

OFFICE OF SPECIAL MASTERS

No. 01-357V

(Filed: December 17, 2004)

EMMA HART, as Representative of the *
Estate of MANASSEH MICLEA, Deceased, *

Petitioner, *

v. * **TO BE PUBLISHED**

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

Richard Gage, Cheyenne, Wyoming, for petitioner.
Traci Manning Patton, Department of Justice, Washington, D.C., for respondent.

DECISION (ATTORNEYS' FEES)

HASTINGS, *Special Master.*

In this case under the National Vaccine Injury Compensation Program (hereinafter "the Program"), petitioner seeks, pursuant to § 300aa-15(e)¹, an award for attorneys' fees and costs incurred in obtaining Program compensation in this case. Respondent does not contest that petitioner is entitled to such an award, but has filed a written opposition challenging the amount requested in several respects.²

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

²Petitioner has made five filings with respect to the issue of the fees and costs award, to which I will refer as P-1 (filed September 3, 2004); P-2 (October 18, 2004); P-3 (November 5, 2004); P-4 (November 9, 2004); and P-5 (December 3, 2004). Respondent has made two filings, to which I will refer as R-1 (September 28, 2004); and R-2 (October 29, 2004).

I

ATTORNEY HOURLY RATE ISSUES

Respondent challenges the hourly rates claimed for petitioner's attorney of record, Richard Gage of Cheyenne, Wyoming, and for two other attorneys in Mr. Gage's firm, Robert Moxley and Kirk Morgan, who also performed work on petitioner's behalf.

A. Background case law

The Supreme Court has set forth guidelines that apply to the calculation of attorneys' fees awarded by statute. See *City of Riverside v. Rivera*, 477 U.S. 561 (1986); *Hensley v. Eckerhart*, 461 U.S. 424, 429-40 (1983).³ Under that Court's adopted approach, the basic calculation starts with the number of hours reasonably expended by the attorney, and then multiplies that figure by a reasonable hourly rate.⁴

The reasonable hourly rate is "the prevailing market rate in the relevant community" for similar services by lawyers of comparable skill, experience, and reputation. *Blum v. Stenson*, 465 U.S. 886, 895 (1984). As the Supreme Court recognized in *Blum*, the determination of an appropriate market rate is "inherently difficult." *Id.* at 895 n.11. In light of this difficulty, the Court gave broad discretion to the trial judge to determine the prevailing market rate in the relevant community, given the individual circumstances of the case. *Id.* at 896 n.11. The burden is on the fee applicant to demonstrate that the rate claimed is appropriate. *Id.*

In this regard, I note that in a number of decisions awarding fees in Program cases, issued in 1992, I and a number of other special masters expressed the view that counsel under the Program ordinarily should not be awarded hourly rates in excess of \$175. See *Maloney v. HHS*, No. 90-1034V, 1992 WL 167257, at *6 (Cl. Ct. Spec. Mstr. June 30, 1992); *Scheuer v. HHS*, No. 90-1639V, 1992 WL 135577, at *3 (Cl. Ct. Spec. Mstr. May 21, 1992); *Vickery v. HHS*, No. 90-977V, 1992 WL

³The Supreme Court has declared that "[t]he standards set forth in [*the Hensley*] opinion are generally applicable in all cases in which Congress has authorized an award of fees." *Hensley*, 461 U.S. at 433 n.7. In *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989), that Court reaffirmed its view that such approach is "the centerpiece of attorney's fee awards."

⁴Once a total, sometimes called the "lodestar," is reached by multiplying the reasonable hourly rate by the number of hours expended, it may then be appropriate in a few cases to adjust the lodestar upward or downward based on the application of special factors in the case. *Hensley*, 461 U.S. at 434; see also *Martin v. United States*, 12 Cl. Ct. 223, 227 (1987), *remanded in part on other issue*, 852 F.2d 1292 (Fed. Cir. 1988). However, the recent teaching of the courts has been that such adjustments are to be made only in the very exceptional case, on the basis of a specific and strong showing by the fee applicant. See, e.g., *Blum v. Stenson*, 465 U.S. 886, 898-902 (1984); *Hensley*, 461 U.S. at 434 n.9; *Copeland v. Marshall*, 641 F.2d 880, 890-94 (D.C. Cir. 1980) (*en banc*). Here, petitioner has not requested any such adjustment of the "lodestar" figures.

