OFFICE OF SPECIAL MASTERS

No. 99-533V

Filed: February 28, 2007

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CASEY HOCRAFFER,	*	
	*	
Petitioner,	*	
	*	Pain and Suffering for a 30 day
v.	*	Period; Lost Wages for Parents;
	*	Parents' Emotional Distress
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

DECISION ON REMAND[1]

On January 26, 2005, Judge Nancy B. Firestone reversed the decision of the then-assigned Special Master,[2] finding that petitioner was entitled to appropriate compensation under the National Childhood Vaccine Injury Act of 1986.[3] However, in finding that petitioner is entitled to compensation, Judge Firestone's decision limited the duration of the injury and therefore the damages to be awarded by finding:

> The court does agree with Respondent and the Special Master that the record does not support a finding that Petitioner suffered any long-term effects from her illness with Reye's Syndrome. Indeed, Petitioner's own expert, Dr. Heubi, testified that children with mild cases of Reye's Syndrome, like Petitioner's,

[1]The undersigned intends to post this Decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire" Decision will be available to the public. Id.

[2]Hocraffer v. Secretary of Health and Human Services, 63 Fed. Cl. 765 (2005).

[3]The statutory provisions governing the Vaccine Act are found at 42 U.S.C. §§300aa-10 to 300aa-34 (1991 & Supp. 2002). Hereinafter, for ease of citation, all references will be to the relevant subsection of 42 U.S.C. § 300aa.

> would not likely suffer any long term effects. He further testified that he did not believe that Petitioner's problems following resolution of her Reye's Syndrome were related to her Reye's Syndrome: "[i]t is more likely than not that the level of the encephalopathy that she had with this did not result in any significant neurological psychiatric sequelae." Tr. at 79. Based on Dr. Heubi's testimony, the court finds that Petitioner did not prove by a preponderance of the evidence that she had any sequelae from Reye's Syndrome after it **resolved itself shortly after** she was released from the hospital in late 1996.

Hocraffer v Secretary of HHS, 63 Fed. Cl. 765, 779 (2005) (emphasis added).

Following Judge Firestone's opinion finding entitlement for petitioner, this case has proceeded on a long and tortuously slow road to resolution. The road is littered with many conference calls, briefs and supplemental expert opinions. What appeared to be a relatively straightforward determination of damages, given Judge Firestone's clear parameters for the injury, was continually muddled by petitioner's insistence that Judge Firestone was incorrect in her limiting the zone of injury. The undersigned detailed the procedural adventure in an Order filed July 14, 2006. That Order made clear the limited scope of the Remand and that "only Judge Firestone, not the undersigned can alter those findings that define the scope of the remand." Order filed July 14, 2006, at 3.

Thereafter, petitioner requested Judge Firestone to revise her opinion. Petitioner's Motion to Revise an Interlocutory Order, July 14, 2006. Respondent filed in opposition thereto. Respondent's Response to Petitioner's Motion for an Interlocutory Order, August 8, 2006. Petitioner replied on August 18, 2006. Petitioner's Reply to Respondent's Response to Motion, August 18, 2006. On September 11, 2006, Judge Firestone denied petitioner's motion for revision, finding that "the Special Master currently has jurisdiction over this matter and accordingly the court will not review its earlier decision and order the Special Master to allow the Petitioner to present additional evidence on the issue of sequalae." Order Denying The Petitioner's Motion To Revise The Court's January 26, 2005 Decision at 2. Therefore, the record is now complete and ripe for decision in accordance with Judge Firestone's findings.[4]

Petitioner's damages request involves three categories of items: pain and suffering and emotional distress; past unreimbursable expenses and lost wages of the mother while she was caring for Casey. Petitioner's support for these items was provided in her May 25, 2005 Damages Memorandum and Motion for Compensation (P. Memo. for Comp.); her July 11, 2005 Supplemental Damages Memorandum and Motion for Compensation (P. Supp. Memo. for Comp.); her December 14, 2005 Notice of Filing and Memorandum Regarding Petitioners

[4]Petitioner filed on November 8, 2006, a Motion to Strike Respondent's Exhibit J, a supplemental expert report from Dr. Brenner concerning the issue of whether the lumbar puncture is a surgical intervention. Respondent responded on November 19, 2006. The undersigned did not consider the information as it concerns an issue not covered by the Remand.

