a § 1988 claim.) This case is somewhat of an appropriate analog to illustrate the case *sub judice.*

As this Court will explain in depth, where a petitioner is denied entitlement because of an attorney's failure to make objective procedural decisions that insure not only a denial of a statutory suspension benefit, but expose the value of the lost benefit by failing to move for relief after trial to retain a medical expert to replace one that was unable to function properly or has died, "the only reasonable fee is no fee at all." *Farrar v. Hobby*, 506 U.S. at 104. In light of the relationship between the extent of petitioner's success, the reasonable fee is not Mr. McCarville's request for $55,072.50 but perhaps, no fee at all.[6] The events that are at issue here are: 1) the failure to avail Petitioner of the "suspension benefit" afforded by the statute; 2) the decision to continue with a severely ill medical expert's testimonial proffer in a telephonic entitlement hearing after it was objectively clear that such testimony removed a reasonable basis for continuing with the case; and because of this, 3) a failure to move either at the trial level or during appeals for time to find a new medical expert or to obtain a new trial negated any possibility of future success in the Program or in state court. The Court's conclusions on these issues draw from its statutory authority, its experience in the program, and over one hundred entitlement hearings.[7]

The Court is well aware that without more, these conclusions do not suffice for the special master must explain a rationale that takes into account the specific facts of this case and why he deems a rejection of fees to be reasonable. *See Cain v. Secretary of HHS*, No. 91-817V, 1992 WL 379932 (Fed. Cl. Dec. 3, 1992); *Brewer v. Secretary of HHS*, No. 93-92V, 1996 WL 147722 (Fed. Cl. Dec. 9, 1996).[8]

---

[6] While the holding in *Farrar* is directed at a failure to prove an essential element of a federal statute, it is an appropriate analog here given the Court's analysis of the statutory suspension benefit as a right afforded by Congress and the attendant failure to make appropriate motions for relief. These two factors are discussed in-depth. As already stated, while this Court has concluded that it has the discretion to award no attorney's fees, Respondent's lack of opposition to the fee petition casts doubt on not awarding fees. In addition, the Court does not wish to "chill" or discourage the plaintiff's bar from zealously advocating for clients. These, among other reasons explained, lead to a decision to awards fees so that this type of case, itself very rare, will not be misconstrued.

[7] It is appropriate for a special master to rely on general experience with similar cases under the Program when determining reasonable attorney's fees and costs. *Wasson v. Secretary of HHS*, 24 Cl.Ct. 482 (1991), *aff'd*, 988 F.2d 131 (Fed.Cir. 1993).

[8] In explaining this analysis, "the court is not necessarily required to base his/her decision on a line-by-line evaluation of the fee application." *Castillo v. Secretary of HHS,* No. 95-652, 1999 WL 1427754 *2 (Fed. Cl. Spec. Mstr. July 19, 1999) (December 17, 1999, reissued for publication on January 24, 2000) (citing *Wasson v. Secretary of HHS*, 24 Cl. (continued...)

1. Statute of Limitations

In his response to Mrs. Helms's initial statement, Mr. McCarville states that her "representations are without merit and should not effect [sic] this Court's decision regarding the Fee Application now pending before the Court." Response to Claims Set Forth in Petitioner's Complaint at 1.[9] Ensconced in a footnote, Mr. McCarville informs the Court that he "does not believe that the allegations regarding the statute of limitations are germaine [sic] to the Court's analysis of the Fee Application." *Id.* at 4. To buttress this claim, he states that Petitioner retained him

> solely for the purpose of preparing and submitting a Petition to the United States Court of Federal Claims in regards to the National Vaccine Injury Program.[10] (See Petitioner's Exhibit 16). Prior to retaining McCarville, Petitioner had retained the law firm of Ravis & Dominguez to represent her in ***any*** State Court proceeding.

See Response on Petitioner's Statement of Attorney Conduct at 4 (emphasis added); *cf.* 3 April 2002 Statement of Mrs. Helms, Ex. 28 (Mr. McCarville told the coroner "Please be advised that this office represents *the Estate of Zachary Helms*.") This footnote is troubling when one considers other parts of the record. Presumably, it is present to show that Mr. McCarville was only representing Mrs. Helms before this Court and had no responsibility for the state action. Both the record and the Vaccine Act indicate otherwise.

The record is replete with instances where Mrs. Helms[11] stated that she retained Ravis & Dominguez because she was concerned about a possible criminal matter; that is, the coroner's "tone" of questioning and his possible insinuation that she may have caused her two-year old son's death. As evidence of this, her Exhibit 26 (a letter dated November 29, 1995) is distressing to read and it is understandable why she would have sought an attorney. The coroner interview was taped and her son's pediatrician who accompanied her voiced concern over the meeting. He suggested that Mrs. Helms retain a criminal lawyer. She did. *See* 3 April 2002 Statement of Mrs. Helms, Ex. 26. It is

---

[8](...continued)
Ct. 482, 484 (1991) (affirming the special master's general approach to petitioner's fee request where the entries and documentation contained in the 82 page fee petition were organized in such a manner that specific citation and review were rendered impossible), *aff'd by unpublished opinion*, 988 F.2d 131 (Fed. Cir. 1993)).

[9] It is important to note that between the date of Mrs. Helms's last statement and the status conference to discuss the Court's draft, Mr. McCarville did not ask or attempt to respond to her allegations that he views as serious. The lapse of time is almost three months.

[10] As for the scope of representation, the Court is not sure that it had not broadened. A letter that should be in Mr. McCarville's own file reveals that he had represented himself to the Coroner's office for a broader purpose–"the Estate of Zachary Helms." *See* 3 April 2002 Statement of Mrs. Helms, Ex. 28; *cf. with* Ex. 16 (Letter of Acknowledgment signed by paralegal confirming that representation was for the purpose of petitioner under the Vaccine Program.)

[11] The Court has no reason to doubt her credibility as it noted in its initial decision that Mrs. Helms was a credible witness and the Court recalls her veracity and sincerity on the stand. Coupled with the exhibits she has filed, the Court makes that same determination here.

important to note that whether that firm was to represent her solely in a criminal matter or for all state court civil matters is *irrelevant* to this analysis. What is clearly relevant is that the record shows that the California law firm's representation ceased upon Mr. McCarville taking the case on or about 29 November 1995. *See id.* Exs. 26-29.

Moreover, the statutory issue of the state statute of limitations is germane. Though she did not raise this point in her statements, in Mrs. Helms's distressing November 1995 letter, she reiterates to Mr. McCarville's paralegal, "*Per our conversation*, *my rights* to bring suit against the pharmaceutical company will be protected through the Compensation Program." Mrs. Helms's 3 April 2002 Statement, Ex. 26. In other words, Mrs. Helms reiterated the benefit of what she thought she was obtaining, namely that her "rights to bring suit against the pharmaceutical company will be protected through the Compensation Program." *Id.*

Contrary to Mr. McCarville's filed response, the assertion that the state statute of limitations issue is not germane to an attorney fee petition in this program is simply untrue when and where it is part and parcel of a statutory benefit under the Vaccine Act. That is to say, the focus is whether the attorney considered the Vaccine Act's statutory suspension benefit by first looking to the relevant state statute. Several recent decisions make this point clear.[12] Were it otherwise, the language of the statute would make no sense. The following is an analysis of that benefit.

a. Does the Vaccine Act confer a statutory benefit that suspends and preserves a state cause of action?