281073, at *6 (Cl. Ct. Spec. Mstr. Sept. 24, 1992); *Petrozelle v. HHS*, No. 90-2215, 1992 WL 249782, at *1 (Cl. Ct. Spec. Mstr. Sept. 16, 1992); *see also Betlach v. HHS*, No. 95-3V, 1996 WL 749707, at *3 (Fed. Cl. Spec. Mstr. Dec. 17, 1996). Further, I note that a number of decisions of judges and special masters have reasoned that it is not necessarily reasonable for the *Program* to pay the same high hourly rates that some attorneys receive in other settings. *See, e.g., Maloney, supra; Zeagler v. HHS*, 19 Cl. Ct. 151, 153 (1989). *See also* the comment of Judge Harkins that "the fees that are awarded under government programs are not meant to duplicate the fees the attorney would normally receive for non-program cases," but need only be sufficient to attract competent counsel to Program cases. *Edgar v. Secretary of HHS*, 32 Fed. Cl. 506, 509 (1994) (citing *Blum v. Stenson*, 465 U.S. 886, 897 (1984)).

However, due to inflation, the value of \$175 has inevitably shrunk since that figure was adopted as a general "cap" by myself and other special masters in 1992. Accordingly, while still adhering to the *basic principles* set forth in the decisions cited in the previous paragraph, a number of judges and special masters have in recent years allowed hourly rates exceeding \$175 in a number of cases. *See, e.g., Gonzales v. HHS*, No. 90-2331V, 1997 WL 438762 (Fed. Cl. Spec. Mstr. Hastings, July 18, 1997) (\$185 per hour for the time of attorney Rodney Klein); *Farnsworth v. HHS*, No. 90-2049V, 1997 WL 739489 (Fed. Cl. Spec. Mstr. Hastings, Nov. 13, 1997) (\$185 per hour--Clifford Shoemaker); *Mandel v. HHS*, No. 92-260V, 1998 WL 211914 (Fed. Cl. Spec. Mstr. Hastings, Apr. 2, 1998) (\$190--James Filenbaum); *McKenney v. HHS*, No. 90-3951V, 1998 WL 409377 (Fed. Cl. Spec. Mstr. Hastings, June 8, 1998) (\$180--William Stapleton); *Marston v. HHS*, No. 91-355V, 1998 WL 719493 (Fed. Cl. Spec. Mstr. Millman, Sept. 29, 1998) (\$200--Kevin Conway); *Slay v. HHS*, No. 00-289V, 2001 WL 1168103 (Fed. Cl. Spec. Mstr. Millman, Sept. 13, 2001) (\$195 --Clifford Shoemaker); *Macrelli v. HHS*, No. 98-103V, 2002 WL 229811 (Fed. Cl. Spec. Mstr. French, Jan. 30, 2002) (\$190--Peter Meyers); *Rupert v. HHS*, 55 Fed. Cl. 293 (2003) (Judge Miller) (\$250--Kevin Conway; \$210--Ronald Homer); *Beatty v. HHS*, No. 98-911V, 2003 WL 21439671 (Fed. Cl. Spec. Mstr. Millman, Mar. 17, 2003) (\$205--Clifford Shoemaker; \$185--J. Bradley Horn); *Ceballos v. HHS*, No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Golkiewicz, Mar. 25, 2004) (\$250--Stanley Kops).

B. Evidence in the record concerning attorney hourly rates

Respondent has offered three items of evidence. Respondent's Exhibit A is a 2003 Wyoming State Bar Survey, indicating "usual hourly rates" of Wyoming attorneys. Exhibit B is a declaration of attorney Gary Scott of Cheyenne, Wyoming, who has practiced since 1981 in the area of civil litigation. Mr. Scott states that his firm bills the time of its six partners at \$120 to \$175 per hour (\$125 to \$150 for Mr. Scott himself), and bills the time of its four associates at \$110 to \$125 per hour. Exhibit C is a declaration of attorney Gregory Dyekman of Cheyenne, Wyoming, who has engaged in civil litigation since 1980. He states that his firm charges \$115 to \$150 per hour for its three associates, and \$175 to \$200 for its four partners, including himself.

