OFFICE OF SPECIAL MASTERS

No. 99-653V

(Filed: March 23, 2005)

* *	
JOANNE BAKER, legal representative for JONATHAN BAKER, *	
Petitioner, *	**TO BE PUBLISHED**
v. *	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, *	
Respondent. *	
* *	

ORDER DENYING MOTION FOR RECONSIDERATION[1]

On February 24, 2005, the undersigned issued a decision on fees and costs in this case. 2005 WL 589431 (Fed. Cl. Spec. Mstr.). On March 16, 2005, petitioner filed a Motion for Reconsideration of Special Master Millman's February 24, 2005 Decision by Petitioner's Counsel. On March 21, 2005, respondent filed Respondent's Response to Petitioner's Motion for Reconsideration of Decision Regarding Attorneys' Fees and Costs. On March 22, 2005, the

[1] Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and move to delete such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

undersigned filed by my leave Petitioner's Response to Respondent's Response to Petitioner's Motion for Reconsideration of Decision Regarding Attorney's Fees to which is attached a draft of Petitioner's Memorandum of Objections to Special Master Millman's February 24, 2005 Decision by Counsel, with 24 exhibits attached to the draft memorandum. This draft is obviously written for the purpose of appeal.

DISCUSSION OF THE LAW

As the Chief Judge of the United States Court of Federal Claims, the Honorable Edward J. Damich, states in Tritek Technologies, Inc. v. US, 2005 WL 318688, *13, ____ Fed. Cl. ____ (Feb. 7, 2005):

> The decision to grant a motion for reconsideration is within the scope of the Court's sound discretion. *Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990). A motion for reconsideration shall be granted only if the movant demonstrates "(a) an intervening change in the controlling law has occurred, (b) evidence not previously available has become available, or (c) that the motion is necessary to prevent manifest injustice." *Citizens Fed. Bank, FSB v. United States*, 53 Fed. Cl. 793, 794 (2002).

In Tritek, Chief Judge Damich granted in part and denied in part plaintiff's motion for reconsideration. The part that Chief Judge Damich granted dealt with defendants' discovery violations (failure to disclose non-infringement arguments) which hindered plaintiff's ability to amend its Claim Chart in a timely fashion. Holding that precluding plaintiff from arguing merely because it failed to so amend would be manifestly unjust, Chief Judge Damich permitted plaintiff to so amend in this patent infringement suit. Id.

However, Chief Judge Damich denied plaintiff's motion for reconsideration in part where it dealt with arguments plaintiff had already raised which Chief Judge Damich had rejected, stating

"a motion for reconsideration should not be used to merely reargue positions previously rejected [citing Stelco Holding v. US, 45 Fed. Cl. 541, 542 (2000)]." Id.

In CW Government Travel, Inc. v. US, 63 Fed. Cl. 459 (2005), the Honorable George W. Miller denied plaintiff's motion for partial reconsideration in a contracts case, stating: "A showing of extraordinary circumstances is necessary before a party may prevail on its motion for reconsideration [citing Fru-Con Constr. Corp. v. US, 44 Fed. Cl. 298, 300 (1999), aff'd, 250 F.3d 762 (Fed. Cir. 2000)]." 63 Fed. Cl. at 462.

As the Honorable Reginald W. Gibson stated in Aptus Co. v. US, 62 Fed. Cl. 808, 810-11 (2004):

> Motions for reconsideration should not be entertained upon "the sole ground that one side or the other is dissatisfied with the conclusions reached by the court, otherwise a losing party would generally, if not always, try his case a second time, and litigation would be unnecessarily prolonged" [citing Seldovia Native Ass'n Inc. v. US, 36 Fed. Cl. 593, 594 (1996) (quoting Roche v. District of Columbia, 18 Ct. Cl. 289, 290, 1800 WL 1263 (1883))].

Judge Gibson denied plaintiff's motion, noting that "a motion for reconsideration is not an invitation to re-argue the case." 62 Fed. Cl. at 812.

