In the United States Court of Federal Claims

No. 02-1052 V
(Filed June 3, 2010)[1]

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ESTHER HALL,	*	National Childhood Vaccine
	*	Injury Act of 1986, 42 U.S.C.
Petitioner,	*	§§ 300aa-1 to -34 (2006);
	*	Motion for Reconsideration,
v.	*	RCFC 59.
	*	
SECRETARY OF	*	
DEPARTMENT OF HEALTH	*	
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
* * * * * * * * * * * * * * * * *	*	

Richard Gage, Cheyenne, WY, for petitioner.

Melonie J. McCall, United States Department of Justice, with whom were *Tony West*, Assistant Attorney General, *Timothy P. Garren*, Director, *Mark W. Rogers*, Deputy Director, *Gabrielle M. Fielding*, Assistant Director, Washington, DC, for respondent.

OPINION AND ORDER

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[1]/ Pursuant to Rule 18(b) of Appendix B of the Rules of the United States Court of Federal Claims, this Opinion and Order was initially filed under seal on May 14, 2010. Pursuant to ¶ 2 of the ordering language, the parties were to propose redactions of the information contained therein on or before May 28, 2010. No proposed redactions were submitted to the court.

Bush, *Judge*.

Now before the court is petitioner Esther Hall's motion for reconsideration of the court's decision, issued under seal on April 6, 2010 (Opin.), which denied Ms. Hall's motion for review of the special master's October 6, 2009 decision (Special Master Opin.) awarding reasonable attorneys' fees and costs under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to -34 (2006) (Vaccine Act).[2] No opposition brief from respondent was required or requested by the court. For the reasons stated below, the court denies petitioner's motion.

BACKGROUND

In her motion for reconsideration, Ms. Hall asserts that this court has established a new rule of law for determining whether there is a very significant difference between local rates and forum rates under the *Davis County* exception to the otherwise applicable forum-rates rule. Pet.'s Mot. at 2. Ms. Hall further claims that this court miscalculated the difference between the local rate and the forum rate for her attorney Richard Gage and thereby erred in declining to award forum rates in accordance with the court's new rule of law. *Id.* at 2-5. Because the court concludes that both of these assertions are without merit, Ms. Hall's motion for reconsideration must be denied.

DISCUSSION

I. Standard of Review

A motion for reconsideration is permitted under Rule 59 of the Rules of the United States Court of Federal Claims (RCFC). That rule provides that a motion for reconsideration may be granted to all or any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity

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[2]/ In the April 6, 2010 opinion, the court also granted the parties' joint motion pursuant to Rule 60(a) of the Rules of the United States Court of Federal Claims for relief from the judgment of the special master with respect to the quantum of attorneys' fees awarded. The Clerk's Office entered judgment for petitioner on April 6, 2010, and the court published its opinion on May 5, 2010. The parties did not request any redactions to the court's unpublished opinion.

applicable as between private parties in the courts of the United States. *See* RCFC 59(a)(1). The decision whether to grant reconsideration pursuant to RCFC 59 lies largely within the discretion of the court. *See Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990). However, a motion for reconsideration will be granted only upon a demonstration of a "'manifest error of law, or mistake of fact, and is not intended to give an unhappy litigant an additional chance to sway the court.'" *Bishop v. United States*, 26 Cl. Ct. 281, 286 (1992) (*quoting Circle K Corp. v. United States*, 23 Cl. Ct. 659, 664-65 (1991)). The movant must show either that: (a) an intervening change in the controlling law has occurred; (b) evidence not previously available has become available; or (c) the motion is necessary to prevent manifest injustice. *See id.* Ms. Hall does not claim that there has been an intervening change in the law, nor does she contend that there is new evidence that was not available at the time of the court's prior decision. Ms. Hall must therefore demonstrate that the denial of her motion for reconsideration would result in a manifest injustice.

II. Analysis of Petitioner's Motion for Reconsideration

In requesting reconsideration of the court's decision in this case, petitioner makes two related arguments. First, Ms. Hall asserts that the court established a new rule of law in its earlier opinion. Under this purported rule, the difference between an attorney's forum rate and local rate will be deemed to be not very significant when the former is less than fifty percent higher than the latter. Second, Ms. Hall argues that the court miscalculated the difference between her attorney's forum rates and his local rates and should have awarded forum rates based on the court's so-called new fifty-percent rule. As discussed in more detail below, both of petitioner's arguments are unavailing.

