In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 02-780V

(Filed: March 20, 2007)

TO BE PUBLISHED[1]

SUSAN IANNUZZI, parent of Peter Iannuzzi, a minor,	*	
Petitioner,	*	Vaccine Act Attorneys' Fees; Fees for Work on "Omnibus Proceedings"
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

RULING CONCERNING ATTORNEYS' FEES REQUEST

HASTINGS, ***Special Master***.

In this case under the National Vaccine Injury Compensation Program (hereinafter "the Program"), the petitioner seeks, pursuant to § 300aa-15(e)[2], an award for attorneys' fees and costs incurred in the course of the petitioner's attempt to obtain Program compensation. Respondent has opposed petitioner's application in part. After careful consideration, I have determined to grant the request in part and deny it in part, for the reasons to be set forth below.

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[1]Because I have designated this document to be published, this document will be made available to the public unless petitioner files, within fourteen days, an objection to the disclosure of any material in this decision that would constitute "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." See 42 U.S.C. § 300aa-12(d)(4)(B); Vaccine Rule 18(b).

[2]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (2000 ed.). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (2000 ed.). I will also sometimes refer to the Act of Congress that created the Program as the "Vaccine Act."

I

BACKGROUND

A. The autism cases and the "Omnibus Autism Proceeding"

This dispute arises in the context of an unusual situation involving multiple cases filed under the Program that share a common issue of medical causation. Each of these cases involves an individual who suffers from a neurodevelopmental disorder known as an "autism spectrum disorder"--"autism" for short--or a similar neurodevelopmental disorder. In each case, it is alleged that such disorder was causally related to one or more vaccinations received by that individual--*i.e.*, it is alleged that the disorder was caused by measles-mumps-rubella ("MMR") vaccinations; by the "thimerosal" ingredient contained in certain vaccinations; or by some combination of the two. As of this date, about 4,800 such cases remain pending before this court.

To deal with this large group of cases involving a common factual issue--*i.e.*, whether these types of vaccinations can cause autism--during 2002 the Office of Special Masters (OSM) conducted a number of informal meetings with attorneys who represent many of the autism petitioners and with counsel for the Secretary of Health and Human Services, who is the respondent in each of these cases. At these meetings, the petitioners' representatives proposed a special procedure by which the OSM could process the autism claims as a group. They proposed that the OSM utilize a two-step procedure: first, conduct an inquiry into the *general causation issue* involved in these cases-- *i.e.*, whether the vaccinations in question can cause autism and/or similar disorders, and, if so, in what circumstances-- and then, second, apply the evidence received in the course of that general inquiry to the *individual cases*. They proposed that a team of petitioners' lawyers be selected to represent the interests of the autism petitioners during the course of the *general causation* inquiry. They proposed that the proceeding begin with a lengthy period of discovery concerning the general causation issue, followed by a designation of experts for each side, an evidentiary hearing, and finally a written analysis of the general causation issue by a special master. Then, in the second step, the causation evidence introduced in the general causation general proceeding would be applied to the *individual cases*.

As a result of the meetings described above, the OSM adopted a procedure generally following the format proposed by the petitioners' counsel. On July 3, 2002, the Chief Special Master, acting on behalf of the OSM, issued a document entitled *Autism General Order #1*.[3] That Order set up a proceeding known as the Omnibus Autism Proceeding (hereinafter sometimes "the OAP"). In that OAP, a group of counsel selected from attorneys representing petitioners in the

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[3]The *Autism General Order #1* is published at 2002 WL 31696785, 2002 U.S. Claims LEXIS 365 (Fed. Cl. Spec. Mstr. July 3, 2002). I also note that the documents filed in the Omnibus Autism Proceeding are contained in a special file kept by the Clerk of this court, known as the "Autism Master File." Most of that file may be viewed on this court's Internet website at www.uscfc.uscourts.gov/osm/osmautism.htm.

autism cases are in the process of obtaining and presenting evidence concerning the *general issue* of whether these vaccines can cause autism, and, if so, in what circumstances. The evidence obtained in that general inquiry will then be applied to the individual cases. (2002 WL 31696785 at *3; 2002 U.S. Claims LEXIS 365 at *8.)

The *Autism General Order #1* assigned the initial responsibility for presiding over the Omnibus Autism Proceeding to the undersigned special master. In addition, I was assigned responsibility for all of the individual Program petitions in which it is alleged that an individual suffered autism or an autistic-like disorder as a result of MMR vaccines and/or thimerosal-containing vaccines. The individual petitioners in those cases requested that, in general, no proceedings with respect to the *individual petitions* be conducted until after the conclusion of the Omnibus Autism Proceeding concerning the *general causation* issue.[4] The plan has been that after that general causation issue is addressed, special masters will then deal specifically with the individual cases.

