In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-584V

(Filed: July 10, 2009)

TO BE PUBLISHED[1]

FRED KING and MYLINDA KING, parents of Jordan King, a minor,	*	Vaccine Act Interim Costs; Fees for Omnibus Proceedings.
Petitioners,	*	
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

DECISION AWARDING INTERIM FEES

HASTINGS, ***Special Master***.

In this case under the National Vaccine Injury Compensation Program (hereinafter "the Program"), the petitioners seek, pursuant to 42 U.S.C. § 300aa-15(e),[2] an interim award for attorneys' fees and costs incurred in the course of the petitioners' attempt to obtain Program compensation. After careful consideration, I have determined to grant the request in part at this time, for the reasons to be set forth below.

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[1]Because I have designated this document to be published, 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); 42 U.S.C. § 300aa-12(d)(4)(B). Otherwise, this entire document will be available to the public.

[2]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (2006). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (2006).

I

BACKGROUND

This case concerning Jordan King is one of more than 5,000 cases filed under the Program in which it has been alleged that a child's disorder known as "autism," or a similar disorder, was caused by one or more vaccinations. A detailed history of the controversy regarding vaccines and autism, along with a history of the development of the 5,000 cases in this court, was set forth in my decision filed in the case of *Cedillo v. Secretary of HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009), and will not be repeated here. However, a very brief summary of that history follows.

A. The Omnibus Autism Proceeding

Beginning in 1998, certain theories became popular, suggesting that the measles-mumps-rubella ("MMR") vaccine, and/or a mercury-based preservative known as "thimerosal" contained in several childhood vaccinations, might be causing the neurodevelopmental disorder known as autism. The emergence of those theories led to a large number of claims filed under the Program, each alleging that an individual's autism, or a similar disorder, was caused by the MMR vaccine, by thimerosal-containing vaccines, or by both. To date, more than 5,000 such cases have been filed with this court, and most of them remain pending.

To deal with this group of cases involving a common factual issue--*i.e.*, whether these types of vaccinations can cause autism--the Office of Special Masters (OSM) devised special procedures. On July 3, 2002, the Chief Special Master, acting on behalf of the OSM, issued a document entitled the *Autism General Order #1,*[3] which set up a proceeding known as the Omnibus Autism Proceeding (hereinafter sometimes the "OAP"). In the OAP, a group of counsel selected from attorneys representing petitioners in the autism cases, known as the Petitioners' Steering Committee ("PSC"), was charged with obtaining and presenting evidence concerning the *general issue* of whether those vaccines can cause autism, and, if so, in what circumstances. The evidence obtained in that general inquiry was to be applied to the individual cases. *Autism General Order #1*, 2002 WL 31696785, at *3, 2002 U.S. Claims LEXIS 365, at *8.

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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." An electronic version of that File is maintained on this court's website. This electronic version contains a "docket sheet" listing all of the items in the File, and also contains the complete text of most of the items in the File, with the exception of a few documents that are withheld from the website due to copyright considerations or due to 42 U.S.C. § 300aa-12(d)(4)(A). To access this electronic version of the Autism Master File, visit this court's website at www.uscfc.uscourts.gov. Select the "Vaccine Info" page, then the "Autism Proceeding" page.

Ultimately, the PSC elected to present two different theories concerning the causation of autism. The first theory alleged that the *measles* portion of the MMR vaccine can cause autism, in situations in which it was alleged that thimerosal-containing vaccines previously weakened an infant's immune system. That theory was presented in three separate Program "test cases" during several weeks of trial in 2007. The second theory alleged that the mercury contained in the thimerosal-containing vaccines can *directly affect* an infant's brain, thereby substantially contributing to the causation of autism. That theory was presented in three additional "test cases," including this *King* case, during several weeks of trial in 2008.