Anyone who has a vaccine-related injury or death must file in this Court first. Section 11 (a) (2) (A) of the Vaccine Act forbids any

> civil action for damages . . . against a vaccine administrator or manufacturer in a State or Federal court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after the effective date of this subpart, *. . . unless a petition has been filed, in accordance with Section 300aa–16 of this title,* for compensation under the Program for such . . . death *and–*
>
> . . . .
>
> (i) (I) such person elects under section 300aa–21 (a) of this title to file such an action, or
>
> (II) such person person elects to withdraw such petition under section 300aa–21 (b)

[12] *See Dickey v. Connaught Laboratories, Inc*., 2002 Ill. App. LEXIS 622 (July 25, 2002) ("The right to litigate the matter in state court is also lost if the injured party fails to follow the federal statutory guidelines." *Id.* at *8.) *and Straus v. American Home Products Corp*., 2002 Lexis U.S. Dist. LEXIS 12536 (June 11, 2002) ("A Program claimant may not file a civil action against a vaccine manufacturer or administrator unless the claimant initially files a timely petition in accordance with the Program's guidelines." *Id.* at *8.)

of this title or such petition is considered withdrawn under such section.

42 U.S.C. § 300aa–11 (a) (2) (A) (West 2001) (Emphasis added.) Of note, this section directs the vaccine litigator to the totality of Section 16.

Section 16 of the Vaccine Act requires that all death related injuries allegedly due to vaccination in post-Act cases be filed within "24 months from the date of death." 42 U.S.C. § 300aa–16 (a) (3) (West 2001).[13] When one continues to read that same section, however, the Vaccine Act unequivocally repeats Section 11's prohibition by implication, and explains the terms of the statutory suspension benefit when a petition is filed in this Court,

> If a petition is filed under section 300aa–11 of this title for a vaccine-related . . . death, *limitations of actions under State law shall be stayed* with respect to a civil action brought for such . . . death *for the period beginning on the date the petition is filed and ending on the date* (1) *an election is made* under section 300aa–21 (a) of this title to file the civil action, (2) *an election is made* under section 300aa–21 (b) of this title to withdraw the petition, or (3) *the petition is considered withdrawn* under section 300aa–21 (b) of this title.

42 U.S.C. § 300aa–16 (c) (West 2001) (emphasis added). Apart from the requirement of timely filing in this Court to be able to proceed under the Program, the statute also works to suspend the power of the several states to regulate tort actions. Clearly, the statute directs an experienced vaccine litigator to consider two things. First, can the petition be filed within the limitations period of the Vaccine Act? Second, can it be filed sooner so as to preserve the state law claim? If the state limitations statute will have run before the attorney obtained the case yet can be timely filed as a petition under the Act, a petitioner would not be able to avail herself of this important suspension benefit or the election out options available under the statute. The attorney has thus satisfied his statutory duty to a petitioner. On the other hand, if the answer to both queries is yes, then the Act provides a statutory suspension benefit–a statutory right to the petitioner–and thus a corollary duty upon the attorney.[14] Consequently, checking the relevant statute of limitations, a *sine qua non* of first year law, is a requisite duty imposed upon all attorneys whether experienced in the Program or not.

---

[13] To avoid confusion, it is important to point out that apart from the 24-month rule, Section 16 states that "no such [i.e.,death] petition may be filed more than 48 months after the date of the occurrence or the first symptom or manifestation of onset or the significant aggravation of the injury from which the death resulted." 42. U.S.C. § 300aa–16 (a) (3) (West 2001). This part which has been omitted from the decision, is a statute of repose. *Weddel v. Secretary of HHS,* 100 F. 3d 929 (C.A. Fed. 1996). It is irrelevant here because its purpose is to bar a suit a fixed number of years after the onset or significant aggravation has occurred rather than to bar a petition if the plaintiff does not file a petition within a set period of time from the date the death occurred. Otherwise, between onset or significant aggravation and death could unfairly amount to many years in which to file a petition.

[14] Clearly, whether Mr. McCarville limited his representation to proceeding on a Program petition is of no great moment. The fact is that no other law firm could proceed with a state action until and unless a petition was filed in time to obtain the statutory suspension benefit. That is the primary issue here.

The suspension benefit is not a vague concept. The term "benefit" means something that is helpful, useful or a useful aid. The term "right" means a claim to something, a legal right. That a Petitioner might be helped and find the federal suspension of a state limitations statute useful is both a benefit and a statutory legal claim offered under the Vaccine Act. If a petitioner may dislike the proceedings under this program, there are provisions to make an "election" so that they can pursue a civil action in state court. In addition, if a petition works to suspend a state statute of limitations, it may prove beneficial for some petitioners who may need time to weigh the benefits of the Program versus a traditional tort suit. The plain wording here does not leave us in the dark concerning Congress' intent. If the statutory suspension of limitations section were not a benefit, if it were not a justiciable right, it would not be present in the text along with the additional provisions allowing petitioners to elect out of the program.[15]

b. Does Mrs. Helms's have a right to benefits and therefore the suspension benefit under the statute?

Mrs. Helms hired Mr. McCarville to represent her for proceedings under the Vaccine Act. Like any petitioner, she had equal claim to all benefits provided under the Act. However, whether she had the right to the suspension benefit depends on two queries: first, it depends upon whether her state claim was active and/or expired during the time she retained her attorney; and second, whether her petition was filed timely to suspend the potentiality for a state action. Though not so probative, an ancillary issue is whether Mrs. Helms knew she was taking advantage of this benefit.

c. Was that suspension benefit available and preserved in this case?

Once it is determined that a person has a right to file a petition, the experienced vaccine attorney knows to analyze the applicable statute of limitations both in the program and within the relevant state. It is the attorney's premier duty.[16] To see whether Mr. McCarville secured the benefit of the Act, a summary of relevant facts is requisite.

In this case, Zachary received a DPT vaccination on 25 January 1995 and subsequently died on 27 January 1995. Mrs. Helms, his mother, brought the action to Mr. McCarville for his professional representation on 28 November 1995. *See* Mrs. Helms's Statement, Exhibit 16. Mr. McCarville then prepared a petition and filed it with this Court approximately nine months later on

---

[15] Though one might posit that this reading of the Vaccine Act encourages an attorney to give advice in a jurisdiction that he is not licensed to practice in, such a position misreads the attorney's duty here. The Vaccine Act does not require the attorney to give advice but rather to preserve a benefit by filing the petition in time to suspend state law. If the attorney is unsure about the status of a state's statute of limitation, he has a duty to obtain an opinion from an attorney in the relevant state.

[16] Under Section 300aa–10 (b) of the Vaccine Act, the attorney's ethical obligation with respect to a vaccine-related injury or death is to "advise such individual that compensation may be available under the program for such injury or death." 42 U.S.C. § 300aa–10 (b) (West 2001). By way of implication, the ability to give that advice assumes that the attorney has at least heard of the Vaccine Act. Once representation is undertaken, it is reasonable to expect that an attorney will review the entire Act and make decisions for his client based upon the Act.

19 August 1996.

Under the Act, Mrs. Helms's had 24 months from the date of Zachary's death to file her claim. Zachary passed on 27 January 1995. The time to file a petition in this Court would therefore have expired on 28 January 1997, exactly 24 months later. Solely for proceedings under the Act, her petition was timely filed before that deadline on 19 August 1996. However, whether that August 1996 filing was sufficient to avail her of the suspension benefit under the Vaccine Act, her attorney who had this case for eight to nine months before filing, would have had to determine the proper state forum.