Claim for Compensation (P. Notice and Memo. for Comp.); and, her October 5, 2006 Petitioner's Memorandum on Pain and Suffering Damages (P. Memo. on Pain and Suffering). Respondent presented his views on petitioner's request for compensation in his September 30, 2005 Respondent's Submission on Damages (R. Sub. on Dam.), and his February 8, 2006 Respondent's Supplemental Submission on Damages (R. Supp. Sub. on Dam.). Before addressing petitioner's request, it is essential to resolve for what period of time are damages being calculated? Judge Firestone did not find an absolute period of time for damages, but found that Casey's Reye's Syndrome "resolved itself **shortly** after she was released from the hospital in late 1996." Hocraffer, 63 Fed. Cl. at 779 (emphasis added). To answer this question, the undersigned requested statements from the experts in this case. Order filed February 27, 2006. Petitioner filed the affidavit of Dr. Heubi on March 27, 2006 as Petitioner's Exhibit B. Dr. Heubi states therein that based upon the liver enzyme levels in Casey, her Reye's Syndrome had yet to resolve by December 31, 1996, the date of the enzyme testing. He states further that "based on [his extensive] experience, I can say that it would have taken at least another two weeks for the pathology to fully resolve and for Casey to have fully recovered from Reye's Syndrome." Id. at 2. Thus, Dr. Heubi's affidavit supports an approximate period of damages of 30 days - beginning with her hospitalization on December 17, 1996 and ending in mid-January 1997. Respondent's expert, Dr. Brenner disagrees.

Respondent filed Dr. Brenner's responsive affidavit on May 12, 2006, as Respondent's Exhibit I. Dr. Brenner concluded that based upon the medical records, "Ms. Hocraffer's acute illness lasted no longer than 15 days (12/16-12/31/1996) and could have been shorter" based upon the absence of medical records documenting any complaints. Dr. Brenner made no effort to address Dr. Heubi's discussion of the elevated liver enzyme levels and how those tests supported a longer period of time. However, given how the undersigned resolves the damages issue, this disagreement between the experts has a marginal, if any, impact on the damages calculation.[5] However, to the extent that there is a financial impact, the undersigned relies upon Dr. Heubi's conclusions. Judge Firestone relied heavily upon Dr. Heubi for her finding of entitlement for petitioner, noting that he is "a nationally recognized expert on Reye's Syndrome" and who "has extensive experience with the diagnosis and treatment of Reye's Syndrome." Hocraffer, 63 Fed. Cl. at 769. Dr. Heubi based his opinion on the length of Casey's illness on specific test results and his extensive experience interpreting the meaning of those results vis-a vis Reye's Syndrome. Dr. Brenner provided no meaningful rebuttal. Thus, the undersigned sides with Dr. Heubi on this issue. [6]

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[5]Respondent suggests a maximum award of $5,000 based upon the two-week period supported by Dr. Brenner. See R. Sub. on Dam. at 9. The undersigned ultimately awards a total of $5,841.50 based upon the 30-day period supported by Dr. Heubi. See p. 11, infra. The longer period results in at most $200 more of unreimbursed expenses. Thus, the issue of the correct time period has marginal impact on the damages awarded.

[6]In making this finding, the undersigned is cognizant of the possible conflict with the court noting that "the follow-up visit [following the hospitalization] indicated that her liver function had

Pain and Suffering and Emotional Distress

The Vaccine Act provides for "actual and projected pain and suffering and emotional distress from the vaccine-related injury, an award not to exceed $250,000." §15(a)(4) Since the period of Casey's injury ended in mid-January 1997, there is no projected award. The issue is how much should be awarded to compensate Casey for the approximate 30-day period of her injury. Petitioner requests $200,000 for the "actual pain and suffering due to the extreme and debilitating pain and suffering that she experienced from her vaccine injury." P. Memo. for Comp. at 7. Petitioner relies on her affidavit, wherein she describes feeling ill after the December 11 vaccination, experiencing the "worst headache", and not being able to do much over the Christmas holidays because of lacking "energy." Id. at Ex. 1, p 2. [7]

In addition, petitioner requests $50,000 for the "severe emotional distress suffered" by Casey's parents. Id. at 7. Petitioner argues that such compensation is allowable under the Act if it "relates to the welfare of the person who suffered the vaccine related injury." Id. at 7-8 citing § 15(d)(2).