On February 12, 2009, decisions were issued concerning the three "test cases" pertaining to the PSC's *first* theory. In each of those three decisions, the petitioners' causation theories were rejected. I issued the decision in *Cedillo v. Secretary of HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). Special Master Patricia Campbell-Smith issued the decision in *Hazlehurst v. Secretary of HHS,* No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). Special Master Denise Vowell issued the decision in *Snyder v. Secretary of HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009).

Decisions have not yet been issued in the test cases concerning the PSC's *second* theory, including this *King* case.

B. The Request for "Interim" Fees in this Case

On November 4, 2008, the petitioners in this case filed their application for interim fees and costs. Respondent filed a response on February 6, 2009, and a number of additional materials addressing the application have been filed by both parties since that time.

In their application, the petitioners sought a total of $7,202,653 for interim fees and costs. This total reflected the fact that this case was, as explained above, one of the "test cases" in the OAP. Because this was a "test case," in which the petitioners sought to present *all* of the "general causation" evidence concerning the theory that thimerosal-containing vaccines can cause autism, several different law firms participated in the development and presentation of the evidence, while five expert witnesses prepared expert reports and testified at length for petitioners during the evidentiary hearing. The high total sought reflects the participation of all those law firms and expert witnesses.

In addition, in this fees application the PSC lawyers also seek compensation for *several years* of work concerning the Omnibus Autism Proceeding. During the period between 2002 and 2007, PSC lawyers were engaged in extensive discovery proceedings and other preliminary matters that set the stage for the "test case" hearings in 2007 and 2008. The PSC attorneys now seek, in this application, compensation for those years of work.

This fees application dwarfs any previous fees application in the history of the Program, in the amount sought, the number of law firms involved, and in the scope and complexity of the disputes between the parties concerning individual issues. During unrecorded telephonic status conferences, I have discussed with counsel for both sides strategies for most efficiently dealing with these many issues. Among other discussions, during an unrecorded telephonic status conference on May 11, 2009, counsel for both sides agreed that due to the unique nature of this case as a "test case" in the Omnibus Autism Proceeding, neither side would object to the issuance of a *series* of interim awards – *one* interim award as to each firm that submitted a fees and costs request in the PSC's November 4, 2008, application for interim fees and costs.

It is also noteworthy that a similar "interim fees" application was filed in the *Cedillo* case on August 19, 2008, seeking $2.2 million in fees and costs, incurred by seven different law firms, pertaining to the efforts involved in presenting the PSC's above-described *first theory* of autism causation in 2007. In decisions issued on March 11 and May 21, 2009, I have awarded interim fees to four of the seven firms involved in that case,[4] while the application remains pending as to the other three firms.

Ordinarily, it is my practice, and that of other Program special masters, to act on fees applications in a very prompt fashion. In light of the scale and complexity of the fees applications in both this case and the *Cedillo* case, and the timing of those applications, that has not been possible with respect to these applications. My first priority in recent months was resolution of the entitlement issue in *Cedillo*, which was completed with the issuance of my 174-page decision in that case on February 12, 2009. I have also in recent months spent considerable time studying the entitlement issue in this *King* case, and on a variety of matters in other cases, both autism cases and non-autism cases. I will continue to work on the pending interim fees applications, concerning both the 11 firms involved in this *King* application, and the three firms yet to be addressed in the *Cedillo* application. I intend to resolve those applications, likely with one "interim fees decision" per firm, as soon as possible, consistent with my duty to resolve the *King* entitlement issue in a timely fashion as well.

II

AN INTERIM AWARD IS APPROPRIATE AT THIS TIME

An "interim award" of fees and costs is permissible, if appropriate under the particular circumstances, in a Program case. *Avera v. Secretary of HHS*, 515 F.3d 1343 (Fed. Cir. 2008). I find that the circumstances are appropriate for such an interim award at this time in this case. While in the vast majority of Program cases, only *one* award for *interim* fees and costs, if any, would be appropriate, the extremely unusual circumstances of this case justify one interim award per firm.