Petitioner has supplied several affidavits from Lawrence Wolfe, another Cheyenne attorney. Attorney Wolfe states that his office bills the time of associates with three years of experience at rates between \$150 to \$180 per hour, and bills the time of partners at rates of \$220 to \$300 per hour.

Further, petitioner supplied the sworn declarations of the three attorneys whose hourly rates are in question, Messrs. Gage, Moxley, and Morgan. (See P-5.) Those declarations indicate that Mr. Gage has practiced law since 1990, Mr. Moxley since 1978, Mr. Morgan since 2002, and also provide additional information which I will discuss below.

C. Attorney Richard Gage

Mr. Gage's declaration indicates that his attorney time is spent either on Program cases or contingency matters, so there exists no information about what he charges to non-Program clients. Therefore, I must look elsewhere to establish an appropriate hourly rate for the Program to pay for Mr. Gage's services. Based on the evidence in the record of this case, I conclude that it is appropriate to compensate attorney Gage at the claimed rates--*i.e.*, \$175 per hour for his initial hours, and \$200 per hour for work performed since the beginning of 2003. There are several reasons for this conclusion.

First, the three affidavits from Cheyenne attorneys submitted in this case support this result. Partner hours are billed at rates of \$150 to \$175 by the Scott firm, \$175 to \$200 by the Dyekman firm, and \$220 to \$300 by the Wolfe firm. Mr. Gage's claimed rates, including his recent rate of \$200 per hour for a partner with 14 years of attorney experience and extensive experience in Program matters, seems to fit reasonably within this context.

Second, I note that this result is not contradicted by the bar survey results submitted as respondent's Ex. A. That survey indicated that 36% of the surveyed attorneys did *not* usually bill on an hourly basis. Meanwhile 17.2% of *all* the surveyed attorneys (not 17.2% of just the 64% who billed on an hourly basis) billed at more than \$150 per hour. This means that of the 64% who billed on an hourly basis, about 27% billed at *more* than \$150 per hour. Further, the survey gives us no information concerning *how much more* than \$150 per hour those attorneys charge. Therefore, this survey, in my view, is consistent with the result that I reach here.

Thus, simply considering only "the prevailing market rate" for attorneys of Mr. Gage's skill and experience, and considering the "relevant community" to consist only of Cheyenne, Wyoming, I would find Mr. Gage's claimed rates to be appropriate.

However, I also note that I find myself in general agreement with the reasoning of Chief Special Master Golkiewicz set forth in *Ceballos, supra*, 2004 WL 784910 at fn. 8, in which he concludes that in determining an appropriate hourly rate, a special master may appropriately draw on his or her experience in Program cases with hourly rates charged by attorneys *around the country*. Therefore, I note that when I consider not only the information with respect to *Cheyenne attorneys*

discussed above, *but also* take into consideration Mr. Gage's skill,⁵ general attorney experience, and especially his considerable experience in Program litigation, and consider the hourly rates allowed to other Program attorneys in the cases set forth at p. 3, above, I still conclude that the rates claimed by Mr. Gage in this case are reasonable within the context of the hourly rates allowed to other Program attorneys in the cases set forth above.⁶

D. Attorney Robert Moxley

Petitioner also seeks \$200 per hour for the time of attorney Robert Moxley, Mr. Gage's law partner, who performed certain services in 2003 and 2004, mainly pertinent to the successful appeal to Judge Allegra. Mr. Moxley's declaration indicates that, unlike Mr. Gage, the "great majority of my legal practice has been at an hourly rate." (Para. 9.) He indicates that his hourly rate was \$175 from 2001 through 2003, then went to \$200 at the start of 2004. In my view, the market rate that Mr. Moxley is able to charge non-Program clients is a very important indicator of an appropriate rate for the Program to compensate him. Accordingly, I will compensate Mr. Moxley's 2003 time at \$175 per hour, and his 2004 time at \$200 per hour. (I also note that these rates are consistent with the evidence concerning the "prevailing market rate" in *Cheyenne* discussed above with respect to attorney Gage, and also with my overall experience in Program cases, considering Mr. Moxley's skill and experience in light of hourly rates allowed to other Program attorneys around the country in the cases set forth above.)