While recognizing that there is no set way to determine awards for pain and suffering, respondent analogized Casey's case to damages awarded for an incision and drainage of an abscess. R. Sub. on Dam. at 8. Relying on the decision in Amorella-Moore v Secretary of HHS, No. 91-1558, 1992 WL 182194, *1 (Cl. Ct. Spec. Mstr. July 13, 1992), respondent contends that Casey should be awarded an amount similar to the $2,000 awarded for past medical expenses and pain and suffering in Amorella-Moore, "but in no event should she be awarded more than $5,000 in pain and suffering." R. Sub. on Dam. at 9; see also R. Supp. Sub. on Dam. at 5.

In response, petitioner filed the affidavit of Dr. Heubi, who stated that Casey suffered from "some nuchal rigidity" resulting in the lumbar puncture as a diagnostic test, a lumbar puncture "is more painful than an incision and drainage of an abscess", and that there is "pain at the puncture site and there may be headache afterwards." P. Notice and Memo. for Comp. at Ex. A. In response, respondent notes that Dr. Heubi "does not connect the diagnostic test for nuchal rigidity with Casey's Reye's Syndrome" and that he does not indicate whether Casey in fact suffered any residual headache. R. Supp. Sub. on Dam. at 3.

The undersigned has exhorted the parties to settle this matter for nearly two years. To assist the parties in attempting to settle, the undersigned adopted, as a very generous award, respondent's top figure of $5,000 as the suggested basis for settlement. In the undersigned's July 14, 2006, Order, the undersigned memorialized what had been said at previous conference calls, that "[b]ased upon Judge Firestone's findings and the reports of Drs. Heubi and Brenner, there is

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returned to normal." R. Supp. Sub. on Dam. at 2 n.2, citing Hocraffer, 63 Fed. Cl. at 768.

[7]The remainder of Casey's affidavit is irrelevant because it discusses time periods outside of which Dr. Heubi supports as vaccine-related.

a 2-4 week period of damages for which respondent's suggestion of at most $5,000 is extremely reasonable for pain and suffering based upon compensation awarded in past cases under the Program." Order at 4. Ultimately, the parties were unable to settle. The undersigned has reviewed all of the filed materials and awards petitioner $5,000 for pain and suffering and emotional distress.

It is abundantly clear from Casey's affidavit that her vaccine-related injury was relatively minor both in duration and severity. Casey relates that after her second immunization on December 11, that she didn't "feel very good." Casey attempted to go to school, but she began vomiting, which led to her hospitalization. P. Memo. for Comp., Ex. 1 at 2. She was hospitalized and subjected to a spinal tap. Following her release from the hospital, Casey continued to feel ill and lacked energy. Id. However, while not feeling well, she was able to go to her grandmother's for Christmas. Id. As is recognized by all, there is no science to determine pain and suffering and emotional distress awards. However, to be fair to all petitioners that appear before the undersigned and to develop a reasonable rationale for determining pain and suffering awards, the undersigned developed from experience the following factors which provide objective guidance: "the ability to understand the injury, *i.e.,* the injured's mental faculties are intact; the degree of severity of the injury; and the potential number of years the individual is subjected to the injury." McAllister v. Secretary of HHS, No. 91-1037V, 1993 WL 777030, at *3 (Fed. Cl. Spec. Mstr. Mar. 26, 1993), vacated and remanded on other grounds, 70 F.3d 1240 (Fed. Cir. 1995).

Reviewing this case against those objective standards, it is clear that the severity of Casey's injury and the extremely brief period of time involved, at most 30 days, argue for a relatively small award. While the undersigned is by no means trivializing Casey's physical and mental anguish, it has to be recognized that there is no permanence to Casey's injury, there are no physical limitations, no scarring and no lasting sequelae. While she was sick and subjected to a spinal tap, the period to be compensated is a very short period of 30 days. Taking all factors into consideration, the award of $5,000 is an exceedingly generous award.