Since July of 2002, the petitioners' interests in the Omnibus Autism Proceeding have been represented by a group of attorneys known as the Petitioners' Steering Committee (PSC). During that time, the Omnibus Autism Proceeding has proceeded at a slower pace than was initially anticipated, because the discovery phase has lasted much longer than expected. In recent months, however, the PSC has become ready to present its evidence concerning the general causation issue, and we have scheduled an evidentiary hearing, to address both the general causation issue, and the specific causation issue in one particular autism case, for June 11, 2007.[5]

B. Proceedings "on the merits" in this Iannuzzi case

On July 12, 2002, Susan Iannuzzi ("petitioner") filed a petition seeking Program compensation on behalf of her son, Peter Iannuzzi ("Peter"). Petitioner filed her case using a "Short Form Autism Petition," authorized by the *Autism General Order #1*. By filing the short-form petition, the petitioner alleged that Peter suffered autism, or a similar neurodevelopmental disorder, as a result of receiving MMR vaccinations and/or thimerosal-containing vaccinations. The petitioner also filed on July 12, 2002, a "Notice to Defer Proceedings," indicating that petitioner wished to defer any proceedings in Peter's case until the conclusion of the Omnibus Autism Proceeding. Accordingly, no case-specific proceedings were conducted in this case from 2002 until November

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[4]I note that it has always been left to each individual petitioner to determine whether to defer proceedings concerning his or her own case pending the completion of the Omnibus Autism Proceeding. If an individual petitioner has proof of causation in his own case that he wishes to put before a special master at any time, without waiting for the conclusion of the Omnibus Autism Proceeding, that petitioner will be allowed to do so.

[5]From July of 2002 until January 2007, all of the autism cases were assigned to me. In January 2007, the Chief Special Master appointed two additional special masters to join with me in presiding over the Omnibus Autism Proceeding, and began the process of reassigning some of individual autism cases from my docket to the dockets of those other two masters. See *Autism Update* issued January 19, 2007, on this court's Internet website. (See fn. 3 above.)

of 2005. On November 4, 2005, petitioner filed the medical records pertinent to Peter's illness. On November 14, 2005, petitioner filed a "Notice to Separate from the Autism Proceeding," and on that same date, she also filed a "Motion for a Ruling on the Record." On December 21, 2005, I issued a Decision in the case, denying compensation to petitioner on the basis that she failed to demonstrate that Peter's autism was actually caused by a vaccination. Petitioner did not seek review of that Decision, so that on January 26, 2006, a judgment was entered denying compensation.

C. The fees and costs application

The judgment described above in this *Iannuzzi* case, entered on January 26, 2006, ended the petitioner's attempt to obtain Program compensation for Peter's autism. Under the Vaccine Act, however, even a petitioner who fails to show a vaccine-caused injury may obtain an award for *attorneys' fees and costs* incurred in the Vaccine Act proceeding, if the petition was filed in good faith and with a reasonable basis. (§ 300aa-15(e)(1).) Accordingly, on July 26, 2006, petitioner filed such an application for attorney's fees and costs. (P1.[6]) Petitioner requested $6,589.50 in fees and $435.21 in costs for work done by her counsel's law firm specific to this *Iannuzzi* petition. In addition to that request, however, petitioner also requested fees and costs for work done by that same law firm in the process of researching the *general issue* of autism causation. This additional request consisted of $373,070.95 in fees and $11,742.48 in costs. (P1.)

A close review of that fee application, along with the documents filed by petitioner since then (see especially P3 at pp. 7-12), shows that this law firm--to which I will sometimes refer as the "CHC firm"[7]--has kept two different billing files relevant here. First, the firm kept an ordinary billing file listing time expenditures and cost expenditures specific to this *Iannuzzi* case. That file resulted in the request for $6,589.50 in fees and $435.21 in costs specific to this *Iannuzzi* proceeding. (See P1, Tabs A and B.)

In addition, the CHC firm, which has represented (and still represents) hundreds of autism petitioners in Vaccine Act proceedings,[8] also has spent considerable time, and some costs,

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[6]Petitioner and respondent have filed a number of documents relevant to this fee application, exhaustively briefing the dispute concerning the application. I will refer to those documents as follows. "P1" refers to petitioner's original fees application, filed on July 26, 2006. "R1" refers to respondent's first response, filed on August 10, 2006. "P2" refers to petitioner's filing of November 6, 2006. "P3" refers to petitioner's filing of November 20, 2006. "R2" refers to respondent's filing of December 4, 2006. "P4" refers to petitioner's filing of January 3, 2007. "R3" refers to respondent's filing of January 5, 2007. "P5" refers to petitioner's filing of January 24, 2007. And, finally, "R4" refers to respondent's filing of February 6, 2007.

[7]The law firm's full name is Conway, Homer, and Chin-Caplan. The principals are Kevin Conway, Ronald Homer, and Silvia Chin-Caplan.

[8]As of the end of December 2006, the CHC firm represented 629 autism petitioners. (See P4, p. 23.)

researching the *general issue* of whether MMR vaccines and/or thimerosal-containing vaccines can cause autism. Accordingly, the firm, reasoning that this work could benefit any or all of its many different autism clients, kept a separate file recording these expenditures of professional time and costs. (See P3, pp. 7-8; P1, Tabs C and D.) This second billing file has resulted in the second, much larger part of the petitioner's request for fees and costs in this case.