Petitioner's Motion for Reconsideration

In petitioner's Motion for Reconsideration, filed March 16, 2005, petitioner does not discuss on which of the three grounds she is basing her motion: (a) an intervening change in the controlling law has occurred, (b) evidence not previously available has become available, or (c) that the motion is necessary to prevent manifest injustice.

Petitioner's Motion for Reconsideration is a little over one page and states that the basis for the motion is "the inaccurate facts upon which" the undersigned based the February 24, 2005 decision, "including numerous correspondence between petitioner's counsel and Dr. Classen that

were not included or acknowledged in that decision, the failure by the court to acknowledge Dr. Classen's scientific training, the failure to award Dr. Classen any costs associated with his testimony, and the failure to award petitioner's counsel reasonable attorney fees and costs associated with the expert witness fee petition."

Respondent's Response criticizes petitioner's Motion for her failure to enumerate the specific inaccurate facts. Moreover, respondent states that petitioner had ample opportunity during numerous submissions of material while the attorney's fees and costs issues were pending to submit all of the material helpful to her assertions.

Petitioner's Draft of Petitioner's Memorandum

In Petitioner's Response to Respondent's Response to Petitioner's Motion, petitioner submits a draft of an appellate brief that concludes that the undersigned was arbitrary and capricious, abused her discretion, and was prejudiced against Dr. Classen. These grounds do not pertain to the three grounds for granting a Motion for Reconsideration as they do not show a change in controlling law, evidence that was not previously available, or a manifest injustice. The basic thrust of petitioner's draft of Petitioner's Memorandum of Objections is that, since the undersigned is arbitrary and capricious, Dr. Classen must be compensated at an hourly rate of $250.00 for more than 404 hours of his time.

1. Petitioner accuses the undersigned of misreading Dr. Classen's submissions. On the contrary, as detailed in the undersigned's opinion on fees and costs, the undersigned's opinion is based on all of Dr. Classen's submissions. In fact, the undersigned requested Dr. Classen to provide greater detail of his work and petitioner faxed a one-page invoice dated November 30, 2004, and a two-page letter from Dr. Classen to petitioner's counsel, also dated November 30, 2004, which the

undersigned filed by her leave on December 1, 2004. The undersigned fully considered all that petitioner filed to justify Dr. Classen's hours and hourly wage request.

2. Petitioner asserts that Dr. Classen had to prepare a lengthy monograph and other written material because there was no assurance that he would be testifying. But the general principle of the Vaccine Program is toward flexibility in permitting petitioners to put on the best cases they have, including expert witnesses. Since there had never been a case in the Vaccine Program going to hearing on the issue of whether vaccines cause type 1 diabetes, there was even more likelihood of going to hearing in the instant action. Petitioner's assertion that Dr. Classen had to expend enormous hours in writing a monograph and other reports on the off chance that petitioner would not be afforded a trial is unreasonable.

3. Petitioner asserts that there was material that the undersigned did not consider in arriving at an opinion on fees and costs. She attaches 24 exhibits to her motion for reconsideration. But exhibits 1-12, 14-18, 20, and 21describe activities whose existence was known to petitioner before the undersigned's February 24, 2005 decision on fees and costs, yet petitioner did not file these exhibits prior to that decision. Petitioner waives compensation on those items. Exhibits 13 and 19 are already in the record, being some of Dr. Classen's letters to petitioner's counsel. The undersigned has already evaluated the amount of time Dr. Classen should have expended on writing them and compensated him accordingly. Exhibits 22-23 are invoices dated March 21, 2005, for activities dating both before and after the February 24, 2005 decision. It would be impossible for the undersigned to consider material before writing her decision for which petitioner did not bill until after her decision. Petitioner waives compensation on these items as well.

Exhibit 24 was filed with the original fee petition on October 1, 2004. Exhibit 24 reflects telephone calls from petitioner's counsel to respondent's counsel regarding the fee petition and to Dr. Classen, in the total of .8 of an hour. It also reflects petitioner's counsel expending two hours for "Fee Petition to court" without any explanation of what he did with those two hours. The rest of exhibit 24 lists the cost of postage and of photocopies, and one hour expended in a letter to respondent's counsel with the date of June 24, 2004. The undersigned assumes that these costs and hours were included in the $58,700.00 to which the parties agreed on November 15, 2004 that petitioner should be paid.

As respondent notes on p. 5 of respondent's response to petitioner's motion for reconsideration, petitioner had nearly five months from the initial filing for fees and costs on October 1, 2004 and the undersigned's decision on fees and costs on February 24, 2005 to prepare a careful and thorough fee petition supplemented, on request from the undersigned, with more specificity. Moreover, during that time period, on November 15, 2004, respondent filed a 12-page response in opposition to petitioner's request for Dr. Classen's fees, certainly enabling petitioner to evaluate the type of evidentiary proof she needed to file with the court.

4. Petitioner filed a Statement on November 15, 2004, noting her agreement on fees and costs for $58,700.00 with respondent, excluding Dr. Classen's fees and costs. She states that both parties agreed that petitioner may incur further fees and costs associated with Dr. Classen's fee petition, to be added to the $58,700.00. But petitioner never filed for these additional fees and costs before the February 24, 2005 decision on fees and costs. Only now, after the decision on fees and costs has been issued, has petitioner put together 24 exhibits and launched into detailed arguments about what is owed to Dr. Classen and to petitioner for costs associated with the fee petition

regarding Dr. Classen. The undersigned is not in the role of guessing what is a "reasonable amount for petitioner's counsel's fees and costs associated with the expert witness fee petition of Dr. Barthelow Classen." Statement of November 15, 2004. Petitioner's burden was to prove, by documenting hours, what her counsel did in association with Dr. Classen's fee. Petitioner failed to satisfy her burden.

5. The emphatic tone used in petitioner's motion for reconsideration reflects petitioner's accusation that the undersigned should have valued Dr. Classen's testimony in her decision on entitlement.[2] Presumably, had the undersigned esteemed Dr. Classen's testimony, petitioner would have prevailed. But the time for appealing the opinion on entitlement is long past, and petitioner did not avail herself of the opportunity of appealing the undersigned's opinion within the statutory time limit.[3] A motion for reconsideration and even an appeal of the undersigned's decision on fees and

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[2] Petitioner also comments that no epidemiologist is board-certified, as if this excused Dr. Classen from not being board-certified in any specialty, including immunology in which he claims expertise and so presented himself in this case.

[3] On January 7, 2004, 103 days after the undersigned's opinion on entitlement of September 26, 2003, petitioner filed a motion for review with the Federal Circuit instead of filing a motion for review within 30 days of the undersigned's opinion. Then, 228 days after the undersigned's opinion, petitioner filed a motion for review pro se with the U.S. Court of Federal Claims. The Honorable Bohdan A. Futey dismissed petitioner's motion on July 7, 2004, which he reissued for publication on August 31, 2004. Baker v. Sec'y of HHS, No. 99-653, 61 Fed. Cl. 669. Petitioner filed an "objection to [respondent's] motion," deemed filed on July 14, 2004, which Judge Futey interpreted as a motion for reconsideration, alleging that she had filed a letter within 30 days of the undersigned's opinion of September 26, 2003, with a corresponding copy to respondent's counsel. When Judge Futey learned that the respondent's counsel listed on that letter was not the counsel of record at the time, he suspected that petitioner had perpetrated a fraud upon the court and, in his Order denying petitioner's motion for reconsideration, filed September 1, 2004, Judge Futey stated, "In sum, the court is deeply troubled by petitioner's most recent submission and seriously questions its authenticity. Petitioner is placed on notice that the gravity of the inconsistencies and discrepancies in her most recent submission have not escaped the court. Whether the submission was prepared by petitioner herself, or with the assistance of an attorney, there is certain conduct which has no place in legal proceedings. Such conduct is

costs is not the appropriate time for challenging the undersigned's opinion of the credibility and expertise of Dr. Classen enunciated in the undersigned's opinion on entitlement.

The undersigned's analysis of Dr. Classen's qualifications and testimony is fully described in her opinion on entitlement. Baker v. Sec'y of HHS, No. 99-653V, 2003 WL 22416622 (Fed. Cl. Spec. Mstr., Sept. 26, 2003). The undersigned's analysis of hourly rate and amount of hours to award petitioner for Dr. Classen's work in this case is also fully described in her opinion on fees and costs. As respondent noted in Respondent's Response, p. 4:

> It is well settled that a motion for reconsideration is not, however, a vehicle "intended to give an unhappy litigant an additional chance to sway the court" [citing Fre-Con Construction Corp. v. US, 44 Fed. Cl. 298, 301 (1999) omitting internal citations]. Nor are "[t]he rulings of a court ... mere first drafts subject to reconsideration and revision at a litigant's pleasure" [citing Fre-Con, quoting Quaker Alloy Casting Co. V. Gulfco Indus., 123 F.R.D. 282, 288 (N.D. Ill. 1988)].

6. Petitioner asserts that Dr. Classen began working on this case before petitioner hired counsel, at p. 12 of her draft memorandum. The undersigned based her decision on fees and costs on the material that petitioner submitted. Any material that petitioner failed to submit is not new evidence. Petitioner waived reimbursement for any contacts that petitioner had with Dr. Classen but for which petitioner did not provide any documentation.

7. Petitioner asserts at p. 13 that Dr. Classen reviewed 187 pages of medical records but this review has no bearing on this case. Petitioner's son's medical records do not offer support for her assertion that vaccinations cause type 1 diabetes. All of Dr. Classen's reports, including his monograph, and his testimony deal not with these 187 pages of medical records, but with his own

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highly inappropriate and will not be tolerated." Baker v. Sec'y of HHS, Order of the Honorable Bohdan A. Futey, at 4 (Fed. Cl., Sept. 1, 2004).

epidemiologic analyses of cases, primarily in Finland, and work he has been publishing over the last decade. The undersigned has already addressed the reasonableness or lack thereof of Dr. Classen's assertion that he should be compensated for spending 186.5 hours to write a monograph in this case.

8. Petitioner asserts at pp. 14-16 that the undersigned did not compensate Dr. Classen for his telephone conversations with petitioner's counsel or other work he performed in responding to respondent's experts' reports. This assertion ignores the fact that the undersigned did compensate Dr. Classen for all the telephone conversations petitioner's counsel listed in his own submissions for compensation for fees and costs and estimated what a reasonable amount of time would be for responding to respondent's experts' reports. If petitioner had telephone records that were available at the time she made her fee request but failed to file them, her attempt to remedy her failure to provide documentation is not new evidence justifying a granting of petitioner's motion for reconsideration. Petitioner waived compensation for any telephone calls for which she did not produce documentation at the time the issue of fees and costs was pending. Moreover, if there is any additional documentation that describes Dr. Classen's work in responding to respondent's experts' reports, petitioner waived compensation by not filing it. Such documentation is not new evidence which was unavailable to petitioner at the time the issue of fees and costs was pending.

Petitioner has not proved an intervening change in the controlling law, evidence not previously available has become available, or manifest injustice unless the motion is granted. The undersigned considers the award of $15,860.00 to Dr. Classen for fees at an hourly rate of $200.00 to be reasonable and fair.[4]

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[4] Petitioner's comparison at p. 21 of how respondent pays respondent's experts is irrelevant to the issue at hand. Respondent engages by contract with respondent's experts and the undersigned has no role or interest in what respondent pays respondent's experts.

CONCLUSION

Petitioner has not satisfied any of the three prongs required to support the granting of a motion for reconsideration. Petitioner's motion for reconsideration is therefore denied.

IT IS SO ORDERED.

_______________________ _____________________________

DATE

Laura D. Millman
Special Master