E. Attorney Kirk Morgan

Petitioner also seeks compensation for the time of attorney Kirk Morgan, Mr. Gage's associate, who performed certain services in 2003 and 2004, with the 2003 services billed at \$135 per hour and the services performed in 2004 billed at \$155 per hour. Mr. Morgan's declaration indicates that he has practiced law and worked on Program cases with the firm since his graduation from law school in 2002.

As noted above, the declarations of attorneys Scott and Dyekman indicate that the services of associates at their firm are billed at the rates of \$110 to \$125 and \$115 to \$150, respectively. Those declarations do not state how the billing varies based upon the associate's experience. On other hand, the affidavit of attorney Wolfe indicates that "the billing rate for associates with three years experience in our Cheyenne office ranges from \$150 per hour to \$180 per hour."

⁵Mr. Gage did an excellent job on behalf of his client in this case, and I have found that to be generally true of his work in many Program cases.

⁶Petitioner's counsel has represented that certain hourly rates were allowed for his work and his law clerk's work in *settlements* in other Program cases in recent years. I agree with respondent that these representations have *no evidentiary value*. These representations have played no role in my resolution of this case.

This information indicates that the \$135 rate for Mr. Morgan's 2003 services seems to be within the general reasonable range for services of such an associate during that year in Cheyenne, Wyoming. For the services performed in 2004, when Mr. Morgan had two years experience (not three as assumed by attorney Wolfe), the evidence from the Cheyenne firms justifies a rate of \$145 per hour.

II

PARALEGAL/LAW CLERK HOURLY RATE

Petitioner seeks \$100 per hour for the services of Julie Hernandez. The record indicates that Ms. Hernandez graduated from law school in 2000, and has since then worked as a law clerk in Mr. Gage's firm, although she has apparently not passed a bar exam. (See P-2, p. 4.)

The Scott and Dyekman affidavits indicate that those firms bill "paralegal" time at \$40 to \$50 per hour and at \$55 to \$85 per hour, respectively, without describing the qualifications of such paralegals. The affidavit of attorney Wolfe indicates that his firm "utilizes a spectrum of support persons which includes paralegals, law students, and clerks with law degrees, * * * and the billing rate for such persons ranges from \$100 per hour to \$130 per hour."

The recent case law concerning paralegal rates is sparse, but includes recent awards of \$85 per hour (*Rupert*, 55 Fed. Cl. at 293 (Miller, J)); \$35 per hour (*Helms v. HHS*, No. 96-518V, 2002 WL 31441212 (Fed. Cl. Spec. Mstr. Abell, Aug. 8, 2002)); and \$60 per hour (*Corder v. HHS*, No. 97-125V, 1999 WL 1427753 (Fed. Cl. Spec. Mstr. Golkiewicz, Dec. 12, 1999)).

Determining an appropriate rate for the time of Ms. Hernandez is difficult. Considering first only the information from the Scott, Dyekman, and Wolfe firms in Cheyenne, I note that the differences between the law firms are startling. While the Scott firm bills paralegal time at just \$40 to \$50 per hour, the Wolfe firm bills it at \$100 to \$130 per hour. I note that with respect to the hourly rates claimed for attorneys Gage, Moxley, and Morgan, the claimed rates fit within or very close to the corresponding range of rates for the Dyekman firm, the firm whose rates are in between those of the two other firms from whom we have information. (That is, the Dyekman firm partner rates ranged up to \$200, while Gage and Moxley sought \$175 to \$200 per hour; Dyekman firm associate rates ranged up to \$150, while Morgan's time was billed at \$135 to \$155 per hour.) This is not true, however, as to the rates claimed for Ms. Hernandez, since the Dyekman firm bills paralegal time at \$55 to \$85 per hour, while petitioner seeks \$100 per hour for the time of Ms. Hernandez. Thus, considering only the information from the Cheyenne firms, I conclude that \$85 per hour, the top rate of the Dyekman firm, is an appropriate rate to allow for Ms. Hernandez' services.

