

# OFFICE OF SPECIAL MASTERS

(Filed: December 29, 2005)

THAD EDWARD RIPPY,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 98-0795V
	)	DO NOT PUBLISH
SECRETARY OF	)	
HEALTH AND HUMAN SERVICES,	)	
	)	
Respondent.	)	

## DECISION ON ATTORNEY'S FEES AND COSTS<sup>1</sup>

Petitioner, Thad Edward Rippy (Mr. Rippy), seeks an award of \$21,756.00 in attorney's fees, \$7,128.69 in attorney's costs, and \$23,504.00 in medical expert's fees for an action that he pursued successfully under the National Vaccine Injury Compensation Program (Program).<sup>2</sup> *See* Petition for Award of Attorneys Fees, Expenses and Expert Fees (Fee Petition) at 1. Mr. Rippy's attorney of record, Douglas D. Small, Esq. (Mr. Small), claims 117.60 hours. *See id.* Mr. Small requests \$185.00 an hour. *See id.* Mr. Rippy's medical expert, J. Barthelow Classen, M.D. (Dr. Classen), claims 94.02 hours. *See* Fee Petition at 21.<sup>3</sup> Dr. Classen requests \$250.00 an hour. *See id.*<sup>4</sup>

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<sup>1</sup> As provided by Vaccine Rule 18(b), 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). Otherwise, "the entire decision" will be available to the public. *Id.*

<sup>2</sup> The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

<sup>3</sup> Dr. Classen's billing method is not entirely clear. It appears that Dr. Classen is charging for *fractions* of *minutes*. For example, .02 hours equates to 1.2 minutes, or 1 minute and 12 seconds.

<sup>4</sup> Mr. Rippy's scientific expert, Bonnie Dunbar, Ph.D. (Dr. Dunbar), waives her claim to  
(continued...)

Mr. Rippy received Program compensation. Therefore, the Act mandates the award of “reasonable attorneys’ fees” and “other costs.” § 300aa-15(e)(1). Nevertheless, respondent contests two aspects of the Fee Petition. First, respondent objects generally to \$600.00 in “attorney time and expenses.” See Respondent’s Opposition to Petitioner’s Application for Attorneys’ Fees and Costs (Opposition) at 1. Mr. Rippy accedes to respondent’s objection. See *id.* Second, respondent objects strenuously to Dr. Classen’s charges. Citing substantial portions of *Baker v. Secretary of HHS*, No. 99-0653V, 2003 WL 22416622 (Fed. Cl. Spec. Mstr. Sept. 26, 2003), an entitlement decision containing Special Master Laura Millman’s sharp criticisms of Dr. Classen’s credentials, see Opposition at 5-7, respondent contends that Dr. Classen’s charges are “exorbitant.” Opposition at *Id.* at 3. Respondent asserts that Dr. Classen has failed to substantiate his hourly rate, see *id.* at 3-7, and the number of hours that he expended. See *id.* at 7-11.

“Petitioners are not given a blank check to incur” attorneys’ fees and costs. *Perreira v. Secretary of HHS*, 27 Fed. Cl. 29, 34 (1992). A petitioner must support in all instances the reasonableness and the necessity of the fees, hours or costs. See, e.g., *Wilcox v. Secretary of HHS*, No. 90-0991V, 1997 WL 101572 (Fed. Cl. Spec. Mstr. Feb. 14, 1997); *Wasson v. Secretary of HHS*, No. 90-0208V, 1991 WL 135015 (Cl. Ct. Spec. Mstr. July 5, 1991), *remanded* 24 Cl. Ct. 482 (1991), *aff’d* 988 F.2d 131 (Fed. Cir. 1993); *Crossett v. Secretary of HHS*, No. 89-0073V, 1990 WL 293878 (Cl. Ct. Spec. Mstr. Aug. 3, 1990). In reviewing a fee petition, the special master may invoke the special master’s experience to reduce aspects of the fee petition that are not reasonable. See, e.g., *Saxton v. Secretary of HHS*, 3 F.3d 1517 (Fed. Cir. 1993).