After petitioner filed the initial application in this case on July 26, 2006, and respondent filed respondent's first opposition thereto on August 10, I conducted an unrecorded telephonic status conference to discuss the matter, on August 22. At that time, the parties embarked upon a mediation process, under the guidance of Chief Special Master Golkiewicz, in an attempt to settle. After two months of efforts, however, those settlement efforts proved to be unsuccessful. Accordingly, both parties filed several additional documents addressing the controversy. (See fn. 6, above.) The last of those documents was filed on February 6, 2007, and, accordingly, the matter is now ripe for my ruling.

II

ENTITLEMENT TO FEES AND COSTS GENERALLY

After reviewing the file, I find that, as respondent does not dispute, this *Iannuzzi* petition was brought in good faith, and that there existed a reasonable basis for the claim. Therefore, an award of fees and costs is appropriate.

III

FEES AND COSTS SPECIFIC TO IANNUZZI FILE

Respondent does not dispute the amounts originally claimed for work done specifically with respect to this *Iannuzzi* case. I also find those requests to be appropriate. Accordingly, I will award those amounts, $6,589.50 in fees and $435.21 in costs.

IV

AMOUNTS CLAIMED WITH RESPECT TO THE "GENERAL CAUSATION ISSUE"--RESPONDENT'S *GENERAL* ARGUMENTS

As to the requests for compensation for the attorney hours and costs expended by the CHC firm with respect to the *general causation issue,* on the other hand, respondent opposes the request. Respondent makes some general arguments and, alternatively, some specific objections to certain aspects of the request. I will deal with the respondent's *general* objections in this section IV of this Ruling. I will then deal with the respondent's *specific* objections in section V of this Ruling.

A. Summary of respondent's general objections

Respondent does not dispute that the CHC law firm expended the hours and costs here in question. Nor does respondent argue that this law firm should *never* receive compensation, at least for much of those claimed hours and costs. Rather, respondent argues that I should not compensate these hours and costs in *this case*, for several reasons. Respondent argues that I should wait until the conclusion of the Omnibus Autism Proceeding to consider the issue of compensating these hours and costs. Respondent suggests that at that time I could utilize one of two possible methods in order to compensate these hours and costs. I could, respondent suggests, pick a single case which becomes closed after the conclusion of the Omnibus Autism Proceeding, and utilize that case as a vehicle to compensate not only the hours and costs expended concerning the general causation issue by the CHC firm, but also all of the hours and costs expended by other members of the Petitioners' Steering Committee (PSC) in the Omnibus Autism Proceeding. (R2 at 24-26.) Alternatively, respondent suggests, I could determine a reasonable amount to compensate the CHC firm for its general causation work, then *apportion* that amount over the various individual cases in which that firm is counsel. (R2 at 26-27.)

Respondent offers a number of arguments as to why I should defer compensating the CHC firm for its work concerning the general causation issue. One of respondent's chief arguments is that it was not reasonable for the CHC firm to spend such a *large number* of hours on the general causation issue, especially when other PSC attorneys have also been working on that causation issue. Respondent argues that the work done by the firm may have been duplicative of work done by other PSC attorneys. Respondent also contends that if I wait until after the conclusion of the Omnibus Autism Proceeding, I will be better able to judge the reasonableness of the firm's expenditure of so many hours on this general causation issue.

B. Discussion of respondent's principal arguments

Respondent raises some reasonable concerns in these general arguments. After careful consideration, however, I conclude that it is appropriate to award compensation in this case, at this time, for the bulk of the hours and costs in question. I will divide my reasoning into several sections below.

1. I see no good reason to wait

One important point is that, as noted above, respondent does not argue that this law firm should *never* receive compensation for the bulk of these claimed hours and costs. Rather, respondent argues that I should not compensate these hours and costs in *this* case at *this time*. Respondent argues that I should wait until the conclusion of the Omnibus Autism Proceeding, reasoning that at that time I will know more about the general causation issue, and be better able to judge whether the amount of hours expended by these attorneys was reasonable. Respondent is correct, of course, that if I wait longer, I might be in at least a slightly better position to judge whether it was reasonable for this law firm to expend the large number of hours in question. However, considering the overall

circumstances, I do *not* find that it would be appropriate to wait for a further substantial time period in this regard, for three major reasons.

First, and most important, I conclude that I am *already* in a good position to judge the reasonableness of the hours expenditure in question. While I have not yet ruled concerning the "general causation issue" in the autism cases, and while I certainly have *not* yet reached a *conclusion* concerning that issue, I have, in fact, spent much time, over the past several years, in researching and considering that issue. As I will explain below (p. 8), I have come to realize that this is an extremely complicated area of medical causation, in which there have been a great many studies conducted, and a great many theories articulated by a great many experts. Accordingly, I conclude that I am familiar enough with this "general causation issue" at this time to make a reasonable, fair determination as to the reasonableness of the number of hours expended by the law firm on that issue.