Further, expanding my consideration to take into account my experience in Program cases, I note that in general \$85 per hour has been considered a premium rate for paralegal/law clerk services in Program cases. (See the cases cited above on this page.) Thus, based on the record of

this case while also taking into account my overall Program experience, I still find it appropriate to award \$85 per hour for the services of Ms. Hernandez in this case.

III

NUMBER OF HOURS

Respondent has suggested that I should disallow 30 percent of the hours billed by the Gage and Moxley firm. However, respondent has not offered any substantial argument as to *why* I should make such a drastic reduction, and I find no compelling reason to do so.

To be sure, I understand and appreciate respondent's concern, and I have carefully considered this issue. In this regard, it is certainly true that the total number of hours claimed does appear somewhat high. Moreover, there certainly exists precedent indicating that where a special master concludes that a fee request is grossly excessive as to the total number of hours claimed, it is appropriate for the master to use his or her own judgment and experience to reduce the total to a more reasonable figure. See, e.g., *Wasson v. Secretary of HHS*, 24 Cl. Ct. 482 (1991), *aff'd*, 988 F. 2d 131 (Fed. Cir. 1993); *Saxton v. Secretary of HHS*, 3 F. 2d 1517 (Fed. Cir. 1993). I have engaged in such wholesale reductions myself in a few cases.

However, it is also true that an attorney for a petitioner under the Program must diligently and zealously pursue his or her client's claim, and that such pursuit may take counsel down many avenues that ultimately prove to be unfruitful. See, e.g., *Holton v. Secretary of HHS*, 24 Cl. Ct. 391, 398 (1991). Further, it is extremely difficult to tell "after the fact" whether an expenditure of hours was "reasonable" or not. In my view, there is an *extremely broad range* of numbers of attorney hours that can be "reasonably" expended in a Program case; some attorneys can "reasonably" spend many more hours on a case than another attorney might spend on the same case.

In this case, it is important to note that the case involved a very complex medical issue, with two different lengthy evidentiary hearings for the presentation of medical experts, as well as extensive post-hearing briefing. It also involved an appeal to a judge of this court, then more extensive briefing on remand. I find that Mr. Gage and his colleagues vigorously and zealously represented their client, and are to be commended for doing so. In this context of this unusual case, I find that, in general, the time billed by the Gage firm members was not excessive, and I will not make any "across the board" reduction.⁷

⁷While I make no general reduction, I also note that at certain points in petitioner's filings concerning this fees application, petitioner's counsel engaged in rhetoric suggesting that respondent's arguments were made merely for harassment or for other improper purposes. I admonish petitioner's counsel that, in my view, such rhetoric is overheated and unwarranted. While often petitioners' and respondent's counsel can reach agreement concerning fees matters, it is inevitable that at times they will disagree. In such situations, it is simply respondent's obligation to argue to the special master that, in respondent's view, certain aspects of a fee request are

I will, however, not compensate Mr. Gage for the disputed 4.8 hours on November 27-28, 2003.⁸

IV

COSTS ISSUES

Respondent has raised several different issues with respect to the costs claimed by the Gage & Moxley firm.