A. The Court Did Not Establish a New Rule of Law

Ms. Hall first claims that this court has established a new bright-line rule of law for determining whether the difference between an attorney's local rate and forum rate is very significant. Petitioner explains that due to "the import of this new rule, this Decision has now been widely disseminated among petitioners' counsel, the Justice Department and the office of the Special Masters." Pet.'s Mot. at 2. However, the court has established no binding rule of law, and Ms. Hall's assertion to the contrary fails for several reasons. First, the decisions of this court are not precedential in subsequent cases before the court. *See W. Coast Gen. Corp.*

v. Dalton, 39 F.3d 312, 315 (Fed. Cir. 1994) ("Court of Federal Claims decisions, while persuasive, do not set binding precedent for separate and distinct cases in that court."). Second, the decisions of this court in Vaccine Act cases are not binding on the special masters except as an order on remand. *See Hanlon ex rel. Hanlon v. Sec'y of Health & Human Servs.*, 40 Fed. Cl. 625, 630 (1998) ("Special masters are neither bound by their own decisions nor by cases from the Court of Federal Claims, except, of course, in the same case on remand."), *aff'd*, 191 F.3d 1344 (Fed. Cir. 1999). In other words, to the extent that it might be asserted that the court established a new legal rule, that rule is not binding on the special masters of this court beyond the parameters of the instant case. Thus, the language of the court's earlier opinion in this case cannot reasonably be interpreted to establish a binding rule of law to be applied in future cases before either the special masters or the judges of this court.

In her motion, Ms. Hall announces that the court's earlier opinion in this case "has, for the first time, and at long last, provided a rule of law that will allow all parties in the Vaccine Program to calculate and apply the, so called, *Davis* [*County*] exception to the forum rates rule." Pet.'s Mot. at 2. In finding that there was a very significant difference between Mr. Gage's local rates and his forum rates as established by the special master, however, this court expressly limited its holding to the facts of the present case:

> In the absence of guidance from the Federal Circuit on this issue, the court hereby holds that, *under the circumstances of this case*, the difference between forum rates and local rates is very significant since the former is more than fifty percent higher than the latter.

Opin. at 16 (emphasis added and footnote omitted). The court merely found that the difference between Mr. Gage's forum rate and his local rate was fifty-nine percent, and that such a difference was very significant in the specific context of this case.

Ms. Hall is also incorrect in her assertion that this court has established a bright-line rule under which any difference of less than fifty percent is, *ipso facto*, not very significant. In its opinion, the court held "that a difference is very significant *when the forum rate is approximately fifty percent higher than the local rate*." Opin. at 17 n.13 (emphasis in original). In fact, the court held that the

difference between a forum rate and a local rate would be very significant where the former was only forty-six percent higher than the latter:

> The court notes that the difference between the local rate and the forum rate would be approximately fifty percent regardless of which local rate is used for comparison. As noted above, the forum rate is fifty-nine percent higher than the 2006 local rate. The forum rate is approximately fifty-two percent higher than the 2007 local rate and approximately forty-six percent higher than the local rate in 2008 and 2009.

Id. at 17 n.14. Contrary to Ms. Hall's assertion, this court did not establish a rigid fifty-percent rule of law to be applied in all future cases. Rather, the court merely held that a difference between local rates and forum rates of approximately fifty percent represented a very significant difference under the circumstances of this case.

B. The Court Did Not Miscalculate the Difference between Forum Rates and Local Rates in this Case

Ms. Hall also contends that the court misunderstood the special master's fees decision in this case and, as a result, miscalculated the difference between Mr. Gage's local rates and his forum rates. According to Ms. Hall, the proper calculation of that difference would entitle her to reimbursement for attorneys' fees at forum rates under the new fifty-percent rule ostensibly established in the court's prior opinion in this case. The source of the court's error, petitioner explains, was its mistaken assumption that $350 per hour was the forum rate applicable in 2006. Ms. Hall notes that the special master's decision was issued in 2009, and she argues that the special master therefore found that the appropriate forum rate for Mr. Gage's services was $350 per hour at that time (*i.e.*, in 2009). Thus, she contends, when this $350 forum rate is compared with the 2009 local rate established by the special master, the former is a mere forty-six percent higher than the latter and thus fails to meet the new fifty-percent threshold for application of the *Davis County* exception to the forum-rates rule.

Petitioner's analysis is, however, in the end, a faulty one. As a threshold matter, and as discussed above, the court did not establish fifty percent as a fixed

demarcation between what does and does not constitute a very significant difference. In fact, the court noted that a difference of forty-six percent was very significant for purposes of the *Davis County* exception. *See* Opin. at 17 n.14. Furthermore, even if the court had adopted a fifty-percent rule of law – which it has not – Ms. Hall has not demonstrated that the forum rate established by the special master was the hourly rate applicable in 2009. Ms. Hall notes that the special master's fees decision was issued in 2009. She then asserts that the special master found Mr. Gage's "forum rate *at that time* to be $350 per hour." Pet.'s Mot. at 2 (emphasis in original). In support of this assertion, Ms. Hall references the special master's use of the present tense in discussing the forum rate for Mr. Gage's services. *See* Special Master Opin. at 23 ("[T]he reasonable rate for Mr. Gage, if he practiced in Washington, D.C., *is* $350 per hour.") (emphasis added).