Second, it is not clear how long respondent would have me wait in order to compensate this law firm for these time and cost expenditures. From beginning of the Omnibus Autism Proceeding (OAP), both the Chief Special Master and I have utilized the term "general causation" to refer to the issue of whether MMR vaccines and/or thimerosal-containing vaccines can cause autism or similar disorders. However, all participants in the OAP have always understood that this so-called "general causation issue" in actuality encompasses several *sub-issues*, such as (1) whether MMR vaccines can cause autism (2) whether thimerosal-containing vaccines can cause autism, and (3) whether those two types of vaccines can *combine* to cause autism. It has always been understood that the PSC might ultimately elect to *separate* the "general causation issue" into its component parts, seeking separate trials for those parts. And, in recent weeks, the PSC has, in fact, sought to divide the general causation issue into three parts, seeking to present evidence concerning the three sub-issues noted above in three *different* hearings. (See *Autism Update* issued March 14, 2007 (pp. 5-6), on this court's website--see fn. 3 above.) And, while the first such hearing is scheduled for June of this year, it is not yet clear exactly when there will be trials concerning the *other* two sub-issues. Therefore, it is unclear how long respondent would have me wait to reach a ruling concerning the reasonableness of the number of hours claimed here.

Third, especially in light of the uncertainty discussed in the preceding paragraph, I conclude that it would simply be unfair to the CHC firm to further delay the process of compensating the firm for the hours and costs in question. The first of these hours and costs were expended in 2000. This firm has waited long enough to be compensated for these hours and costs.

2. The number of hours expended was reasonable under the circumstances

Another of respondent's chief arguments is that the number of professional hours spent by the CHC firm concerning the general causation issue was unreasonable. After full consideration, however, I conclude that under all the circumstances, it was reasonable for the firm to expend the bulk of the hours in question.

First, and most importantly, I conclude that the very nature of the relevant general causation issue--*i.e.*, whether MMR vaccines and/or thimerosal-containing vaccines can cause autism--justifies the number of hours spent on the issue by this firm. To be sure, the number of professional hours spent--*i.e.*, approximately 1200 attorney hours and 130 paralegal hours between September 8, 2000, and November 14, 2005--is an extremely large one. However, as explained above, over the past several years, I have already spent much time studying that general causation issue. I have come to fully appreciate that this is an *extremely complicated* causation issue. A person could reasonably expend an enormous amount of time in an attempt to identify and understand all of the evidence concerning that issue. For example, on February 12, 2007, I placed into the record of this case copies of just two of the huge number of documents that are relevant to this causation issue. Those were reports of the Institute of Medicine concerning the topics of (1) whether MMR vaccines can cause autism, and (2) whether thimerosal-containing vaccines can cause autism. Those two reports, I believe, illustrate the vast amount of material that is relevant to these topics. For example, the 2001 MMR-related report lists 172 bibliographic references (see pp. 60-69), while the 2004 report, related to thimerosal-containing vaccines, lists 217 bibliographic references (see pp. 154-163). From my experience, it appears that, concerning this particular general causation issue, there have been far more articles written, far more epidemiologic studies conducted, and, in general, far more relevant information published, than has been true with respect to any prior general causation issue addressed in Vaccine Act cases. This means that there was an enormous amount of relevant evidence for this law firm to locate and master, justifying the large number of hours spent by the firm members on this task.

In this regard, respondent has expressed concern that the work done by the CHC firm may have been "duplicative" of work done by other lawyers on the Petitioners' Steering Committee. Respondent seems to suggest that the CHC firm should have been content over the years to sit back and let other PSC attorneys do all the work concerning the general causation issue. I cannot agree. The CHC attorneys have had a professional obligation to protect the interests of not only Peter Iannuzzi and his family, but also more than six hundred other families with autistic children that they represent. While it is true that other PSC attorneys did the bulk of the work in the Omnibus Autism Proceeding during the years 2002-2006 (most of that work pertained to discovery matters), the CHC attorneys have not been content to merely assume that the lead PSC lawyers would do a perfect job in representing the interests of all the autism petitioners. The CHC attorneys, rather, have done a reasonable amount of work on their own, in order to assure themselves that their clients' interests are being well-represented. This work has, quite reasonably, included a substantial amount of time researching the relevant medical literature, a substantial amount of time consulting with medical experts, and a substantial amount of time meeting with other PSC attorneys. By doing this work, the CHC attorneys have put themselves in a position in which they can make their own *well-informed* judgment as to whether the lead PSC counsel are optimally representing the autism petitioners. I find it quite reasonable for them to have done so.