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[4]The first of those two decisions was published. *Cedillo v. Secretary of HHS*, No. 98-916V, 2009 WL 811449 (Fed. Cl. Spec. Mstr. March 11, 2009).

In addition, I conclude that the petitioners filed this petition in good faith, and with a reasonable basis for the claim, so that an award is appropriate pursuant to 42 U.S.C. § 300aa-15(e)(1).

Further, respondent has requested that I state in writing my reasoning, previously stated orally during an unrecorded status conference, concerning one argument raised in respondent's response filed on February 6, 2009. In that response, respondent objected to an interim fees and costs award on the ground that, in respondent's view, at this time the PSC has not established that the $7,202,653.10 in interim fees and costs claimed is reasonable. Respondent argued that it is currently unknown how many, if any, other claims pending in the Program will be "resolved" by the entitlement ruling in this single case. Respondent objects and argues that if the entitlement decision in this case determines the outcome of this case alone, then petitioners' interim fees and costs request for several million dollars is *per se* unreasonable.

I do not find merit in this argument of the respondent. I conclude that the presentation of the PSC's second general theory of vaccine causation, presented in this *King* case and in the two other "second theory" test cases, was undoubtably a crucial and huge step toward resolving the pending autism cases. In the *King*, *Mead*, and *Dwyer* cases, the petitioners presented their evidence concerning one of the PSC's two general theories of vaccine causation. Those presentations will soon result in rulings by the three special masters. All of the petitioners with pending claims will be able to study those rulings, along with the recently-issued rulings concerning the PSC's *first* general theory of causation, and consider their impact upon the viability of the pending cases. It is true, of course, that until the rulings of the special masters in the "second theory" test cases are issued, and until any *appeals* concerning any of the six test case rulings are resolved, no one can know *exactly how* those test case rulings will affect the resolution of the pending petitions. But, based upon both my experience in prior "omnibus proceedings" under the Program (see *Cedillo*, 2009 WL 331968, at *12), and my understanding of the issues involved in these autism cases, I am confident that the massive efforts made by the petitioners' counsel and experts, the respondent's counsel and experts, and the special masters, in presenting and resolving this *King* case and the other autism test cases, will ultimately, after the resolution of all appeals, prove to be *very fruitful* in leading to the ultimate resolution of most, if not all, of the pending autism petitions.

In short, I *reject* the respondent's argument that I cannot determine at this time whether the amount of interim fees and costs sought by petitioners in this case is reasonable. I conclude that I am, in fact, in a very good position to evaluate, at this time, the reasonableness of the interim fees and costs request.

III

THE AMOUNT AWARDED IN THIS DECISION IS REASONABLE AND APPROPRIATE

During an unrecorded telephonic status conference on July 1, 2009, the law firm of Williams, Love, O'Leary, and Powers (WLOP) agreed to reduce its interim attorneys' fees and costs request from $3,101,764.84 to $2,300,000.00, including $2,070,000 in fees and $230,000 in costs. Respondent's counsel then indicated that respondent will not object to that amount.[5] WLOP's reductions included: the withdrawal of time and expenses relating to direct legislative lobbying, that is, any activity relating to efforts to affect the outcome of the political process; the withdrawal of time and expenses relating to "case specific" work in cases other than this claim, and unrelated to "general causation" work on the OAP; the withdrawal of time and expenses WLOP conceded were related exclusively to civil cases outside of the Vaccine Program; and the withdrawal of time and cost claims relating to public relations and media work during the pendency of the OAP. In addition, WLOP generally reduced the fees it requested for time spent on the OAP. Finally, WLOP agreed to significantly reduce the expenses for which it sought reimbursement, particularly those costs incurred while on travel.

