

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-458 V

Filed: February 14, 2011

For Publication

SAMUEL HABER and LYNN HABER,
as parents and natural guardians of
GARY HABER,

Petitioners,

v.

SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Respondent.

Attorneys' Fees and Costs;
Guardianship Costs

Anne Toale, Sarasota, FL, for petitioners.

Katherine Esposito, Washington, D.C., for respondent.

MILLMAN, Special Master

DECISION AWARDING ATTORNEYS' FEES AND COSTS¹

Petitioners filed an application for attorneys' fees and costs on January 28, 2011. Petitioners supplemented their application with additional documentation on February 1, 2011 and February 10, 2011. On February 11, 2011 Respondent filed a response to Petitioners' application. On that same day, Petitioners filed a reply to Respondent's response.

Petitioners originally requested \$29,338.21 in attorneys' fees and costs, representing \$26,270.50 in fees and \$3,067.71 in costs. See Pet. Fee. App., Ex. A. After conferring with Respondent's counsel, Petitioners reduced their request to \$27,338.21 for attorneys' fees and

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 constitute a clearly unwarranted invasion of privacy. When such a decision 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.

costs. Respondent does not object to compensation in the amount of **\$27,338.21**. The undersigned finds this amount to be reasonable.

In accordance with the General Order #9 requirements, petitioners state they incurred **\$2,500.00** in costs to pursue their petition. Respondent does not agree to petitioners' costs. Petitioners' costs are addressed below.

Guardianship Costs

Petitioners urge the Special Master to award fees and costs for the establishment of a guardianship trust, arguing that costs incurred in a guardianship proceeding for the benefit of the vaccine-injured individual are the direct result of Respondent's requirements. Respondent, on page 3, paragraph 13 of the stipulation filed on October 4, 2010 in the damages portion of the case, required Petitioners to establish and become guardians of the estate of Gary Haber within 90 days of the date of judgment as a condition of the stipulation. Stipulation, filed October 4, 2010 at p. 3.

Respondent contends that neither fees nor costs incurred in a guardianship proceeding are reimbursable as a matter of law, citing *Mol v. Secretary of HHS*, 50 Fed.Cl. 588, 591 (2001), and *Siegfried v. Secretary of HHS*, 19 Cl.Ct. 323, 325 (1990).

The issue of whether guardianship expenses are reimbursable has been the center of substantial debate. The judges and special masters who have found guardianship expenses not to be reimbursable have done so while relying on the premise that costs arising from a guardianship proceeding are not "incurred in any proceeding on [a Vaccine] petition" filed in the Court of Federal Claims. § 300aa-15(e)(1)(B); *Mol v. Secretary of HHS*, 50 Fed. Cl. 588, 591 (2001) (citing *Siegfried v. Secretary of HHS*, 19 Cl.Ct. 323, 325 (1990), and *Lemon v. Secretary of HHS*, 19 Cl.Ct. 621, 623 (1990)); see also *Zeman v. Secretary of HHS*, No. 92-0240V, 1994 WL 325425 (Fed. Cl. Spec. Mstr. 1994).

These decisions are not binding authority on special masters,² and while they constitute persuasive authority, the undersigned respectfully disagrees that the Respondent may require guardianship in order to receive an award but not pay for the costs of establishing a guardianship. Not only did Respondent require the establishment of a guardianship in the Stipulation, but this Court adopted the provisions of that Stipulation in issuing a damages award. The issuance of that award squarely placed the issue of guardianship, and the accompanying costs, within the purview of a proceeding on a vaccine petition.

The persuasiveness of decisions by the U.S. Court of Federal Claims judges makes discussion of the *Siegfried* and *Mol* Decisions advisable. In *Siegfried*, the court found that work

² See *Ceballos v. HHS*, 2004 WL 784910, at *22 (Fed. Cl. Spec. Mstr. 2004) (where a special master, ruling after *Mol*, found that costs associated with establishing a guardianship are compensable if ordered by the court as part of the process of providing compensation to a petitioner).

done incidentally to a Vaccine Act petition in a probate court was not reimbursable because it was not a “proceeding under [the vaccine injury] petition.” 19 Cl.Ct. 323, 325. The court stated that “[t]he Act does not provide attorney fee awards to cover the myriad legal implications of establishing or administering an estate. Rather the Act provides reasonable fee awards for work by petitioners' attorney during the pendency of a petition before a special master, the Claims Court, the United States Court of Appeals for the Federal Circuit, or the Supreme Court.” *Id.* In *Siegfried*, the court identified an important distinction that should be respected: that is, compensation is unavailable for *myriad* legal implications unrelated to the vaccine petition. This case does not present *myriad* legal implications related to the administration of an estate. Costs in dispute here for Gary Haber’s guardianship relate only to Respondent’s demand which the undersigned adopted in her damages decision. Therefore, the distinction identified in *Siegfried* is inapplicable here.