In making this award, the undesigned considered not only the facts of this particular case, but also compared this case to other awards the undersigned has made and awards made by my colleagues. Unfortunately, there is a dearth of reported decisions. This is because the parties successfully settle the vast majority of damages cases, frequently utilizing the Special Master's suggested award for pain and suffering. However, it is clear from reported decisions that petitioner's request for $200,000 for actual (not future) pain and suffering for a 30-day period is extremely out of line when compared to other cases. See Rivera v Secretary of HHS, No. 91-960V, 1992 WL 198853 (Cl. Ct. Spec. Mstr. July 31, 1992)(awarding $100,000 actual pain and suffering to a child suffering an encephalopathy with spastic quadriparesis); Euken v Secretary of HHS, No. 91-1059V, 1992 WL 132548 (Cl. Ct. Spec. Mstr. May 28, 1992)(awarded $100,000 actual pain and suffering to a three-year old with profound mental and physical defects) rev'd on other grounds, 34 F.3d 1045 (Fed. Cir. 1994); Thomas v Secretary of HHS, No. 90-2022V, 1991 WL 263730 (Cl. Ct. Spec. Mstr. November 22, 1991) (awarded $20,000 for actual pain and

suffering to an eight year old who suffered severe auditory processing dysfunction and attention deficit disorder following immunization); Riley v Secretary of HHS, No. 90-466V, 1991 WL 123583 (Cl. Ct. Spec. Mstr. June 21, 1991) (awarded $50,000 for actual pain and suffering to a paralyzed polio victim); and Schafer v. Secretary of HHS, No. 89-122V, 1991 WL 116814 (Cl. Ct. Spec. Mstr. June 17, 1991) (The undersigned awarded $50,000 for actual pain and suffering to a mother suffering from polio caused by contact with her immunized child). It is clear from any of these cases and many others that petitioner's 30-day illness and spinal tap pales in severity and duration and thus should receive far less in compensation.

In determining how much to award petitioner, the undersigned also relied on a number of scarring cases the undersigned resolved. The dollar figures in those cases ranged from a low of $5,000 to a high of $15,000. Those awards included both actual and future pain and suffering and emotional distress. The focus in determining those awards was on the emotional distress of the permanent scarring. Unfortunately, the undersigned could not find any reported decisions. The one reported case, cited by respondent, involved an abscess which required surgical drainage and left a permanent scar. Amorella-Moore v. Secretary of HHS, No. 91-1558V, 1992 WL 182194 (Cl. Ct. Spec. Mstr. July 13, 1993). In that case, petitioner was awarded $500 for pain and suffering. Indicative of the subjectivity of determining pain and suffering and the wide latitude given the decision-maker, the undersigned views that award as too low. However, it provides context for analyzing and determining the award in this case.

Petitioner makes several arguments to support a higher award. However, most of her arguments are based upon a far more extensive injury and duration of injury than found by Judge Firestone and thus are inapposite. The arguments will be addressed in brief. First, petitioner attacks respondent's argument that petitioner should be placed on the bottom of the scale of the allowable $250,000 by arguing that this "obfuscate[s] . . . congressional intent" of awarding generous compensation. P. Memo. on Pain and Suffering at 2. Petitioner's argument is off base. The limited Congressional guidance on the award of pain and suffering provides as follows:

> (4) Pain and Suffering. Awards for pain, suffering, and emotional distress are authorized to be made at a level not to exceed $250,000 for each petition. As contrasted with the fixed death benefit, the award for pain and suffering is to be set at the discretion of the Master and of the court. The Committee does not intend that all petitions for which compensation is awarded be given this maximum level but rather that the Master consider the individual pain and suffering of the injured person, as well as the benefits conferred by other forms of compensation within the legislation.

H.R. REP. No. 99-908, pt. 1 at 21, (1986). Relying on this language and to fairly treat all petitioners, the Special Masters have attempted to create a continuum of injury, awarding the highest pain and suffering to the most injured and reducing the pain and suffering for lessor injuries. Thus, in Long v. Secretary of HHS, No. 94-310V, 1995 WL 470286 (Fed. Cl. Spec. Mstr. July 24, 1995), Special Master Hastings stated that:

> It is, of course, obvious that there is no scientific or mechanical way to quantify the monetary worth of the physical pain and emotional distress that an injured person suffers. Any resolution is inherently a "judgment call." I must start, however, by stating my general view that the "typical" Program case should not call for a figure at or near the maximum $250,000 level set by the statute. Note that the legislative history states that Congress "does not intend that all petitions for which compensation is awarded be given this maximum level." (H.R. Rpt. No. 99-908, 99th Cong., 2d Sess., pt. 1 at p. 21, reprinted at 1986 U.S. Code Cong. & Admin. News p. 6362.) Further, it must be kept in mind that the $250,000 maximum was established in the context of a Program in which it was clearly anticipated that many if not most claimants would be individuals with severe brain damage allegedly attributable to "DPT" inoculations. In my view, under the Program, amounts at or near the $250,000 "cap" should be reserved for individuals who have suffered the worst types of injuries, especially brain damage. Moreover, it seems to have become the norm in Program cases that even many individuals with ongoing seizure disorders, serious neurologic problems, and/or significant mental deficiencies have been limited to awards in the $100,000 to $150,000 range. (Citations omitted) Clearly, the problems of the petitioner here, while truly unfortunate, do not compare to those of the individuals in the six cases enumerated above, and many other cases like those six, in which similar pain and suffering awards have been made.