After reviewing the entire record of this case, as well as the record of the Omnibus Autism Proceeding in general, I conclude that the amount that I award in this Decision is reasonable and appropriate compensation for the services in question provided by the WLOP firm. That firm did the principal work in (1) representing the Petitioners' Steering Committee in the OAP over a period of more than five years, (2) assembling and presenting the "general causation" evidence for the petitioners concerning the PSC's *second theory* of causation in the three "second theory" test cases, and (3) presenting the petitioners' "specific causation" evidence in this *King* case.

Of note, this Decision resolves all fees and costs requested by the WLOP firm in the *King* interim fees application, at Tabs A & B of that application. This Decision does not resolve the amounts requested at Tabs C through U of that application. Further explanation regarding which expert fees and expenses are resolved by this Decision may be informative. This decision resolves

[5] I note that the amount awarded to the WLOP firm in this Decision resolves *all* of the fees and costs requested by that firm in the *King* interim fees application, at Tabs A & B of that application. This Decision does *not* resolve the amounts requested at Tabs C through U of that application. I further note that respondent's counsel indicated that respondent will not object to a $2,300,000.00 award to WLOP only after I informed respondent that I was rejecting respondent's argument that I could not determine the reasonableness of the PSC's interim fees and costs application at this time.

WLOP's claims for expert fees and costs WLOP incurred relating to the work of Drs. Lorscheider[6] and Grandjean[7]; payments WLOP made to Dr. Gershwin in September 2007[8]; and payments WLOP made to Dr. Aposhian on May 10, 14, and July 31, 2008[9]. WLOP agreed to withdraw its requests for expert fees WLOP personally incurred relating to work by Drs. Geier and Young.[10] This decision does not resolve any expert fees and expenses submitted in Tab C, or any other Tab, of the fee application.

In this regard, I am aware that the amount that I award in this Decision is very large, higher than I have ever previously awarded in a Program case. I take very seriously my duty and responsibility, in all Program cases, to award Program funds only in *reasonable and appropriate* amounts. Accordingly, a few additional comments are appropriate.

A. The scope of the work performed by the WLOP firm

There is ample justification for the high amount awarded here to the WLOP firm. First, the amount awarded here represents compensation for *years* of work performed by multiple lawyers and other employees of that firm, incurred during *two very different and lengthy stages of proceedings*. The *first stage* involved *five years* of work by the firm in performing the lion's share of the work on behalf of the PSC in the Omnibus Autism Proceeding since 2003. That is, Mr. Michael Williams of that firm became a member of the Executive Committee of the PSC in early 2003. (See "Autism Update" filed into the Autism Master File on April 2, 2003.) That summer, Mr. Williams became a co-chair of the Executive Committee. (See "Designation of Counsel" filed into the Autism Master File on August 25, 2003.) From then to the present, Mr. Williams and his law partner Thomas

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[6] This decision resolves all fees and expenses relating to the work of Dr. Lorscheider.

[7] This decision resolves the $2,000.00 requested by WLOP for expenses related to Dr. Grandjean. *See* Tab B at 995-96. $10,000.00 in fees and expenses relating to Dr. Grandjean remain outstanding – $5,000.00 submitted by the PSC and $5,000.00 submitted by the Cohen Milstein law firm. *See* Tab C at 3890 and Tab J at 6217-18.

[8] This decision resolves the $7,500.00 requested by WLOP. This decision does not resolve the $30,000.00 included in the PSC Committee Costs for fees and expenses relating to the work of Dr. Gershwin. *See* Tab C at 4058, 4061, 4063, 4064, 4066.

[9] This decision resolves the $34,048.25 that WLOP requested for expenses related to Dr. Aposhian ($31,750.00 in fees; and $2,298.25 in expenses incurred in May 2008). This decision does not resolve the $207,382.53 in fees and expenses included in the PSC Committee Costs for costs relating to Dr. Aposhian, nor does it resolve the $7,910 requested by Williams Kherkher for costs associated with Dr. Aposhian. *See* Tab C at 3887 and Tab E at 4396-98.