Indeed, in just the last several weeks, it has become clear how justified and valuable these efforts by the CHC firm have been, with respect not just to their own CHC clients, but to all the autism petitioners. That is, over the last several months, the PSC has been preparing to try the first

"test cases" in the Omnibus Autism Proceeding, presenting the PSC's evidence concerning the general causation issue; the first such test case has been scheduled for June of 2007. And during just the last several weeks, the PSC lead counsel have turned to the members of the CHC firm to *take an important role* in trying the first test case, *Cedillo v. Secretary of HHS*, No. 98-916V.[9]

I also note that, while the number of hours the CHC lawyers have expended concerning this general causation issue is large, one may also reasonably consider the *large number of autism clients* that the firm represents. Considering the approximately 1200 attorney hours and 130 paralegal hours expended by the CHC firm between September 8, 2000, and November 14, 2005, that would certainly be a high number of hours to spend on a single case. But if one were to divide that number of hours by the number of autism cases in which the CHC firm was counsel during that period (about 629 cases), the resulting figure, of less than three combined attorney and paralegal hours per case, would be very low. Still, in the final analysis, it is *not* the number of cases that justifies the number of hours expended. It is the *complexity of the general causation issue*. And that complexity would be exactly the same if the CHC had only *one* autism client, the Iannuzzi family. Because of that complexity, the time expenditure of the CHC firm concerning the general causation issue, for which that firm seeks compensation in this case, would still be justified.

In addition, I note that the CHC firm has an admirable 19-year record of providing services to Vaccine Act petitioners. This firm has a well-established history of achieving solid results for its clients, while, at the same time, expending a number of hours per case that has usually seemed quite reasonable, in comparison to other Vaccine Act attorneys. This history, in which this firm's expenditure of professional hours has typically seemed to be reasonable and efficient, gives me added confidence in concluding that the firm was acting reasonably in expending the hours in question concerning the autism general causation issue.

Accordingly, for all the reasons set forth above, I conclude that the number of professional hours expended and the costs incurred by the CHC firm, during the period from September 8, 2000, through November 14, 2005, was generally reasonable.

3. Fees awards in prior "omnibus proceedings"

I also conclude that the result that I have reached in this case is consistent with a number of previous Vaccine Act rulings, in which fees and costs awards have been made in the context of "omnibus proceedings." That is, on a number of occasions during the history of the Vaccine Act, when a large number of different cases raised common issues of causation, such cases have been grouped before a single special master. In each such situation, a proceeding was conducted in order

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[9]See *Autism Update* issued Jan. 19, 2007, p. 7. I note, however, that I see no good reason to wait until the *Cedillo* case concludes before compensating the CHC firm for the "general causation" work here at issue. I note that the *Cedillo* case will not conclude until, at the earliest, late this year; and, if the Cedillos qualify for compensation, the *Cedillo* case would not likely conclude until late 2008 or even later.

to address the "general causation issue" that was common to that group of cases, and each such proceeding has been described as an "omnibus proceeding." Of course, in each such situation, one or more petitioners' counsel expended time and costs working on the "general causation issue" in question, and sought compensation for such time and costs in the context of one of the individual cases involved. In each such situation, a special master of this court has found it appropriate to award, in the context of one particular case, compensation for attorney time and costs expended concerning the relevant general causation issue.

The first example of such an award, of which I am aware, occurred with respect to an omnibus proceeding involving allegations that the rubella vaccine can cause chronic arthropathy. I myself was the special master in that proceeding, and I conducted a hearing on that general causation issue in 1992. After one petitioner voluntarily dismissed her petition following my ruling concerning that general causation issue, the attorneys who had done the work on the petitioners' behalf concerning that general issue used that case as a vehicle to seek compensation for the work done concerning the general issue. Over respondent's objection, I awarded the bulk of the compensation requested. *Gustafson v. HHS*, No. 91-1539 (Fed. Cl. Spec. Mstr. May 10, 1993).[10] That decision was not appealed.

Similarly, in 2001, after an omnibus proceeding concerning the hepatitis B vaccine, a petitioner's attorney sought compensation for his "general research" involved in that proceeding. *Lopez v. HHS*, No. 99-657V (Fed. Cl. Spec. Mstr. June 6, 2001), p. 1. The respondent informed Chief Special Master Golkiewicz that the respondent "agreed in principle with the payment, in this case, of fees generated from research for all of the petitioners' counsel's hepatitis B cases." (*Id*.) The special master awarded compensation in that case for the "general causation" work in question, awarding a total of $160,000 for that work. (*Id*. at 2.)

Another omnibus proceeding involved the issue of whether the hepatitis B vaccine can cause demyelination. In *Cramer v. HHS*, No. 99-428V (Fed. Cl. Spec. Mstr. Sep. 1, 2005), Special Master Sweeney issued a fees and costs award of $178,944, most of which was to compensate two law firms for work pertaining to that *general causation issue*. (*Id*. at 2.) The special master's opinion indicates that while the respondent initially had certain objections to particular aspects of that fee application, after petitioner's counsel made reductions in the initial request, respondent thereafter did *not object* to compensating the law firms in that particular case for the omnibus proceeding work. (*Id*.)

After the above-described fees awards was made in *Cramer*, Special Master Millman took over the still-ongoing "hepatitis B/demyelination" omnibus proceeding. In the individual case of *Stevens v. HHS*, No. 99-594V (Fed. Cl. Spec. Mstr. July 28, 2006), that special master awarded compensation for *additional* general work done by petitioners' counsel concerning that omnibus proceeding. The total fees and costs award in the *Stevens* case was $220,000, with apparently about

[10]Most of the special master rulings discussed in this section of this Ruling were unpublished rulings. Accordingly, for convenience' sake, I filed copies of those rulings into the record of this case, attached to my Orders filed on January 25, 2007, and February 2, 2007.

$160,000 of that related to the additional omnibus proceeding work. (*Id*. at 2.) The special master noted that respondent had "no objection" to that award. (*Id*. at 1.)

Finally, the Chief Special Master recently awarded fees and costs in *Ross v. HHS*, No. 05-417V, 2007 WL 415187 (Fed. Cl. Spec. Mstr. Jan. 22, 2007). As part of that award, he compensated fees and costs incurred by petitioners' counsel in yet another omnibus proceeding related to the hepatitis B vaccine. In that ruling, the Chief Special Master noted that the parties to that *Ross* case, including the respondent, "agreed" both (1) "that it makes eminent sense to bill the charges [pertaining to the omnibus proceeding] to one case, as opposed to allocating the charges to all of counsel's cases involved in the [omnibus proceeding]," and (2) "that both for the benefit of counsel getting paid in a timely fashion and to assist respondent in its review of counsel's charges relative to the [omnibus proceeding], the charges should be awarded in the first decided case * * *." (*Id*. at pp. 2-3.)

These five special master rulings cited above concerning fees and costs, thus, all offer *clear support* to the outcome that I have reached in this case. In each case, an award was made, in the context of an individual case, for "general causation" work done in the context of an omnibus proceeding. In four of the five cases, the special master's opinion indicated the *respondent's own agreement*, or lack of objection, to the use of the individual case as a vehicle for compensating the general causation work. And in the fifth case, *Gustafson*, the respondent did not appeal the award.

In one of respondent's briefs filed in this case, respondent suggests that respondent was simply mistaken in agreeing to the awards in *Cramer* and *Stevens*. (R2, pp. 22-23.) But, in my view, respondent did not err in those cases, but instead was simply being reasonable and practical.

Moreover, in the latest opinion cited above, *Ross*, the Chief Special Master's opinion states that the respondent "agreed," in January of this year, that "it makes eminent sense to bill the charges [for the general causation work] in one case," and that such charges should be compensated "in the first decided case." (2007 WL at 415187, pp. 2-3.) In my view, both respondent and the Chief Special Master were correct in *Ross* that it did make "eminent sense" to utilize the approach adopted in that case--*i.e.*, to compensate the "general causation issue" work performed by a petitioner's counsel in a single case, typically the "first decided case" that comes along as a vehicle for compensation. I conclude that using a similar approach in this case also makes eminent sense.

Of course, I recognize that respondent argues that the situation here is different from the circumstances of some of the above-cited cases, in that here, there has not as yet been any *evidentiary hearing* concerning the "general causation issue" in question. That is certainly a rational distinction. However, as explained above (p. 7), in the circumstances here, where I have already studied a good deal of the vast amount of medical literature that exists concerning the "general causation issue" in question, I conclude that it is reasonable and appropriate that I compensate, in this case, the relevant professional time and costs expended by the CHC firm, even though the first "test cases" concerning autism have not been tried.

In short, in this case we have a situation in which a law firm expended time and costs concerning a "general causation issue," an expenditure which could potentially benefit *any* of a *number* of Vaccine Act cases in which that firm is counsel. The five rulings cited above support the proposition that in such a situation, a special master has *discretion* to compensate that time and cost expenditure in *any* of the relevant individual cases. I remain persuaded that I have such discretion in this situation, and I conclude that it is appropriate for me to exercise that discretion by compensating, in this case, the relevant time and cost expenditures by the CHC firm.

4. Argument concerning "interim fees"

Respondent has also argued that to grant, in this case, compensation for the time and costs that the CHC firm expended concerning the autism "general causation issue," would amount to an erroneous award of "interim fees." I disagree.

The concept of "interim fees" in Vaccine Act cases is one that has not been the subject of published opinions, and requires a bit of explanation. As noted above, in a Vaccine Act case, a petitioner, whether successful or not in demonstrating a vaccine-caused injury, may seek an award for attorneys' fees and costs incurred in the course of pursuing the claim. (§ 300aa-15(e).) As a result, in the vast majority of cases decided during the 18-year history of the Vaccine Act, *after* the proceedings "on the merits" of the case are finished--*i.e.*, after there is a final ruling concerning whether the petitioner should receive Vaccine Act compensation for the alleged injury, and, if so, how much compensation--the petitioner has *at that time* applied for an award of attorneys' fees and costs. In recent years, however, some petitioners' attorneys have suggested that they should be permitted to apply for a preliminary award of fees and costs at an *earlier* stage of the case, rather than having to wait until proceedings "on the merits" are concluded. Such a hypothetical grant of fees, prior to the conclusion of the case, has been described as a grant of "interim fees." As the respondent notes (R2, p. 12, fn. 12), there have *legislative proposals* to specifically authorize in the statute such an earlier, "interim" award of fees and costs, but no such explicit provision has been added to the statute.