Id. at *12. The undersigned concurs. See McAllister v. Secretary of HHS, No. 91-1037V, 1993 WL 777030 (Fed. Cl. Spec. Mstr. Mar. 26, 1993).

Lastly, petitioner argues that the $250,000 maximum for pain and suffering reflects 1986 dollars and has since been eroded by inflation. P. Notice and Memo. for Comp. at 1-2. In effect, petitioner requests the undersigned to adjust Casey's award to reflect 2007 dollars. Neither the statute nor the undersigned's authority allows such an adjustment.

Petitioner provides no support for her argument that the undersigned should adjust Casey's award to account for the diminution in value of the $250,000 maximum award. Petitioner cannot. Congress legislated a maximum award of $250,000 and counseled that not all petitioners should be awarded that amount. It is within Congresses' province to amend that maximum provision to account for inflationary erosion. In fact, there have been a number of legislative proposals to do just that, to raise the maximum to $350,000. Obviously, to date, they have been unsuccessful. Petitioner's suggestion to raise lower awards on the scale to account for inflation is effectively raising the $250,000 maximum reserved for the most severely injured. That is for Congress to do, not the undersigned.

In addition, the statute does not permit such an upward adjustment. § 15(f)(4)(A) provides that compensation "shall be determined on the basis of the net present value of the

elements of the compensation . . . ." In addressing a Special Master's finding that a past award should be increased to reflect its current net present value, Judge Gibson rejected summarily the finding, stating that:

> we [] think it is clear that 300aa-15(f)(4)(A) applies only to future compensation and not compensation for past expenses.

Stotts v. Secretary of HHS, 23 Cl. Ct. 352, 369 n. 16 (1991). To the undersigned's knowledge and research, that is the only instance the argument has been made and rejected, until today. For the reasons stated above, petitioner's argument for an inflationary adjustment must fail.

It is clear that "generosity" as well as the award of pain and suffering is to be determined relative to the nature and degree of injury. The award of $5,000 to Casey is indeed generous relative to her injury, the duration of her injury and in comparison to other awards granted in the Program.[8]

Emotional Distress for Casey's Parents

Petitioner requests $50,000 for the emotional distress suffered by her parents. P. Memo. for Comp. at 7-9. Petitioner contends that such compensation is permitted as it relates to the welfare of Casey. Id. at 8. Petitioner notes, correctly so, that the Special Masters and the court judges have awarded psychological counseling services for parents for the benefit of the injured child. Id. at 9, citing Brewer v. Secretary of HHS, No. 93-0092, 1996 WL 147722 (Fed. Cl. Spec. Mstr. Mar. 18, 1996). However, the reasoning in Brewer and like cases is that "this counseling would be to assist the parents and children to develop a more positive, supportive atmosphere for [the injured]." Brewer at *17. See Huber v Secretary of HHS, 22 Cl. Ct. 255, 257 (1991) (Family counseling is awardable only if it is for the immediate benefit of the injured child. This includes counseling "that equips parents with the expertise necessary to properly manage their injured child . . . ." It does not include counseling "for the sake of the parents' own mental rehabilitation . . . ."). The undersigned has awarded such monies frequently to give the other family members the emotional stability necessary to cope with the mental and physical exertion required in caring for a severely disabled child. Those cases do not support petitioner's request here.

Petitioner cited no vaccine decision supporting an award for past emotional distress for the parents of an injured child, and the undersigned could not find any supportive decisions. There is no showing, and the undersigned cannot conceive of one, that compensating Casey's parents for their past emotional distress will in anyway inure to Casey's benefit. Thus, unlike the reasoning in Brewer where future counseling will assist the family in providing care to the

[8]Petitioner cited to several state court decisions to support her request. P. Memo. on Pain and Suffering at 3-4. Those decisions are inapplicable as they are premised upon a brain injury to Casey that was not found by Judge Firestone.

injured, an award to Casey's parents would be for the parents' benefit only. There is no statutory support for such an award and in fact such an award under these facts, providing an award for the sole benefit of the parents, would violate §15(d)(2) (prohibiting compensation for "other than the health, education, or welfare" of the injured). Petitioner's request must be denied.