[10] This does not resolve the vast majority of fees and expenses relating to Drs. Geier and Young. The majority of expenses relating to Dr. Geier, David Geier, and Dr. Young are included in the PSC Committee Costs, at Tab C of the initial Fee Application.

Powers have been the *primary actors* on behalf of the PSC in the OAP, representing the PSC in the course of the continuous interaction among the PSC, respondent's counsel, myself, and eventually the other two special masters added to the OAP in 2007. The *second stage* involved the development and presentation of the petitioners' evidence concerning the PSC's *second theory* of causation, in the *King*, *Mead*, and *Dwyer* cases in 2007-08. Messrs. Williams and Powers have represented the petitioners in *all three* of the "test cases" concerning that second theory, and have performed by far the largest share of the work in presenting the petitioners' "general causation" evidence concerning that theory.

To perform *both* of those crucial functions on behalf of the PSC and the autism petitioners, over a period of more than five years, simply required a very large expenditure of time by the WLOP attorneys during that period.

Second, the WLOP firm reasonably spent so many hours in their work concerning the PSC's second causation theory because the amount of scientific evidence relevant to the causation issue involved in that theory, evidence that that law firm was obligated to consider and analyze in prosecuting this case, was simply *massive*. A few statistics may give a flavor of the amount of material involved. The parties filed a total of 26 expert reports in this *King* case and the companion *Mead* and *Dwyer* cases. At the evidentiary hearings, 17 expert witnesses testified during the combined *King/Mead* hearing, and two experts during the *Dwyer* hearing. The hearing transcripts totaled 3294 pages for the *King/Mead* hearing, plus 337 pages in *Dwyer*.

In addition, in the three cases the parties filed a total of 1246 medical journal articles, medical textbook excerpts, or other items of medical literature (even after excluding from the count those documents that were filed in more than one case). Some of those items were extremely lengthy. (*E.g.*, RML 255, 199 pages; RML 6, 617 pages; PML 443, 342 pages.) I have not attempted to calculate the total number of pages of those 1246 documents, but clearly the total runs well into the tens of thousands of pages. And most of those documents are densely packed with difficult, technical information, so that studying even a medical journal article that is only a few pages long can require a lengthy time period. Further, the WLOP attorneys had to analyze extensive medical records, including 1061 pages of medical records in this *King* case alone.

Third, the *extreme complexity* of the material involved in the second theory is an important factor as well. The causation issues involved many different subspecialties of biology and medicine, including neurology, virology, immunology, molecular biology, toxicology, genetics, and epidemiology. Obviously, it took much time for WLOP lawyers involved in this case to familiarize themselves with so many varied and complex areas of medicine and science.

Fourth, one must consider, as well, the *extreme importance* of this case as a "test case." The WLOP counsel well knew that the outcome of this case would have significance for not only the King family, but also for 5,000 other families with pending Program petitions involving autism.

In light of all those factors, I find that the WLOP firm acted reasonably in expending a very large amount of time, and substantial costs, in (1) representing the PSC over the years 2003-2008, (2) assembling and presenting the petitioners' "general causation" evidence concerning the PSC's second theory of general causation, and (3) presenting the "specific causation" case on behalf of the King family.

B. The importance of fees awards in Program cases

Finally, it is important to realize that in the final analysis, the award for fees and costs issued in this case, as is true of fees/costs awards in all Program cases, will strongly benefit many *future* Program petitioners.

Simply put, the *ultimate purpose* of Program 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 counsel is crucial in enabling Program petitioners to prosecute their claims successfully, and in ensuring an adequate *level* of compensation in successful cases. Attorneys will agree to represent Program petitioners, 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 Program petitioners, such attorneys must be fairly compensated for their expenditures, in order to encourage attorneys to participate in future Vaccine Act cases.