A. Expert hourly rates

First, respondent argues that I should deny reimbursement for part of the fees paid by petitioner's counsel to the petitioner's expert witnesses, suggesting that the hourly rates charged by such experts were unreasonably high. (R-1, p. 12, para. 3; R-2, p. 12, fn.4.) But respondent fails to offer any evidentiary support for this suggestion, or even any substantial argument on this issue. Based on my experience in recent years with rates for medical expert witnesses, the rates paid in this case appear reasonable.⁹ I note that cases in which petitioner's counsel were reimbursed at the rate of \$300 or more per hour for the services of a medical expert include *Isom v. HHS*, No. 94-770V, 2001 WL 101459 (Fed. Cl. Spec. Mstr. Abell, Jan. 17, 2001); *Haugh v. HHS*, No. 90-3128V (Fed. Cl. Spec. Mstr. French, June 30, 1999); *Berry v. HHS*, No. 97-0180V, 1998 WL 481882 (Fed. Cl. Spec. Mstr. Edwards, Jul. 27, 1998); *Hayden v. HHS*, No. 91-643V, 1998 WL 430081 (Fed. Cl. Spec. Mstr. Hastings, Jul. 10, 1998); *Mandell v. HHS*, No. 90-2853V, 1995 WL 715511 (Fed. Cl. Spec. Mstr. Hastings, Nov. 21, 1995); *Lindsey v. HHS*, No. 90-2586V, 1995 WL 715513 (Fed. Cl. Spec. Mstr. French, Nov. 21, 1995); *Yeoman v. HHS*, No. 90-1049V, 1994 WL 387855 (Fed. Cl. Spec. Mstr. Abell, Jul. 11, 1994).

B. Dr. Lindquist

Respondent has argued that I should deny reimbursement for payments made to Dr. Lindquist. (R-1, pp. 11-12; R-2, pp. 12-13.) However, it appears that petitioner's counsel did legitimately retain Dr. Lindquist as an expert. To be sure, Dr. Lindquist's opinion letter concerned only one aspect of the case, but it proved to be quite important. Further, while the number of hours

unwarranted. I see nothing improper in the arguments made in that regard by respondent in this case.

⁸I further note that I have considered the hours claimed by Messrs. Gage (17.6) and Morgan (1.5) on the fees issue reply memorandum, and the 3.4 hours claimed by Mr. Gage for the sur-reply memo. I will allow the 1.5 hours for attorney Morgan, as well as a total of 15 hours for Mr. Gage. While it was certainly very appropriate for the Gage firm to make these replies, I found the number of hours spent by Mr. Gage to be somewhat excessive for these particular filings.

⁹I will compensate the time of Dr. Byers at \$300 per hour.

that Dr. Lindquist spent on the opinion letter seems somewhat high in relation to the short length of the letter, apparently Dr. Lindquist spent time going through the lengthy medical record, which I would expect a conscientious expert to do. I will allow the claimed reimbursement for Dr. Lindquist's time.

C. Dr. Byers' hours

Respondent requests that I decline to compensate petitioner for five of the hours billed by Dr. Byers. (R-1, p. 11.) However, I do not agree that the number of hours that Dr. Byers spent in preparing for the second hearing was excessive. I will compensate petitioner for all of Dr. Byers' claimed hours.

V

LANDYE FIRM

Petitioner initially requested fees (\$7,165) and costs (\$5,934.45) for the Landye firm, but subsequently reduced the claim to \$1,060.04 for costs. (See P-2, p. 8.) I will grant the latter amount.

VI

SUMMARY AND CONCLUSION

FEES

| | | | |
|------------------------------------|-------------------------|---|-------------|
| Richard Gage | 98.80 x \$175 per hour | = | \$17,290.00 |
| Richard Gage (271.60 - 4.8 + 15 =) | 281.08 x \$200 per hour | = | 56,360.00 |
| Robert Moxley | 24.03 x \$175 per hour | = | 4,252.50 |
| Robert Moxley | 5.04 x \$200 per hour | = | 1,080.00 |
| Kirk Morgan | 7.07 x \$135 per hour | = | 1,039.50 |
| Kirk Morgan (3.2 + 1.5 =) | 4.07 x \$145 per hour | = | 681.50 |
| Julie Hernandez | 43.61 x \$ 85 per hour | = | 3,706.85 |

COSTS

| | |
|---|-----------|
| Gage firm costs | 18,163.03 |
| (\$18,313.03 less \$150 reduction of Dr. Byers' fees) | |
| Landye firm costs | 1,060.04 |

| | |
|-----------------------------|---------------------|
| TOTAL FEES AND COSTS | \$103,633.42 |
|-----------------------------|---------------------|

Accordingly, my Decision is that fees and costs are to be awarded in the total amount of \$103,633.42 pursuant to § 300aa-15(b) and (e)(1). In the absence of a timely motion for review of this Decision, the Clerk of this Court shall enter judgment accordingly.

George L. Hastings, Jr.
Special Master