At a gloss, there are only two possible choices of law to choose from, California, where the vaccination was administered, or perhaps Arizona, where Mr. McCarville took charge over the claim. If California law were to apply, the statute of limitations appears to be one year.[17] California has no exceptions to its limitations period such as a discovery rule. And so, Mr. McCarville would have had to file a petition in this Court before California's limitation period ended on 27 January 1996. In contrast, if Arizona law were to apply, he would, presumably, have to insure that a petition was filed in this Court within two years from the date of death.[18] And so, barring any other exceptions that may be unique to Arizona's limitations period, he would have had until 28 January

---

[17] California's law provides a strict rule: "[A]n action for injury or death against a health care provider based upon such person's alleged professional negligence . . . shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, *whichever occurs first*." California Code of Civ. Proc. Sec. 340.5 (West 2001) (emphasis added); *see also* California Code of Civ. Proc. Sec. 340 (1) (West 2001) (general one year limitations rule). Section 340.5 sets out exceptions that do not appear relevant to this case:

> In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose of effect, in the person of the injured person.

In cases in which a child has died, the statute commences upon death, *Ferguson v. Dragul*, 187 Cal. App. 3d 702, 709 (1986) and there is *no* one-year "reasonable discovery" doctrine. *Young v. Haines*, 41 Cal. 3d 883, 897 (1986). In summary, a California plaintiff has three years from the date of the malpractice or one year from the date that the child died as a result of the malpractice–whichever is sooner. For wrongful death or product liability, California's law is also clear:

> A wrongful death action against a manufacturer based upon negligence or products liability comes within the rule that a plaintiff who is "blamelessly ignorant" of his cause of action is not barred by his delay in bringing suit; the one-year period to file suit, therefore, commences on the date on which the *plaintiff discovers, or should have discovered*, his injury *in the form of the death of his decedent and its tortious cause*.

Frederick v. Calbio Pharm., 152 Cal. Rptr. 292, 294 (Cal.App., 1979) (emphasis added). At most, Mrs. Helms could be said to have discovered a vaccine as the alleged cause on the date she retained Mr. McCarville.

[18] In Arizona, wrongful death claims appear to accrue at the date of death and must be brought within two years. Ariz. Rev. Stat. Ann. § 12-542 (West 2001).

1997. If Arizona law were to apply, the suspension benefit under the statute would have been preserved.

Arizona's law does not apply[19] to the facts of this case for the simple reason that the events complained of transpired in California. It is California's legislature that has constitutional jurisdiction to govern tortious conduct and acts against people within its territory. If one tried to apply Arizona law, it is evident that Arizona would be controlling tortious conduct within California. She may lay no such claim on California's territorial jurisdiction. The U.S. Constitution makes this clear[20] and thus there can be no dispute as to the proper state law.

This means that while Mr. McCarville was retained, he missed availing Mrs. Helms of the Vaccine Act's statutory suspension benefit of being able to file a California state law claim because the California statute of limitations period expired almost seven months prior to filing the petition in this Court. Restated differently, Mr. McCarville had two months to file a petition under the Act in order to stay the state limitations period. By failing to do so, Mrs. Helms was denied both the suspension benefit offered under the Vaccine Act and the ability to opt out of Vaccine Act proceedings.

In addition, if one looks at the exhibits attached to Petitioner's statements, it is evident that Mr. McCarville *continued to advise* her that she could file a state law claim even though she told him that a California attorney had advised her otherwise.[21] In other words, it would appear that he did not bother to check her concerns or he simply ignored the issue. Attorneys unfamiliar with the Vaccine Act might not be aware of the federal program's purpose of ameliorating state law tort claims until such time as it was raised in the state action. *See, e.g., McDonald v. Lederle Laboratories,* 341 N. J. Super. 369, 775 A.2d 528 (N.J. Super. June 18, 2001). As Mr. McCarville notes, he is well practiced in the program and therefore he knows full well that filing a petition in this Court stays the statute of limitations in any state.

As Mrs. Helms's has noted, she thought she was obtaining the suspension benefit of the

---

[19] Some states do not adopt the territoriality approach to conflict of laws but opt for a balancing of interests among the forums. This is most often the case where states adopt section 6 of the 2nd Restatement of Conflict of Laws.

[20] Article 4, Section 1 reads that "Full faith and credit shall be given in each state to the public acts . . . of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." The only way Arizona can give full faith and credit to California's tort laws without extending Arizona control in California is to insure that California's territory and her laws, like any other state, are absolutely respected. This respect requires that Arizona not adjudicate matters that are properly within the jurisdiction of the courts of California.

[21] *Cf.* Mrs. Helms's 31 January 2002 statement, Ex. 17 (Email from Mr. McCarville dated June 7, 2000), *with* Ex. 12 (Letter dated June 7, 2000) ("We have spoken with Andrew Dodd, a well-known [California licensed] attorney who has experience within the Vaccine Compensation Program as well as against pharmaceutical companies. . . . His comments are as follows: . . . if our case had not been filed within one year the statute of limitations would have expired."), *and* Ex. 18 (Letter from Mr. McCarville dated August, 30 2001) ("Please let me know . . . your intent to file a civil action.")

Program. In her own words, "*Per our conversation*, *my rights to bring suit against the pharmaceutical company will be protected through the Compensation Program*." Mrs. Helms's 28 April 2002 Statement, Letter dated 29 November 1995, Exhibit 26 (emphasis added). Today, even if Petitioner won her case under the Vaccine Program yet was dissatisfied with the award, she is unable to avail herself of a California remedy.

Had Mrs. Helms's vaccine case been resolved in her favor, it is quite probable that the Court would not have been concerned about this primary issue. However, the denial of the statutory suspension benefit is exposed where her medical expert's presentation during trial collapsed and there was a failure to ask for appropriate post-trial relief. It is to these secondary issues that the Court now turns.

2. The late Richard Defendini, M.D. and his testimonial proffer

The issue of what caused Zachary's death represented a close case because it boiled down to whether the Court could trust one expert over another.[22] At inception, the facts, the medical literature, and the expert report did not raise adverse conclusions against Mrs. Helms's case. It did, however, raise several questions. The critical factor was Petitioner's medical expert and whether he would be able to answer those questions. He did not and now it is plain why.

As already observed, the outcome in this case was not favorable though it was a case that should have been brought for it was one that could have seen a favorable result. However, the negative result was brought about in large part by critical, non-strategic decisions made by Mr. McCarville. **To clarify, it wasn't the selection of Dr. Defendini or the *use* of him as an expert that is at issue.** Rather, it was the decision to continue with the doctor's *trial testimony* at all stages of litigation when Mr. McCarville must have known or should have known that the severity of Dr. Defendini's cancer and his recent chemotherapy treatment (or for that matter, whatever else), was severely impacting his testimony. And this, with Dr. Defendini virtually admitting on that stand that he was having physical and mental trouble testifying. The severity of this illness was the missing context that the Court was not aware of at that time or it would have questioned both Dr. Defendini and Mr. McCarville.

This case, like the average vaccine case, contained difficult material not encountered by the traditional tort lawyer but often encountered by an attorney who practices before this program. The science is not always new, up-to-date, or even available. In this case, the experts were not relying on factual testimony inasmuch as the battle involved only their opinions, the basis of their opinions, and how they were able to marry their testimony under *Daubert*'s[23] standards. Persuading the trial judge to trust one opinion over the other may seem the epitome of subjectivity. Yet there are testimonial proffers in which this Court can safely say, no special master could be persuaded.