In addition, in my view it is very important, for the families that have brought Program claims involving autistic children to this court, that the petitioners have had their chance to present their evidence concerning their theories about the causation of autism, and to get rulings from special masters concerning those theories. That evidence did not ultimately persuade the special masters who heard the "first theory" test cases, and it is not yet clear whether the "second theory" evidence will prove persuasive, but it is important that the theories were *presented and considered*. In other words, win or lose, it is very important that the autism petitioners have had their "day in court," or at least the first of their "days in court." And it was the WLOP firm that stepped forward to shoulder most of the burden of representing all of the autism petitioners for five years in the OAP, and in assembling and presenting the evidence in the "second theory" test cases. It is appropriate, therefore, that the firm is reasonably compensated for the time and expense spent in shouldering that heavy burden.

Accordingly, under all of the circumstances here, I conclude that it is appropriate for me to reasonably compensate the WLOP firm in this case for the work performed by the firm during the period in question. 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.

IV

UNDERSTANDING CONCERNING HOURLY RATES FOR WLOP

The parties have also notified me that they have reached an understanding concerning hourly rates for the WLOP firm that they desire to be applied to further fees requests in this *King* case, as well as WLOP fees requests in other Program cases.

The parties note that although they have agreed to appropriate hourly rates for WLOP in future fee requests in this *King* case, as well as WLOP fee requests in other Program cases, they reserve all respective rights with regard to establishing or challenging as reasonable under the Vaccine Act, all other aspects of a petition for attorneys' fees and costs. That is to say, the determination of the hourly rates, set forth below, is independent of other issues that must be determined in deciding the reasonableness of attorneys' fees and costs, which include, among others, jurisdictional issues, number of hours spent, and appropriate costs. These collateral areas of attorneys' fees and costs, exclusive of the agreed-upon hourly rates for WLOP set forth below, shall continue to be evaluated for appropriateness and reasonableness on a case-by-case basis consistent with the Vaccine Act.

The following schedule sets forth the parties' joint views on hourly rates to be applied to future fee applications submitted by WLOP. For time billed by WLOP from January 1 to December 31, 2007, the following hourly rates shall apply:

Mr. Michael Williams:	$325 per hour,
Mr. Thomas Powers:	$270 per hour, and
Firm paralegals:	$100 per hour.

For time billed by WLOP from January 1 to December 31, 2008, the following hourly rates shall apply:

Mr. Michael Williams:	$325 per hour,
Mr. Thomas Powers:	$280 per hour, and
Firm paralegals:	$105 per hour.

For time billed by WLOP from January 1 to December 31, 2009, the following hourly rates shall apply:

Mr. Michael Williams:	$325 per hour,
Mr. Thomas Powers:	$290 per hour, and
Firm paralegals:	$105 per hour.

For time billed by WLOP on or after January 1, 2010, WLOP will request hourly rates that reflect the 2009 rates adjusted upwards to accommodate annual changes in the national consumer price index (CPI-U),[11] and respondent will not object to such an annual "CPI" increase.

I note that I find those rates to be reasonable and appropriate.

V

CONCLUSION

For the reasons set forth above, I hereby make an "interim" award of fees and costs in this case, pursuant to 42 U.S.C. § 300aa-15(e), in the total amount of $2,300,000.00. That amount includes $2,070,000 in fees, and $230,000 in costs.

I also note that the amount awarded to the WLOP firm in this Decision resolves *all* of the fees and costs requested by that firm in the *King* interim fees application, at Tabs A & B of that application. This Decision does *not* resolve the amounts requested at Tabs C through U of that application.

In the absence of a timely motion for review of this Decision, the Clerk of this court shall enter judgment accordingly.

/s/ George L. Hastings, Jr.

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George L. Hastings, Jr.
Special Master

[11] For purposes of this agreement, the phrase "national consumer price index" is defined as the annualized average to average percent change as set forth at the Bureau of Labor Statistics Consumer Price Index History Table, currently found at ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt.