

Milstein; Roda Nast; Shoemaker & Associates; Robert Krakow; and The Kim Firm, for the reasons to be set forth below.

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

³The *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 § 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.

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.

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.

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.

On July 10, 2009, I issued an interim award for fees and costs attributable to the law firm representing the King family, Williams Love O’Leary & Powers. On July 27, 2009, I issued an interim award for fees and costs attributable to Ed Kraus, one of the attorneys on the PSC. This decision awards interim fees and costs to all of the other PSC member firms whose interim fees and costs requests remain pending.⁵ This decision awards interim fees and costs for work performed and costs incurred by the PSC firms through July 20, 2008.⁶

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 this award, as the parties had not yet resolved all firms’ fees and costs at the time of my previous two interim fees decisions in this case.

⁴The 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).

⁵This includes all law firms and attorneys who submitted requests with the PSC’s November 4, 2008, application, other than Shaheen & Gordon, and all subsequent modifications to the initial requests. Shaheen & Gordon withdrew its request for interim fees and costs on March 27, 2009, with the filing of the PSC’s “Reply In Support of Interim Fee Petition.”

⁶While some law firms’ requests spanned only a few years, the decision resolves all interim fees and all interim costs incurred by these individual firms, other than Tabs M, N, and Q, which were withdrawn. It does not include interim costs requested by the PSC Committee, which costs are contained at Tab C.

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).

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 objects to an interim fees and costs award on the grounds that, at this time, the PSC has not established that the claimed \$7,202,653.10 in interim fees and costs are reasonable. According to respondent, 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 undoubtedly 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.

After reviewing the entire record in this case and the Omnibus Autism Proceedings in general, I conclude that the amounts set forth herein are reasonable and appropriate compensation for the services provided by the following law firms and attorneys: Williams Kherkher; Lommen Abdo; The Miller Firm; Cohen Milstein; Roda Nast; The Shoemaker Firm; Robert Krakow; and The Kim Law Firm.

III

THE AMOUNT AWARDED IN THIS DECISION IS REASONABLE AND APPROPRIATE

Petitioners' counsel of record represents that the law firms and attorneys listed above agreed to reduce their interim attorneys' fees and costs request from over \$2.75 million to \$1,550,000.00 in fees and costs. Respondent's counsel has indicated that respondent will not object to that amount.⁷ After reviewing the entire record of this case, as well as the record of the Omnibus Autism Proceeding in general, I conclude that such amount, which I award in this Decision, is reasonable and appropriate compensation for the services in question provided by the PSC member firms.

Of note, this Decision resolves *all* fees and costs requested by the firms in the *King* interim fees application, at Tabs D through L and P through U of that application, as well as subsequent additions and modifications to those requests. Tabs A, B, and O were resolved in prior interim decisions. Tabs M and N, submitted on behalf of Shaheen & Gordon, were withdrawn by that firm in the PSC's March 27, 2009, Reply Brief. This Decision resolves all expert fees and costs submitted by the individual firms at Tabs D through L and P through U. This Decision does *not* resolve the amounts requested at Tab C of that application, which involve the PSC Committee Costs.⁸ In making this award, I do not make any specific allocation of fees or costs to any of the individual firms. It is my understanding that the firms participating in this interim petition, through the attorney of record in the *King* matter, will distribute this award pursuant to an agreement between those firms that they all have agreed is fair and reasonable.

In this regard, I am aware that the amount that I award in this Decision is very large. I take very seriously my duty and responsibility, in all Program cases, to award Program funds only in *reasonable and appropriate* amounts. However, given the unusual circumstances of this case, I conclude that the amount awarded in this decision is, in fact, reasonable and appropriate.

IV

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 \$1,550,000.00.

⁷I note that respondent's counsel indicated that respondent will not object to a \$1,550,000.00 award to these firms 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.

⁸ It is my understanding that the majority of expenses set forth in Tab C involve expert fees and costs.

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.

George L. Hastings, Jr.
Special Master