---

[22] While Respondent concludes that there was no scientific basis for Dr. Defendini's opinion, it had no objections to the fee petition.

[23] *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993).

Petitioner's expert, the late Dr. Richard Defendini, M.D., was not well received for a number of reasons. As the Court noted in its denial of entitlement,

> Dr. Defendini has never presented himself to a pediatric board for certification. In fact, Dr. Defendini is not certified in anything and has virtually no credentials or relevant experience in pediatric neurology except for research of medical literature. Dr. Defendini has been retired since 1993 and has not signed out any autopsy records since that time.[24]

While this questionable background alone would not necessarily preclude the persuasion of a special master it makes the expert's hurdle at trial all the more critical. Clearly, the Court thought that Dr. Defendini, based on his submitted reports, was qualified to opine.

> The Court found that the general theory proposed by Petitioner's doctor was indeed possible. However, as shall be seen, the Court found that his credibility, veracity and credentials, when coupled with the paucity of facts in the record, did not support that theory.[25]

Thus, Dr. Defendini's qualifications did come into play with his telephonic testimony. The Court did not trust his lack of training, his interpretation of medical issues, facts, and medical articles as much as the qualifications and cogent testimony of Respondent's expert. This might have been overcome if Dr. Defendini's terminal condition had not affected his persuasiveness or his ability to articulate Zachary's course or the medical literature in response to questions. The reason that Dr. Defendini's background and testimony were so critical here given his lack of qualifications and seeming incapacity to testify,[26] condensed to an interpretation of autopsy slides.

> To rule out an ischemic event, one where a blood deficiency would have been present, Dr. Defendini concluded that the requisite swelling in such an event would have occurred at least 12 to 24 hours prior to the onset of intracranial pressure. Tr. at 70-71. Such evidence, he opined, was not present here. An ischemic event would have been indicated on the autopsy slides by the presence of a "hot pink" nerve cell. Tr. at 70-71. Since the autopsy slides did not reveal those cells, according to Dr. Defendini, he had to reject an ischemic event. . . . In support, he opined that "it would take two to three days to reach a maximal point of killing the child." And unless the nerve cells thereafter received 12 hours of blood circulation in the brain, the nerve cells would not change to the hot pink. *Id.* If the hot pink color were

---

[24] *See Helms v. Secretary of HHS,* No. 96-518v, slip op. at 5 (Fed. Cl. Spec. Mstr. January 13, 2000) (unpublished).

[25] *Id.*

[26] Unfortunately, Dr. Defendini testified by telephone and the Court had no opportunity to observe his condition. It does recall that he had to be excused to use the bathroom. However, because it did not realize the severity of his condition until the Mrs. Helms's statements, the Court did not link the illness with going to the bathroom and so, it relied upon counsel to proceed with his witness.

> present, then presumably for Dr. Defendini, Respondent's medical expert would have been accurate to conclude that an acute ischemic necrosis had occurred--that is, a decay of nerve cells due to asphyxiation.[27]

This point was more than probative at trial–it was a critical mass.[28] In the Court's own wording, it was "another 'clash' between Dr. Defendini and Respondent's expert. Again, the Court defer[red] to Respondent's expert because of Dr. Defendini's credentials."[29] It must be pointed out that the Court is not faulting Mr. McCarville for selecting an expert with fewer credentials. As has been stated, this Court could have found in Petitioner's favor were it convinced of the reliability of Dr. Defendini's testimony. Rather, Dr. Defendini's credentials became paramount when it was clear to any listener that his telephonic testimony was sorely delivered, contradictory, confusing, and therefore, the weight assigned to the evidence and report he had proffered, minimal.

As the Court pointed out in its second decision on remand, many of the articles submitted by Petitioner's expert did provide support but that support was either conclusory or did not follow through. It was up to Dr. Defendini to fill those gaps. If he could not have a command of his own literature or respond to the questions proffered by Respondent's attorney who is not a doctor, how is the Court to trust Dr. Defendini's claim that his literature and interpretation of facts or autopsy slides supported Petitioner's case? For instance, an issue arose as to whether Zachary's misidentification of a familiar person was a cognitive error indicating what happens to every person, or an instance pointing to an important causative issue. Without the ability to trust Dr. Defendini's opinion, the Court was loath to make the medical leap that the event was importantly related to the DPT vaccination and Zachary's injury.

In terms of this Court's experience, it does have a degree of specialization that enables it to read and understand complex medical literature in this area. However, the importance of a medical expert opinion and attendant testimony in these cases is requisite to making a right decision interpreting difficult medical literature. The Court should not have the confidence to make such an interpretation unaided by an expert cogently explaining a medical process. Experience has proven this time and time again and the analogy of a paralegal giving advice about what a legal case means is apropos. Laymen or well experienced paralegals could very well give the right summary of what a case means provided they have correctly studied the issue. However, an untutored synthesis may lead to unexpected ramifications. And so, probability tells us that an attorney who practices in the courts is the safer route to making predictions. Likewise with a special master concerning a point in medical literature applied to a given case.

---

[27] *See Helms v. Secretary of HHS,* No. 96-518v, slip op. at 10.

[28] When the issue boiled down to an expert's distinction to opine on whether a certain set of autopsy slides revealed hot pink purkinje cells (i.e., nerve cells), it is clear that the right approach would have been to seek the opinion of an expert *board qualified* pathologist, especially given Dr. Defendini's condition. And if that opinion could not be obtained, then that, perhaps, is where the case should have ended.

[29] *See Helms v. Secretary of HHS,* No. 96-518v, slip op. at 10, note 25.

True it is that the Court did not make this analysis clear in its first decision. It did not think it had to. What Mr. McCarville has done is egregious. To restate, it was not that the selection or use of Dr. Defendini was wrong or simply a matter of a "bad" expert. It is more. It was an expert who was incapable of testifying properly because he was physically and mentally fatigued from severe cancer and chemotherapy treatments. With this hindsight in mind, Dr. Defendini was not adequate nor were the appeals that continued to proffer his testimony as sound. As evident in Petitioner's statements, Mr. McCarville knew what was going on with Dr. Defendini's health and knew or should have known that this testimony was actually hurting his client's case. This fact will be treated more in detail for it cuts to the core of this case. Not the selection or use of Dr. Defendini, but the decision to continue with that testimony was so central to an ongoing reasonable basis that it removed the core support in a case that Mr. McCarville might have prevailed on and dashed any hope of obtaining relief for his client.

On appeal of that first decision, Mr. McCarville argued that he "presumed" that the Court found Dr. Defendini's credibility lacking because he gave "flippant or unprepared" answers–that he was "not sure exactly what it was about his answers."6 January 2000 Appeal Tr. at 14. Indeed, the Court did not know then what it was about Dr. Defendini that caused him to testify badly at the time for it did not know Dr. Defendini. But, no doubt Mr. McCarville knew or must have known. He did not think that the "special master [was] leaning in either direction in terms of making a decision" (Mrs. Helms's 3 April 2002 Statement, Exhibit 21). In a letter from Mrs. Helms's husband to Mr. McCarville, Mr. Helms summarized what Mr. McCarville's paralegal (who is also Mr. McCarville's brother) assured–that "Special Master Abel[l] was sensitive to Dr. Defendini's serious illness and that [she] should not be worried about his testimony–the case would be decided based on the medical reports." *Id.* at Exhibit 25 (Letter dated September 28, 1998 from Mrs. Helm's husband to Kirk McCarville).[30] Mrs. Helms's husband then

> reiterated to Kim [McCarville] that we needed to get a new expert witness who was familiar with the program. I suggested that we retain Dr. Menkes, whom Michelle [Helms] has had several conversations with.
>
> Your letter states that you advanced fees to consult with Dr. Stephen Coons. I'm not sure why you chose him; maybe it was because he is located in Phoenix. However, we have agreed to advance fees for a new expert, and *request that you retain one whom is experienced testifying within the program*. *Surely the court will allow us additional time to respond, if you let them know that Dr. Defendini has passed away*.

Id. (emphasis added.)

The Court finds it unconscionable that an attorney, in spite of the fact that his clients were

[30] One would be hard pressed to say that a special master would find for a petitioner based on medical reports alone if the Respondent had proffered a qualified expert and a petitioner's expert proffer was essentially non-existent. It may happen in an extremely rare case but the special master would have to justify disagreement with a well practiced medical doctor and experienced expert. Essentially, the special master would become his own expert.

giving him the true legal advice, would continue to support, proffer, and use Dr. Defendini's telephonic trial testimony. To wit, Mr. McCarville, though assuaged by "almost weekly" conversations with Dr. Defendini as a "measure of his status," (6 January 2000 Appeal Tr. at 15) stated that he was aware that Dr. Defendini was "*very, very sick* with cancer . . . . In fact, he leaves at one point in the transcript to go to the bathroom, to take care of himself, . . ." *Id.* (Emphasis added). Surely Mr. McCarville's "vaccine litigation experience, knowledge and . . . comparable skill . . ." (Petitioner's Attorney Fee Application *at* 2) would have alerted him that a severely ill cancer patient who abruptly interrupted his testimony to use the bathroom was a first warning sign. So ridden with cancer, Dr. Defendini died a mere two weeks after the July 1998 trial.[31] This fact coupled with the troubling parts of Dr. Defendini's testimony such as the following, should have further alarmed Mr. McCarville:

> Unfortunately, you know, *as Mr. McCarville has told you*, you know, I *have been seriously ill* and I *have been functioning on two cylinders*, so I can't – *I can't be as prepared for this as I would have like to be.*

Entitlement Hearing Transcript at 84 (emphasis added). Clearly, when one looks back, Dr. Defendini's lack of capacity to testify is evident here and in numerous other instances during cross examination.[32] This testimony troubled the Court but since it could only evaluate Dr. Defendini by telephone, it relied on Mr. McCarville's preparation and determinations, primarily because Dr. Defendini *had been* ill. In rueful hindsight, the true context was that Dr. Defendini was still seriously ill at trial.

This raises another point. That Mr. McCarville may have had almost weekly conversations with Dr. Defendini to anticipate and prepare his trial testimony leads this Court to ask, what preparation ensued? During trial, Dr. Defendini noted that he had not read either Respondent's literature, (Entitlement Tr. at 92), been up to date on literature (Tr. at 92), or read the material in over one year. (*Id.* at 95) That he was not as polished as he would like to have been is not the issue. It was the repeated statements that he could not prepare for trial or answer questions. That testimony should have raised a mammoth red flag to the person who knew precisely the severity of that condition and the level of preparedness–Mr. McCarville. Alternatively, if the Court were to presume that Mr. McCarville was intimately familiar with Dr. Defendini pre-trial and that Mr. McCarville had not expected Dr. Defendini's demeanor and presentation at trial, the matter is made even more egregious. In other words, Mr. McCarville, having been supremely confident in the expert's ability because of preparation only days before, would have been shocked and surprised at the testimony.

---

[31] In Mrs. Helms's 3 April 2002 Statement, she offers a September 28, 1998 letter from her husband to Mr. McCarville that states, "Additionally, Kim said *he thought* Dr. Defendini had passed away." Exhibit 25 (emphasis added.) This letter shows how long after trial it took for Mrs. Helms to find out that her expert had passed away.

[32] Dr. Defendini responded to cross examinations by stating that he was not going to give opinions on the medical literature. *See, e.g.,* Ent. Hrg. Tr. at 84, 92, 95, 97, 98-100, 102, 110. He could not recall the sources he was relying on, quote the names of the articles, or have prepared through a careful literature review. Moreover, in hindsight his illness was apparently severe enough to interrupt parts of his testimony and cause him to use the restroom during testimony. *See* Appeal Transcript.

That surprise would have lead him to make a motion during, before, or after trial on any number of grounds that go to fundamental fairness, such as the opportunity for a retrial, a new expert, or more time for Dr. Defendini to recover. Yet none of this was raised at any time during litigation.

In rueful hindsight, it was not merely Dr. Defendini's refusal to answer questions but a physical illness, the severity of which the Court was not aware of until the filing of Mrs. Helms's statements. It is true that the Court knew Dr. Defendini had cancer and that the first telephonic entitlement trial was being rescheduled to accommodate medical treatment. However, many people have different types of cancer and they function normally. To wit, the undersigned has a mild form of cancer yet functions normally with treatment. The Court had no knowledge of his death while writing the first entitlement decision or the decision issued on remand. The Court could have interjected at that point to suggest that Mr. McCarville find a new expert, yet it relied upon Mr. McCarville to determine whether he could even retain another expert.

If Mr. McCarville had not anticipated this potential pitfall earlier, it appears his client already had. To wit, Mrs. Helms proffers a letter written before the telephonic entitlement hearing that Mr. McCarville's paralegal told her that

> Dr. DeFendini had cancer and had to undergo chemotherapy treatments. . . . He [Mr. McCarville's paralegal] *stated that the compensation program would not allow us to bring in another expert witness*. This doesn't seem right. *How could the government expect a man to testify under these conditions*. You told us from the beginning that what our case boiled down to was expert v. expert.
>
> I told Kim [i.e., Mr. McCarville's brother who is also his paralegal] how my father died of cancer at the age of 47. He too had to undergo chemotherapy treatments and he died within one month of his second treatment. He became frail and couldn't even stand up on his own. . . . Not only did my father deteriorate physically but mentally as well.
>
> Although my heart goes out to Dr. Defendini I can't express to you how much this concerns me.[33]

First, as any attorney practicing under this program is aware, the Court rarely turns down requests to find another medical expert.[34] In fact, there is no rule that states Petitioner could not

---

[33] 28 January 2002 Statement of Mrs. Helms, Exhibit 3 (emphasis added). This letter shows the reliance upon the advice of Mr. McCarville's firm concerning rules under the Vaccine Program and explains why they continued with his services throughout the appeal process. Of note, Mr. McCarville made no response to this letter in his reply.

[34] It is common under the lenient standards of this program to afford multiple extensions of time spanning several months to aid petitioners in procuring a new, better, or more detailed expert report. It is hard to find cases that are appealed on the grounds that not enough time was given. A perfunctory search, however reveals the common process. *See, e.g., Gershenson v. Secretary of HHS*, 1997 WL 79874 (1997) (second expert report allowed); *Ware v. Secretary* (continued...)

change her expert at any phase of the litigation process. Regardless of whether Mr. McCarville or his paralegal told Mrs. Helms that she could not have a new expert, the Court finds that Mr. McCarville should have, at a minimum, requested time to find another medical expert after the trial was over. He should have done this if, for no other reason than the fact that Mrs. Helms made a number of such requests.