The court first notes that the special master's fees decision does not expressly link the established forum rate of $350 per hour to any specific year. The special master's use of the present tense in discussing the applicable forum rate for Mr. Gage's services might theoretically be argued to indicate that the $350 rate applied to work performed in 2009. However, the court more reasonably determined that the special master's specific comparison of that rate to the 2006 local rate indicated that the $350 rate was the forum rate applicable in 2006. *See* Opin. at 17 n.14. Ms. Hall has provided no explanation for why the special master would have compared a 2009 forum rate with a 2006 local rate, a comparison which appears nonsensical to the court. In her motion for review, Ms. Hall did not challenge the forum rates or the local rates established by the special master. Nor did she challenge the special master's comparison of the $350 per hour forum rate with the local rate applicable in 2006 (although she did challenge the special master's determination that the difference between those two figures was very significant). The court further notes that a consistent application of petitioner's interpretative technique to the special master's fees decision would result in inconsistencies which flatly contradict petitioner's position. The decision states, for example, that the reasonable local rate for Mr. Gage's services *is* $220 per hour. Special Master Opin. at 24 (emphasis added). Petitioner does not argue that the use of the present tense in that sentence should be read to establish $220 as the applicable local rate in 2009.[3]

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[3]/ In fact, as a part of his introductory remarks, the special master states that the "reasonable hourly rate for attorneys in Wyoming was $220 per hour *in 2008*." Special Master (continued...)

Ms. Hall further contends that this court erroneously adopted the calculation of the difference between local rates and forum rates presented in *Masias v. Sec'y of Health & Human Servs.*, No. 99-697V, 2009 WL 1838979 (Fed. Cl. Spec. Mstr. June 12, 2009), *aff'd*, (Fed. Cl. Dec. 10, 2009). Pet.'s Mot. at 3 ("This Court's error appears to be the result of reciting a calculation that is found at page 24 of the Special Master's Decision in reference to the *Masias* case."). Ms. Hall also appears to suggest that this court is unaware that Mr. Gage was not the attorney of record in the *Masias* case. *See id.* ("However, the $220 per hour local rate and $350 per hour forum rate discussed in *Masias* are *2008 rates for a different attorney*. The undersigned was *not* the attorney in *Masias*.") (citation omitted and emphasis in original). Ms. Hall is incorrect on both counts.

First, the special master explicitly explained that the comparison between the $220 per hour local rate and the $350 per hour forum rate applied to the services rendered by Mr. Gage in this case:

> *Here*, the difference between the appropriate local rate, which is $220 per hour, and the appropriate forum rate, which is $350, per hour, is 59 percent. (The similarity to the figures in *Masias* stems from the fact that both Mr. Gage and Mr. Moxley practice in Cheyenne, Wyoming.)

Special Master's Opin. at 24 (emphasis added and footnote omitted). Ms. Hall is incorrect in stating that the comparison quoted above relates only to the *Masias* case, which is discussed three paragraphs and two cases earlier in the special master's fees decision.

Second, Ms. Hall's apparent contention that the court was unable to discern that Mr. Gage was not the attorney of record in *Masias* – and erroneously mistook Robert Moxley's rates as the rates applicable to Mr. Gage in this case – is flatly contradicted by the discussion of *Masias* in the court's opinion. In discussing that

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[3]/ (...continued)
Opin. at 5 (emphasis added). The court must assume that the above statement, which Ms. Hall fails to acknowledge in her motion, was a typographical error. As discussed above, the special master specifically determined that $220 per hour was the appropriate local rate for Mr. Gage's services in 2006. *See id.* at Table 5.

case, the court noted that

> *Masias* is particularly relevant here, because the attorney of record in that case was Robert Moxley, Mr. Gage's former law partner. The forum rate in that case was approximately fifty-nine percent higher than the local rate, which is the same difference between those rates in the case at bar.

Opin. at 15 (footnote omitted). Nothing in the court's opinion supports Ms. Hall's assertion that the court adopted the rates established in *Masias* as the rates applicable to Mr. Gage's services based upon the mistaken assumption that he was the attorney of record in both cases.

Finally, Ms. Hall argues that the $350 forum rate established by the special master could not have been the rate applicable in 2006 because the adjustment of that rate for inflation would produce hourly rates consistent with the *Laffey* matrix, which the special master found to be inapplicable to the recovery of attorneys' fees for Vaccine Act litigation. While similarities between the inflation-adjusted rates and the rates set forth in the *Laffey* matrix are present, that fact alone does not invalidate either the special master's or the court's analysis and does not entitle petitioner to an award of attorneys' fees based on forum rates. As discussed above, and as explained in the court's prior opinion, the difference between the forum rate established by the special master ($350) and the local rate applicable in 2008 and 2009 ($240) constituted a very significant difference for purposes of the *Davis County* exception. *See* Opin. at 17 n.14.

CONCLUSION

For the foregoing reasons, the court holds that petitioner has failed to demonstrate any basis for granting reconsideration in this case. Ms. Hall has not identified an intervening change of law or any evidence that was unavailable when the court issued its earlier opinion. Nor will the denial of Ms. Hall's motion for reconsideration result in a manifest injustice.

Accordingly, it is hereby **ORDERED** that

(1) Petitioner's Motion for Reconsideration, filed on May 5, 2010, is **DENIED**; and

(2) The parties shall separately **FILE** any proposed redactions to this opinion, with the text to be redacted clearly marked out or otherwise indicated in brackets, on or before **May 28, 2010**.

/s/ Lynn J. Bush
LYNN J. BUSH
Judge

cc: Special Master Christian J. Moran