Unreimbursable Expenses

The Act provides for compensation for certain "actual unreimbursable expenses incurred before the date of the judgment. §15(a)(1)(B). Petitioner requested $22,684.15 of unreimbursable expenses. P. Memo. for Comp. at 9. However, much of the requested expenses, even if allowable, pertain to periods outside of the 30-day period of the injury. Thus, petitioner modified her request somewhat to reflect the narrower period of time. See P. Notice and Memo. for Comp. at 4-5. The items will be discussed in turn.

- - Insurance Copayments

Petitioner claims $841.50 for the 30-day period. P. Notice and Memo. for Comp. at 2-3. This modifies petitioner's original request. See P. Memo. for Comp. at 6, items 1-3. Respondent contests the claim as inadequately documented. R. Supp. Sub. on Dam. at 4. The undersigned reviewed petitioner's documentation, and while not perfect, it certainly is sufficient to justify the award. Thus, petitioner is awarded $841.50 for past unreimbursed insurance copayments.

- - Health Insurance

Petitioner requests $9,205.00 (reduced from the original request of $11,295.00) for reimbursement of health insurance premiums for the period of 1996 through 1997. P. Memo. for Comp. at 7; see also P. Supp. Memo. for Comp. at 2-3. While petitioner reduced her insurance copayment claim to the 30-day period supported by Dr. Heubi, petitioner claims insurance premiums from the first vaccination of November 7, 1996 through the end of 1997. Id. at 3. Clearly, petitioner's claim exceeds the period of the injury. More importantly, in short, the Hocraffer's were insured with a family health insurance policy. This was a family cost unrelated to Casey's injury, and thus not compensable. Stated another way, the Hocraffer's insurance policy and premiums were not influenced in any way by Casey's injury; the Hocraffers would have carried the family policy and incurred the costs with or without Casey's injury. Petitioner's reliance on cases that have provided for the cost of health insurance when such costs are less than the cost of the actual services are inapposite. Those case are providing future benefits. In weighing out the most economical means of providing services to the injured, the cost of health insurance is often provided. See Brewer v Secretary of HHS, No. 93-0092, 1996 WL 147722 at *3-5 (Fed. Cl. Spec. Mstr. Mar. 18, 1996). However, in the case at hand, the Hocraffers would have incurred the cost of this family policy with or without Casey's injury and, thus, Casey's injury had no economic impact on the Hocraffer's insurance needs. Thus, there is no vaccine-related cost to reimburse.

- - Lost Wages for Denise Hocraffer

Petitioner claimed $7,760.96 for "in kind residential and custodial care and service costs in the form of lost wages due to Denise Hocraffer's inability to work while Casey required care, January thru August, 1997 at $970.12 per month." P. Memo. for Comp. at 7. Petitioner substantiated the request with Denise Hocraffer's W2 covering the months of September 1997 through December 1997. Id at Ex. 5. Petitioner subsequently modified this request to reflect Dr. Heubi's affidavit, P. Notice and Memo. for Comp. at Ex. A, indicating that the Reye's Syndrome lasted about one month. Id. at 3. "Petitioner is reducing this claim to the one-month period from December 16, 1996 to January 16, 1997, pursuant to Dr. Heubi's affidavit." Id. One would logically conclude based upon the supporting evidence previously submitted that the claim would be reduced to $970.12. See P. Memo. for Comp. at 7. However, the logic involved in this case seems, at times, to be somewhat convoluted, and yes indeed, petitioner, without a word about the previously filed evidence, now requests the "reduc[ed]" amount, to reflect the one-month period, of $7,500. P. Notice and Memo. for Comp. at 3-5. Thus, for an eight month period, petitioner claimed $7,760.96; and for a one-month period petitioner now claims the "reduced" amount of $7,500. Petitioner's claim is now based not on the purported actual lost wages of Denise Hocraffer, but on the hypothetical cost of hiring a 24 hour RN at $250 per day. Id. at 4. Petitioner provides no justification for the need of 24 hour care (for example, Casey was in the hospital for five days, and was able to visit her grandmother for Christmas) or for the need for an RN as opposed to a less expensive attendant.