In *Mol v. HHS*, the court decided against a broad “but for” test in determining what costs are reimbursable under a Vaccine Act petition, stating that: “[i]f the court interpreted the Act in such a way that fees incurred to establish guardianships were compensable, under the theory that they would not have been incurred but for the receipt of the vaccine award, any number of “but for” expenses would have to be compensable including a wide variety of probate matters.” *Mol v. Secretary of HHS*, 50 Fed.Cl. 588, 591 (2001).

Assuming *arguendo* that *Mol* was correct in determining that a “but-for” test is inadequate to address the issue of guardianship expenses, a “but for” test is not necessary here to award those expenses. Instead, a *sine qua non* analysis is all that is needed. If Respondent requires an essential prerequisite condition be fulfilled in order for an award to be made, awarding the fees and costs associated with fulfilling such a *sine qua non* is appropriate and reasonable. This very limited analysis respects the persuasive authority of *Mol* while similarly respecting equity, and the prevailing policy of generosity and preservation of the vaccine award in this case.

This analysis also recognizes that guardianship expenses, including both fees and costs, arise during the damages portion of a Vaccine Act case. They specifically arise from Respondent’s requirements in stipulations settling damages. The special master controls all of the proceedings on damages; however, not all of the “proceedings” necessarily occur before the special master. In fact, a broad variety of activities occurs as required components of establishing damages, such as consulting with life care planners, independent medical examinations, lost wages economist consultations, and third party mediation. Each of these activities occurs pursuant to the special master’s order or within the purview of her authority but none occurs directly before the special master.

Moreover, many of these activities occur due to the demands of the Respondent. They are routinely reimbursed without Respondent’s objection, as they are costs incurred on a Vaccine

Act petition and as part of prosecuting the claim. Special Master Golkiewicz opined that “it is unconscionable to request, negotiate or demand [a guardianship] for the recipient of the vaccine funds and then shift the costs to the parent . . . [R]espondent's position on this close issue is shortsighted and threatens their stated policy, a very good policy, of protecting the minor's vaccine award.” See *Ceballos ex rel. Ceballos v. Secretary of HHS*, 2004 WL 784910 (Fed.Cl. Spec Mstr. 2004). The establishment of a guardianship, in this case, was also demanded by Respondent. Stipulation, p. 3.

Petitioners point to a growing line of cases finding that guardianship fees and costs are reimbursable. See *Gruber v. Secretary of HHS*, 2009 WL 2135739 (Fed.Cl. Spec. Mstr. 2009), vacated on other grounds, 91 Fed.Cl. 773 (2010); *Thomas v. Secretary of HHS*, 1997 WL 74664 (Fed Cl. Spec. Mstr. 1997); *Velting v. Secretary of HHS*, 1996 WL 937626 (Fed Cl. Spec. Mstr. 1996). In *Gruber*, Special Master Vowell quoted congressional history regarding the purpose of the Vaccine Act: “ ‘In adopting the Vaccine Act, Congress sought to “establish a Federal ‘no-fault’ compensation program under which awards can be made to vaccine-injured persons quickly, easily, and with certainty and generosity.’ H.R.Rep. No. 99-908, at 3 (2d Sess.1986), reprinted in 1986 U.S.C.C.A.N. 6334, 6343.” *Loving v. Secretary of HHS*, 86 Fed. Cl. 135, 141 (2009). Special Master Vowell went on to state that although the court did not directly address fees and costs in *Loving*, it stands to reason that “when the costs incurred are for the benefit of the vaccine-injured individual and the reason for incurring the cost is directly related to how the damage award is administered, common sense would suggest that reasonable guardianship costs are reimbursable, as no award on a petition will be paid by respondent until the guardianship is established.” *Gruber*, 2009 WL 2135739, fn. 17.

This trend of using common sense to award guardianship costs when they are mandated as a *sine qua non* of receiving a vaccine damages award should continue. The undersigned recently issued two decisions reinforcing this common-sense trend of awarding guardianship costs. See *Finet v. Secretary of HHS*, No. 03-348V, 2011 WL ____ (Fed. Cl. Spec. Mstr. 2011); *Cansler v. Secretary of HHS*, No. 09-596V, 2011 WL ____ (Fed. Cl. Spec. Mstr. 2011). In both cases, Respondent elected to accept judgment without appeal. In the undersigned’s view, it is a waste of time for respondent to continue to object to reimbursement of guardianship costs when respondent makes obtaining guardianship a condition precedent for the payment of funds to which the parties have stipulated and the undersigned has adopted that stipulation in awarding compensation. The undersigned finds Petitioners’ request for \$2,500.00 in guardianship costs to be reasonable.

Conclusion

The court hereby awards compensation in the amount of **\$27,388.21**, representing reimbursement for attorneys’ fees and costs. The award shall be in the form of one check made jointly payable to petitioners and Maglio Christopher & Toale, PA in the amount of **\$27,388.21**.

The court further finds Petitioners' request for reimbursement for guardianship expenses in the amount of \$2,500.00 to be reasonable. The court awards **\$2,500.00**, which shall be in the form of one check made payable solely to petitioners.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.³

IT IS SO ORDERED.

Dated: February 14, 2011

/s/ Laura D. Millman

Laura D. Millman
Special Master

³ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.