At this time, it is not absolutely clear whether an award of "interim fees" is legally authorized under the currently-existing statute. As respondent points out, no case law endorses an award of "interim fees," and the fact that the relevant legislative proposals have been proposed but not enacted suggests that the existing statute does *not* authorize such an award. On the other hand, as petitioner has noted, no controlling case law actually *prohibits* such an award, either.

However, even *assuming* that interim fees are *not* authorized under the existing statutory language, respondent's argument concerning "interim fees," in my view, simply has no relevance to this case. In this *Iannuzzi* case, rather, it is clear that the proceedings "on the merits" were, in fact, finally concluded, when judgment was entered on January 26, 2006. Therefore, any award in this case clearly would *not* amount to an unauthorized award of "interim fees."

Of course, I realize that respondent agrees that this *Iannuzzi* case is finally concluded on the merits, and, thus, is ripe for an award of attorneys' fees and costs. Rather, the respondent's argument is that the *Omnibus Autism Proceeding* is not finally concluded, so that no award for work pertaining to the autism "general causation issue" should be made until the conclusion of the Omnibus Autism Proceeding. However, I have, in effect, already addressed that argument of respondent, at pp. 6-7 above. As detailed above, I conclude that when a special master has enough experience and information available in order to adequately judge the reasonableness of the attorney's time and cost expenditures concerning a "general causation issue," it is appropriate for that master to compensate that expenditure in the context of an individual case, even though there may in the future be more work done concerning that same "general causation issue." Further, I note that the special masters' decisions in *Cramer* and *Stevens*, discussed above, support my conclusion in that regard.

5. Importance of fees and costs awards

I also note that initially it might seem anomalous that in this case I am making such a large award for attorneys' fees and costs, nearly all of which will ultimately go to the petitioner's attorneys rather than to the Iannuzzi family, which was unsuccessful in obtaining an award for Peter's injury. At first glance, this outcome--*i.e.*, a substantial sum for the attorneys, when the family was not compensated--may intuitively seem less than fair or sensible. In my view, however, it is important to realize that in the final analysis, the award for fees and costs issued in this case, along with the awards in the five cases cited at pp. 10-11 above and the fees/costs awards in *all* Vaccine Act cases, will strongly benefit many future Vaccine Act *petitioners*.

Simply put, the ultimate purpose of Vaccine Act fees and costs awards is *not* to benefit the *attorneys* involved, but to *ensure that Vaccine Act petitioners will have adequate access to competent counsel*. Access to such counsel is crucial in enabling petitioners to prosecute their claims successfully, and in maximizing the amount of petitioners' awards in successful cases. Attorneys will agree to represent petitioners in such cases, however, only if they are ensured an adequate recompense for their time. Accordingly, when attorneys spend a reasonable amount of time and costs in representing Vaccine Act petitioners, such attorneys must be fairly compensated for their expenditures, in order to encourage attorneys to participate in future Vaccine Act cases.

The CHC firm has provided valuable services to hundreds of Vaccine Act petitioners, over the history of the Program. As a result of the efforts of these attorneys and their staff, many severely injured vaccinees have received awards. Moreover, as noted above, this firm has a history of achieving solid results for its clients while, at the same time, expending a number of hours per case that has usually seemed quite reasonable, in comparison to other Vaccine Act attorneys.

Accordingly, under all of the circumstances here, I conclude that it is quite reasonable and appropriate for me to compensate the CHC firm for the bulk of the hours claimed in this case. I believe that doing so will benefit future Vaccine Act *petitioners*, by making it clear that counsel who provide solid assistance to such petitioners will be reasonably compensated for their work.

6. Fees and costs incurred after November 14, 2005

Respondent notes that some of the hours and costs in question concerning the autism "general causation issue" were incurred after the petitioner in this *Iannuzzi* case moved for a ruling on the record. I conclude that those hours and costs are *not* appropriately compensated in this case. That is, as explained above, a good argument can be made that this law firm could reasonably have expended all of its considerable efforts concerning this complicated "general causation issue" even if this *Iannuzzi* case constituted the firm's only case. (See pp. 8-9, above.) However, any hours and costs expended after November 14, 2005, clearly could *not* have benefitted the Iannuzzi family. Therefore, I conclude that the CHC firm should bill those hours and costs in its next autism case that becomes final "on the merits."

C. Conclusion concerning general objections

For the reasons set forth above, I conclude that it is appropriate, in general, that I award funds in this case to compensate the time and cost expenditures of the CHC firm, concerning the autism general causation issue, for the period between September 8, 2000, and November 14, 2005.

V

AMOUNTS CLAIMED WITH RESPECT TO THE "GENERAL CAUSATION ISSUE"--RESPONDENT'S *SPECIFIC* ARGUMENTS

Respondent has also raised a number of *specific* objections to the claims for fees and costs concerning the general causation issue. I will deal with those objections below.[11]

A. Specific Objection #1

I agree with respondent, and deny compensation for this item.

B. Specific Objections #2 through #8

These requests have been withdrawn by petitioner. (See R4, pp. 40-42.)