Respondent objects to the award of any lost wages for Denise Hocraffer. Citing Riley v. Secretary of HHS, No. 90-466V, 1991 WL 123583, *5 (Cl. Ct. Spec. Mstr. June 21, 1991),[9] respondent contends that lost wages have been routinely denied parents who "forego wages in order to stay home or to otherwise provide services for their injured child." R. Sub. on Dam. at 7. The undersigned agrees with respondent and denies the lost wages claim, in whatever amount, as an unallowable expense under the Act.

The Act provides for as part of damages an award for "actual unreimbursable expenses." § 15(a)(1)(B). In short, Denise's "lost wages" are not an expense. In interpreting the now repealed "$1,000 requirement" of §11(c)(1)(D)(I), which required a demonstration that petitioner incurred "unreimbursable expenses" of greater than $1,000 to file a claim for compensation, Special Master Abell observed that a dictionary definition of an "expense" is "[s]omething paid out to attain a goal or accomplish a purpose." Warner v. Secretary of HHS, No. 92-0201V (Fed. Cl. Spec. Mstr. Dec. 29, 1992), 1992 WL 405286, *1 citing the American Heritage Dictionary, p. 477 (2d College ed. 1985). Special Master Abell concluded that, while in losing the opportunity to earn wages the petitioner had certainly suffered an economic detriment, he did not "pay out" anything, and therefore the lost wages did not qualify as an expense. Id.

Rulings under § 15(a)(1)(B), allowing for compensating pre-judgment "unreimbursable expenses" have adopted virtually identical analysis found in Warner. See Riley v. Secretary of

[9]Respondent inadvertently cited the incorrect Riley decision. Respondent cited to the attorney's fees decision. The undersigned provided the correct citation.

HHS, No.90-466, 1991 WL 123583 (Cl.Ct. Spec. Mstr. June 21, 1991); Stotts v. Secretary of HHS, No. 89-108V, 1990 WL 293856 (Cl.Ct. Spec. Mstr. Oct. 11, 1990), rev'd on other grounds, 23 Cl. Ct. 352 (1991); Wasson v. Secretary of HHS, No. 90-208V, 1991 WL 20077 (Cl. Ct. Spec. Mstr. Jan. 10, 1991). In Edgar v. Secretary of HHS, 26 Cl. Ct. 286 (1992), vacated and remanded on other grounds, 989 F.2d 473 (Fed. Cir. 1993), Judge Harkins denied a claim for lost earnings as an "incurred expense" under this section calling them "opportunity costs" which "facially are questionable." Id. at 296. Petitioner's request for her mother's alleged lost wages is denied for two reasons: there is no statutory support for awarding the lost wages, and even if there were, the lost wages are unsupported. The statute provides for "actual" unreimbursable expenses, not hypothetical expenditures. Ms. Hocraffer worked for American Family Insurance and as a real estate broker. P. Notice and Memo. for Comp. at Ex. C. No wage slips were provided. The W2 provided was for a later period of time with a different organization. P. Memo. for Comp. at Ex. 5. Thus, in addition to the lack of statutory support for compensating this item, petitioner failed to adequately document any alleged lost wages.

- - Travel Expenses

Petitioner requested travel expenses related to Casey's medical care during the period of November 1996 through December 1997. P. Memo. for Comp. at 6. The total requested travel expenses were $1,877.50. Id. at 6-7. Respondent contested the request because the costs were incurred during a time period beyond the period found by Judge Firestone and because the costs were inadequately documented. R. Sub. on Dam. at 6. Subsequently, petitioner adjusted her request for unreimbursable items to comport with Dr. Heubi's affidavit indicating that Casey's Reye's Syndrome lasted about 30 days. See P. Notice and Memo. for Comp. Accordingly, petitioner's claim for unreimbursable expenses was reduced to $841.50 for insurance copayments and $7,500 for Denise Hocraffer's alleged lost wages. Id. at 2-3. Petitioner's adjusted compensation claim contained no claim for travel related expenses. Id. Accordingly, the undersigned deems the request waived. Even if petitioner did not intend to waive the request, the undersigned would deny any reimbursement of travel related expenses as unsubstantiated.

Conclusion

In accordance with the above decision, petitioner is awarded $5,841.50 in compensation for her vaccine-related injury. The Clerk shall enter judgment accordingly, unless a new motion for review is filed. The parties should consult Vaccine Rule 28A for procedural guidance.

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Gary J. Golkiewicz
Chief Special Master