It must be noted that a petitioner does bear a certain *de minimis* responsibility to monitor her attorney's conduct if he did not meet with her expectations. This Court finds that Mrs. Helms did make reasonable inquiry into what her attorney was doing considering that Mr. McCarville spoke with her on a number of occasions immediately before and after trial, presumably to calm her justifiable fear and answer questions. Based on the documents submitted by Mrs. Helms, and the continuation with Mr. McCarville's services, it is probable and evident that she didn't think she could change or seek a new expert.[35] While her statements and exhibits are well composed,[36] given her uneducated background and reliance upon Mr. McCarville, it was not unnatural for her to repose her trust in his decisions. Second, it appears to the Court now that there were other experts available. *See, e.g., 3* April 2002 Statement of Mrs. Helms, Exhibit 19[37] and Petitioner's Application for Fees at 20. What these experts would have said is of no moment now, and is, in fact, moot inasmuch as Mrs. Helms no longer has the *opportunity* to obtain them. Both her vaccine claim and state claim are finished.

Probative of Mr. McCarville's decision-making is a letter dated 29 July 1998 where Mr. McCarville states, a mere one day after the entitlement hearing, "If [Dr. Defendini] is up to it [assisting on the brief] I'm sure he will provide assistance." Mrs. Helms's Statement, Ex. 11. Mrs. Helms's statement shows that Mr. McCarville knew that Dr. Defendini was at a minimum and merely one day after trial, in questionable physical or mental condition. For whatever reason–it matters not–Mr. McCarville continued to rely on the trial testimony as the grounds for his appeals, even when Mrs. Helms wrote to him on two occasions, one of which was on 7 June 2000 asking him to appeal the final decision largely based upon Dr. Defendini's physical and mental inadequacy due to cancer. *See* Mrs. Helm's Statements, Exs. 12-14, *and especially* 15. This is not a question of

---

[34](...continued)
of HHS, 28 Fed.Cl. 716 (1993) (multiple extensions given for expert report); *Shackil By Morrero v. Secretary HHS*, 1992 WL 142609 (Fed. Cl. Spec. Mstr., Jun 05, 1992) ("[A]fter numerous orders and extension of time, petitioner failed to provide an expert medical opinion." *Id.* at *1.).

[35] *Supra* note 33.

[36] Before filing her statements, Mrs. Helms contacted my law clerk to see whether she could file and what procedural requirements there were for filing documents with the Court. Though her letters do not take the form of a legal pleading under the Vaccine Rules, Mrs. Helms's statements substantially comply with those requisites and the Court treats them as pleadings.

[37] That letter is from the renown Dr. Menkes who stated, "I do have some recollection of our conversation of Zachary's brain swelling, and I think that my recommendation of Mr. Dodd, and *my agreeing to be your expert witness is in line with what I would have said under these circumstances*." (Emphasis added.) The Court has heard Dr. Menkes in the past and considers him a highly reputable and credible expert.

strategy but one requiring an attorney to ask for time to find a new expert where he was intimately familiar with the expert's preparation that imploded at trial.

Mr. McCarville disagreed with this request from Mrs. Helms on the grounds for this appeal stating, "I have expressed reservations regarding the merits of an appeal. . . . I disagree with the concept that an appeal should focus on Dr. Defendini's performance at trial. I don't believe that constitutes reversible error. . . . I think it is imperative that an appellant be consistent in his arguments throughout the appellate process." *See* Mrs. Helms's Statement, Ex. 15. Consistency may be important in the appellate process and in strategy but this cannot be used to obviate the defect of a patently obvious problem–a medical expert whose inadequacy is manifested by his own admission. Whether the issue of a new medical expert was appealable is now hindsight and speculation though it would not have been had Mr. McCarville requested the opportunity to find a new expert while the courts still had jurisdiction of the matter. Obviously, as a broad generalization, it might prove embarrassing for an experienced vaccine attorney to request–for the first time–a new expert on appeal where his expert was clearly incapacitated at trial. The Court is not finding here that this was the reason Mr. McCarville did not ask for an expert but simply notes that in terms of litigating this case, Mr. McCarville either intentionally or unintentionally failed to recognize the obvious–Dr. Defendini was unable to carry the burden of the Helms's case because he was mentally and physically unable to testify as a result of severe cancer, chemotherapy, or whatever else was ailing him.

Shortly before the trial, Dr. Defendini underwent chemotherapy treatment for cancer. Within a few weeks after the trial, Dr. Defendini passed away. In fine, under the lenient standards of this program, it would have cost virtually nothing, a one page motion and a status conference to request additional time to find another expert. Assuming *arguendo* that Dr. Defendini was the only expert Mr. McCarville could obtain, he should have stopped prosecuting this case further for he should have known that there was no longer a reasonable basis to continue. If he did not believe that his client had a case, and this was affecting his zealous representation, he should have withdrawn.

From this Court's perspective, this is sufficient to consider a decision on fees yet the Court finds it necessary to continue. No doubt a great deal of work must have gone into preparation of Dr. Defendini and counsel was aware of his status. If Dr. Defendini was ill before trial and couldn't perform, Mr. McCarville could have requested to call off the trial. If Dr. Defendini performed badly at trial, Mr. McCarville would have known this and should have gone off the record or acted post-trial. Mr. McCarville's representation of Petitioner was seriously compromised. The Court is not entering into matters of strategy here for in this case it was a patent and obvious problem. Rather this has been a discussion of procedure as it relates to fundamental fairness and statutory benefits.

The denial of the statutory suspension benefit tainted the outcome because the value of the benefit was exposed when Dr. Defendini's presentation collapsed and because of the failure to seek post-trial relief on that issue. This should have been evident to Mr. McCarville. He was in control of Petitioner's case and must assume a responsibility in continuing with Dr. Defendini under the circumstances. Mr. McCarville may have spent long periods of time with Dr. Defendini according to his own fee records. Given this fact, it makes the failure to ask for relief after trial all the more

egregious because it bifurcates his numerous discussions with Dr. Defendini and his presentation at trial. And, the defects in the statutory suspension benefit could have been obviated if there had been a different result or had he retained an expert physically and mentally competent to testify anew. In other words, he could have more adequately prevailed. Mr. McCarville's lack of stewardship of the suspension benefit is therefore clear.

D. Mr. McCarville's Fee and Costs Application

1. Attorney Fees and Rate

In his 30 page fee application that has attached over 50 pages of cost receipts and justifications, Mr. McCarville's requested attorney hours[38] and rate consist of the following:

Phase	Hours	Hourly Rate	Total
Litigation before Special Master	208.2	$175.00	$36,435.00
First Appeal leading to remand	35	$175.00	$6,125.00
Second and Third Appeals	71.5	$175.00	$12,512.50
Total Attorney Hours Requested	**314.7**	**$175.00**	**$55,072.50**

While the Court finds that it has discretion not to award any fees at all in a discretionary case such as this, it is important in the Court's opinion to restate its purposes. The threshold factors are that

[38] For the complexity of this litigation, it is the Court's experience that this type of case should not have incurred such a high amount of attorney hours. The Court is not questioning that the amount of hours were actually expended but rather that the time logged may not have been wisely spent. Stated differently, the number of hours billed was reasonable for an inexperienced vaccine litigator, but are not reasonable for an experienced vaccine litigator. An inordinate number of hours were spent on the "status" of the case and conferencing with the paralegal, writing letters to the client, preparing the petition, and general file review. For instance, on a number of occasions, Mr. McCarville billed .20 to .30 hours for reviewing the status of a case. (Fee App. at 2, 4.) .2 hours equates to 12 minutes. For an experienced program attorney such as Mr. McCarville, 12 minutes may not be excessive until it is constantly repeated over and over.