C. Specific Objections #9 through #12

I find the petitioner's explanations concerning these items to be persuasive, and will compensate the time in question.

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[11]I will utilize the numbers assigned to those objections by respondent, at R2, pp. 29-32. Petitioner's arguments concerning those specific objections are set forth at P4, pp. 39-48.

D. Costs Objection #1

I find the petitioner's explanation for this item to be persuasive.

E. Costs Objection #2

It appears to me that the costs in question here relate to the meetings that resulted in the Omnibus Autism Proceeding. See *Autism General Order #1*, 2002 WL 31696785 at *2. Accordingly, I will allow these costs as appropriately incurred in protecting the interests of the firm's autism clients. In addition, I accept the petitioner's explanation as to the hotel cost matter.

F. Costs Objections #3 through #8

I find the petitioner's explanations concerning these items to be persuasive.

VI

SUPPLEMENTAL REQUEST

On January 24, 2007, petitioner's counsel filed a supplemental request for fees and costs. (P5.) Respondent filed an opposition to that request on February 6, 2007. (R4.)

My analysis of the petitioner's filing indicates that the professional hours and costs in question were spent working on the issue of the respondent's challenge to the initial fees and costs application. This included both work related to the settlement and mediation effort, as well as work on the several briefs filed on petitioner's behalf. (See fn. 6, p. 4, above.) After careful consideration, I conclude that it is appropriate to award compensation for the bulk of the hours and costs in question.

To be sure, the CHC firm has spent a relatively large number of professional hours on the task of supporting the initial fees and costs application. However, two factors make this understandable. First, as noted above, the parties engaged in a lengthy settlement and mediation process. Part of the claimed attorney time was spent in that process. I believe that this time was appropriately spent, in good faith, and should be compensated.

Second, this case involves a very unusual request for attorneys' fees and costs. Not only is the total amount at issue quite high, but the issues raised by respondent in opposing the request, discussed above, are substantial and unusual ones. Those issues required the CHC firm to write lengthy briefs to defend against the respondent's opposition. I cannot fault the firm for spending a considerable amount of time in supporting and defending their request.

It is well-established that it is appropriate, in Vaccine Act cases, to compensate counsel for time and costs incurred in putting together fees and costs applications, and in supporting and defending such applications in the face of opposition from respondent. See, *e.g. Lindsey v. HHS*, 1995 WL 715513 at *1 (Fed. Cl. Spec. Mstr. Nov. 21, 1995); *Stott v. HHS*, 2006 WL 2457404 at *2 (Fed. Cl. Spec. Mstr. July 31, 2006); *Corder v. HHS*, 1999 WL 1427753 at *9 (Fed. Cl. Spec. Mstr. Dec. 22, 1999); *Farrar v. HHS*, 1992 WL 336502 at *3 (Fed. Cl. Spec. Mstr. Nov. 2, 1992); *Rasmussen v. HHS*, 1996 WL 752289 at *2 (Fed. Cl. Spec. Mstr. Dec. 20, 1996); *Estranda v. HHS*, 29 Fed. Cl. 78, 79 (1993). In this case, of course, the attorney time spent in supporting the fees application was much greater than is usual, but that is because respondent filed a wide-ranging opposition to the application. When respondent vigorously opposes a fees application, respondent must expect that the petitioner's attorney will make a vigorous defense, and that, if such defense is reasonable, the special master will compensate the attorney for the time spent in such defense.

I will, however, make one reduction in the supplemental request. On October 23, 2006, I conducted an unrecorded telephonic status conference, during which I asked petitioner's counsel to file a general explanation of the firm's "general causation file." Petitioner's counsel then filed, on November 6, 2006, a brief that did not contain the explanation that I requested, and also made a number of inappropriate criticisms of respondent's counsel. At another conference held on November 9, 2006, I told petitioner's counsel of the deficiencies in the brief filed on November 6, 2006, and requested that another brief be filed. Petitioner's counsel then did file another, far superior brief, on November 20, 2006. Accordingly, I am denying compensation for 10 of the hours expended by Mr. Conway on the brief filed on November 6, 2006.

VII

CONCLUSION

For the reasons set forth above, I will grant compensation for the professional hours and costs expended by the CHC firm concerning "general causation," for the period up to November 14, 2005. The firm's initial request pertaining to that period, however, must be reduced by the adjustment for travel hours conceded by petitioner (see P4, page 36), and by the adjustments arising from the respondent's Specific Objections #1 through #8 (see p. 14, above). Similarly, while I also will grant most of the supplemental request, that request will be reduced as well, as specified on this page above.

Accordingly, I hereby instruct both parties each to promptly calculate the award of fees and costs to be made in this case, based on the petitioner's requests as modified by the adjustments set forth in this Ruling. Within 10 days of the date of the Ruling, opposing counsel shall confer and attempt to agree on that calculation. Counsel shall then report telephonically to my law clerk, David

Case, either a set of agreed-upon figures, or an explanation of any difficulties in arriving at such figures. I will file my final Decision after hearing from the parties in that regard.

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George L. Hastings, Jr.
Special Master