To boot, Mr. McCarville billed paralegal hours paralleling his attorney hours when it seems that such hours were used for ministerial or redundant tasks. For instance, Mr. McCarville billed .1 hours for a letter to the client about the petition being filed. *See* entry dated 08/27/96. Based on his fee request, this equates to a letter costing $17.50 when, as a paralegal task, it could be billed as a ministerial task at $5.50. In addition, he spent .3 hours or 18 minutes concerning the "status of this case" when that description is subsumed or implied by the existence of other entries on that same date. *See* entries dated 02/01/96, *Fee Application* at 2. On 02/01/96 he spent half an hour in conference with his paralegal about coroner reports and then an unknown block of time of two hours on 02/05/96 reviewing that report. This seems excessive given Mr. McCarville's experience, the overall amount of time spent by his paralegal on this report, and the type of report filed in this case. Between the time of his first entry on 11/22/95 to the time of filing on 08/13/96, almost nine months later, Mr. McCarville seems to have expended over 50 attorney-paralegal hours to prepare the petition and related filings. The Court finds this amount *appears to be* excessive given the fact that he missed the state statute of limitations deadline when he filed the petition in this Court. However, the Court is unable to sufficiently parse what hours to reduce without seeming arbitrary and the Court feels uncomfortable in doing so given that the excessiveness seems borderline. Therefore, there is no reduction in the number of hours.

the Court does not want the decision to seem like a penalty or have the effect of chilling the plaintiffs' bar in zealous representation. To divine the other factors that weigh into the Court's decision to award fees, it is necessary to discuss what Mr. McCarville has presented.

Mr. McCarville notes in his fee petition that he has previously received $160-165 dollars as an hourly rate in this program. He states that the Chief Special Master noted in an opinion that Mr. McCarville's rate might be open to an upward adjustment "with the appropriate substantiation." *See* Petitioner's Application for Attorney Fees and Costs (Fee App.) at 2. Presumably, this customary rate and possibility for a higher rate is partially intended to mean that Mr. McCarville's skill and standing as a well-practiced vaccine attorney ought to be accepted in this Court. However, no attorney's past history or customary rate can act as an *ipso facto* substitute for work in all vaccine cases.

Normally, the Court begins by forming a loadstar and makes equitable adjustments. It begins with the evidence supplied by Mr. McCarville, which in this case, is scant to none. The only documented proof that he supplied in the petition were his past cases, a statement from the "judicial conference of the United States recognized since 1988 . . . ." (Fee App. at 2) that Arizona attorneys in the District of Arizona have higher prevailing fee rates, and an averment that he normally bills $220 per hour outside the vaccine program. Concerning this latter rate, the Court sees no evidence as to whether it is based on Mr. McCarville's tort practice, his tax law practice, or his success in the free market. That Mr. McCarville usually receives a usual rate of $165.00 per hour in front of other special masters and between $145.00-$165.00 before the undersigned (along with a requested increase to $175.00 per hour) is not an appropriate starting point.

In a recent case, *Rupert v. Secretary of HHS,* ____ Fed. Cl. ____, 2002 WL 1141768 (May 30, 2002), the Federal Court of Claims required evidence of a market rate in cases brought under § 300aa-15 (e) (1), specifically pertaining to cases *requiring* an award of fees; that is, where entitlement is found. However, in this case fees are discretionary and the decision to award fees and costs is made under the second sentence of § 300aa-15 (e) (1). While the application of *Rupert* seems generally applicable as a guide in discretionary cases, its application in such cases is not automatic. In this case, application of *Rupert*'s standards are problematic. How to divine a market rate for a case in which there is no market comparison? There is no comparison because, as has been explained, the attorney's decisions did not simply constitute expected errors in judgment within the standard representation but go beyond. A critical decision during or after trial severely affected the value of the representation performed thus far. While the substance of some vaccine claims present novel and complex issues, this case appeared to be in the Court's experience, one of average difficulty. The importance of Dr. Defendini's testimony did not yield any benefit to Mrs. Helms and Mr. McCarville should have recognized that post-trial there would no longer be a reasonable connection between the fees he was charging, the degree of success obtained through appellate litigation, and the benefits to Mrs. Helms.

Mr. McCarville has had a number of cases in this Court, some successful, some not. He has performed adequately in previous cases. Mr. McCarville, like any attorney in this program–like any human being–can make bad judgments. The law allows attorneys a certain degree of latitude

provided the questionable conduct falls within a reasonable range of the standard of services.

At the time this case was filed, the suspension benefit had already been abridged by Mr. McCarville. It no longer existed. Moreover, the effect of the first appeal was lost when he did not seek post trial relief in the form of a request to obtain another medical expert to opine anew or a new trial. While the suspension benefit defect could not be cured technically, it may have been obviated in large part had Mr. McCarville "adequately prevailed."[39] The fact that he did labor can be severed from the issue of final result but not from whether he should have more "adequately prevailed." Notwithstanding speculation on what an alternative result might have looked like, it is clear that the petitioner would have more adequately prevailed if she had been given the opportunity for the relief discussed. Accordingly, for this and other reasons,[40] the Court awards Mr. McCarville the hourly rate given to him previously in June of 1999.[41] However, the award extends only to matters litigated before this Court and for the first successful appeal leading to a remand.[42]

---

[39] *See supra* footnote 5 and the text it explains.

[40] *See supra* footnote 6 and the text it explains.

[41] *Carlson v. Secretary of HHS*, No. 91-1486V (Fed. Cl. Spec. Mstr. June 17, 1999) (unpublished).

[42] It should be noted that while the first appeal yielded a remand was issued for the purpose of clarifying how the special master applied *Daubert* standards and not on the grounds Mr. McCarville originally sought. During oral argument before Judge Allegra, Mr. McCarville argued that the special master "erred in this case because he refused to evaluate Zachary Helms's death on all the particular facts, and by that I mean the absence of an analysis of the encephalopathy. . . ." Dec. 7, 1999 Transcript at 24-25. It was the "fundamental reason that it was fatal . . . ." *Id.* at 5. As the Court noted in its decision, it considered the entire record and it evaluated all of the facts before it.

Mr. McCarville also tried to show on appeal that this Court erred in not determining first whether an encephalopathy *actually* occurred in this case as opposed to determining whether, under the *Daubert* guideposts, it theoretically could have occurred. Beginning with theoretical question of can DPT cause Zachary's acute encephalopathy is not novel and has been applied numerous times in this Court. Further, the theoretical prong is a practical starting point in the circle, especially when there is epidemiological evidence. The Institute of Medicine (IOM) has recognized this point,

> Although *Can It? causality is usually addressed from epidemiologic studies*, *an affirmative answer can occasionally be obtained from individual case reports*. Thus, if one or more cases have clearly been shown to be caused by a vaccine (i.e., *Did it?* can be answered strongly in the affirmative), then Can It? is also answered, even in the absence of epidemiologic data. In several circumstances, for example, the committee based its judgment favoring acceptance of a causal relation *solely on the basis of one or more convincing case reports.*

See KATHLEEN R. STRATTON, ET AL., ADVERSE EVENTS ASSOCIATED WITH CHILDHOOD VACCINES, EVIDENCE BEARING ON CAUSALITY 21-23 (1994) (emphasis added). Of important note, the IOM also noted that the absence of convincing case reports cannot be relied upon to answer *Can It?* in the negative where a given vaccine has an extremely long history of use, like the DPT vaccination in this case. And yet, because of the fallibility of a passive surveillance system and the extremely rare occurrence of an adverse vaccine related event generally, the IOM acknowledges that "that which has not been reported might indeed have occurred." *Id.*

(continued...)

2. Paralegal rate and hours

Mr. McCarville has asked for $55.00 per hour for his paralegal who is experienced in this program. The Court finds this amount to be a little more given its past awards and the circumstances of this case. The Court normally awards Mr. McCarville's brother a paralegal rate between $45.00 and $50.00 per hour. While the Court was also loath to award even paralegal fees given the "experienced" paralegal's advice to the Helms's, it is compelled to so as not to create an adverse impact on the petitioner's bar, because it is Mr. McCarville who bears the responsibility for oversight, and because Respondent had no objections. Again, it would be difficult to apply a lodestar where there is no market rate for this type of paralegal work. The award is, therefore, a generous $35.00 per hour rate for 150.5 hours. The total amount awarded is $5,367.50.

3. Costs

Mr. McCarville's cost request totals $11,822.03. In addition to those costs, Mrs. Helms seeks $11,551.59 for costs that she expended *in propria persona.* Without conducting an analysis that would exclude attorney costs, a perfunctory review of Mr. McCarville's costs appear in-line with a case of comparable difficulty and the Court awards that amount *in toto* (i.e., $11,822.03). Some of Mrs. Helms's costs are not documented by receipts. Though the Court is loath to reduce them, especially when considering the issues of fairness and equity, it cannot award amounts that are undocumented. Of note, Respondent and Mrs. Helms have orally informed the Court that they have settled upon the amount of $9,352.34. This amount excludes undocumented expenses. After considering the record and the parties' oral stipulation, the Court finds that an award of $9,352.34 to Mrs. Helms is reasonable in this matter.

III. Conclusion

Time is the lawyer's sole expendable asset. The economic worth of his ability, training, experience, and work ethic, are determined by his use of hours to effect a zealous representation, here in the context of the Vaccine Act. A petitioner always bears the initial burdens of presenting sufficient evidence that will enable a Court to make a decision on entitlement and the reasonableness of a fee request. Those burdens were not met here for what Mr. McCarville has done is egregious. This case is not the typical scenario.

(...continued)

In other words, before a medical practitioner can answer *Can It?*, the *Did It?* query ought to be been answered first in the analysis. Clearly, in cases *where there is no research data or other reports*, *Can It?* and *Did It? are one and the same query*. Not only has the IOM acknowledged this point when referring to individual cases, they credit discovery of known adverse vaccine related events to the suggestions of DPT associations from one or more cases. *Id.* at 22. Therefore, for a few petitions under consideration before this Court, individual cases provide the only available report of the occurrence of an adverse event associated with a vaccine and therefore, the only means to answer *Can It?* In fine, the appeal can be seen as at least affording Mr. McCarville the opportunity to ask for a new trial or a new medical expert. Because there was a remand, and because the Court has already awarded fees for litigation, it would seem inconsistent not to award fees for other successful activities. And this, despite the fact that a failure to raise issues after trial and appeal undid the good that had been accomplished.

This Court has made no finding concerning Mr. McCarville's strategy. Rather it notes that the failure to obtain the statutory suspension benefit became paramount with an expert whose presentation collapsed. Mr. McCarville was either lax in his preparation or he was intimately familiar with it. The Court presumes that latter and this makes the event at trial all the more profound. Mr. McCarville bore a degree of responsibility that carried with it, the objective duties to analyze the appropriate statute of limitations, to secure the statutory suspension benefit, to monitor his paralegal, to give proper advice, to determine whether he should ask for another expert because of incapacitation that he alone knew the severity of at a telephonic hearing--that he alone would probably have been surprised about if he had a high level of confidence before trial--and to ask for time to find a new expert or a new trial. There were ample opportunities for this relief during litigation.

As noted, Dr. Defendini's report and the inapposite medical literature appeared adequate at the start, but at trial, *and more importantly before, during, and after remand,* it would have been clear to any attorney in attendance *who knew the severity* of Dr. Defendini's cancer or whatever else may have been affecting him that he could not carry the preponderance burden because of his physical and mental condition. And so, a motion after trial or an appeal which failed to raise this point of fundamental fairness worked to taint and eviscerate the entirety of the successes achieved in this case.

After the Court's final decision on remand, Mr. McCarville's decision to stick with Dr. Defendini rather than obtain another expert or new trial equated not simply to a cessation of a reasonable basis to prosecute this claim further but removed the entire case from viability–especially since state court was no longer an option. And, coupled with the evidentiary exhibits supplied by Mrs. Helms, it worked to taint any further chances the case may have had for a reversal or a favorable result. So it is difficult to award fees to an attorney whose egregious error removed the effectiveness of the work that had been accomplished. Through the point of the first appeal, the fee requests could be seen as generally appropriate. At a time when a motion for relief was ripe, the effect of the attorney's work was lost because the client's requests for a new expert did not make it into the record.[43] As stated numerous times, this exposed the abridgment and value of Mrs. Helms's statutory suspension benefit.

During the status conference that the Court conducted to discuss a draft of this decision, Mr. McCarville requested *ore tenus,* a need for discovery to depose Mrs. Helms and others on the grounds that he was concerned that the Court was questioning his strategy. That request is denied. There is no need for discovery since the Court has not rested this decision on any evaluation of strategy but rather upon clear statutory duties made manifest by the abridgment of Mrs. Helms's

[43] During the Court's status conference to discuss a draft of this decision, the Department of Justice argued that Mr. McCarville ought to be reimbursed for his work performed in good faith despite the Court's finding of egregious error and a failure to act on a fundamental responsibility in both the suspension benefit and post-trial relief related to the medical expert's physical condition. The Court awards fees notwithstanding that it is disconcerted with what has transpired and that Mr. McCarville could have more adequately prevailed. In making the award, the Court is also aware that it has an independent duty to determine what rights are available under the Act and to parse the value of a right that has been extirpated.

suspension benefit and failing to move for the appropriate relief. In short, strategy does not obviate securing a fundamental statutory right. Therefore, the award is as follows:

Description	Hours	Hourly Rate	Total
Mr. Kirk McCarville, Esq., Fees and Rate	243.2	$165.00	$40,128.00
Mr. Kirk McCarville, Esq., Costs			$11,822.03
Mr. Kim McCarville, Paralegal	150.5	$35.00	$5,267.50
Mrs. Michelle Helms, Costs			$9,352.34
Total Award			**$66,569.87**

In the absence of a motion for review filed in accordance with RCFC Appendix J, the Clerk of the Court is directed to enter judgment in favor of Petitioner in the amount of **$66,569.87**[44] for reasonable attorney's fees and costs. A check shall be paid to Petitioner and Petitioner's counsel, Mr. McCarville, jointly in the amount of **$57,217.53** and a check to Petitioner in the amount of **$9,352.34**.

IT IS SO ORDERED.

Richard B. Abell
Special Master

[44] 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) that would be in addition to the amount awarded herein. *See generally*, *Beck v. Secretary of HHS*, 924 F.2d 1029 (Fed. Cir. 1991).