In *Baker v. Secretary of HHS*, No. 99-0653V, 2005 WL 589431 (Fed. Cl. Spec. Mstr. Feb. 24, 2005), *reconsideration denied*, 2005 WL 834647 (Fed. Cl. Spec. Mstr. Mar. 23, 2005), a decision on attorneys’ fees and costs, Special Master Laura Millman addressed an appropriate hourly rate for Dr. Classen’s participation in a Program case alleging vaccine-related insulin-dependent diabetes mellitus (IDDM) that proceeded to a hearing on medical issues. Special Master Millman deemed \$200.00 an hour to be “a fair market rate” for Dr. Classen. *Baker v. Secretary of HHS*, No. 99-0653V, 2005 WL 589431, at \*5. Special Master Millman reasoned that Dr. Classen is essentially a “part-time, untrained, uncertified epidemiologist/immunologist,” *id.* at \*3, who is not “recognized by professionals” in the fields in which “he holds himself out as an expert.” *Id.* at \*5. A judge of the United States Court of Federal Claims affirmed Special Master Millman’s decision. See *Baker v. Secretary of HHS*, No. 99-0653V, slip op. (Fed. Cl. June 21, 2005) (<http://www.uscfc.uscourts.gov/Unpublished%20Decisions/Futey.Baker.pdf>).

In *Britton v. Secretary of HHS*, No. 02-0094V, this special master described Special Master Millman’s attorneys’ fees and costs decision in *Baker* as “especially instructive.” *Britton v. Secretary of HHS*, No. 02-0094V, slip op. at 3 (Fed. Cl. Spec. Mstr. July 11, 2005) (<http://www.uscfc.uscourts.gov/Unpublished%20Decisions/edwards.BRITTON.pdf>). Thus, this special master awarded \$200.00 an hour for Dr. Classen’s work in the case. *Id.* at 4. In *Presley v.*

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<sup>4</sup>(...continued)

“any payment for her work in performing research and preparing a report.” Fee Petition at 1, ¶ 3.

*Secretary of HHS*, No. 98-0417V, Chief Special Master Gary J. Golkiewicz adopted also the rationale in *Baker*, granting \$200.00 an hour for Dr. Classen's work in the case. *See Presley v. Secretary of HHS*, No. 98-0417V, slip op. at 7 (Fed. Cl. Spec. Mstr. July 12, 2005)(<http://www.uscfc.uscourts.gov/Unpublished%20Decisions/Golkiewicz.Presley2.PDF>). Chief Special Master Golkiewicz considered the rate to be "very generous." *Id.* Indeed, Chief Special Master Golkiewicz suggested apparently in a previous order in *Presley* that Dr. Classen should receive no more than \$175.00 an hour. *See id.* at 6.

Mr. Rippy contends that Dr. Classen merits \$250.00 an hour because the rate "is well within the range of hourly rates sought and paid the experts in other [Program] cases, including the rates paid to" respondent's experts. Petitioner's Reply to Respondent's Opposition to Application for Attorneys' Fees and Costs (Reply) at 6. Moreover, Mr. Rippy suggests that the failure to pay Dr. Classen \$250.00 an hour "would greatly handicap claimants in their ability to obtain expert witnesses." *Id.* at 9. However, Mr. Rippy misses the critical issue: Dr. Classen is merely a self-professed expert whose credentials and experience are not in the least comparable to petitioners' experts and respondent's experts who command \$250.00 and upwards an hour.<sup>5</sup> Thus, Mr. Rippy does not advance a persuasive basis for the special master to depart from *Baker*, *Britton* and *Presley*. Therefore, the special master allows \$200 an hour for Dr. Classen's work in the case.

Whether the number of hours that Dr. Classen represents he worked in this case is reasonable is the more vexing issue. Dr. Classen dedicated clearly some time to the case. After all, Dr. Classen produced an initial report in April 1999, *see* Submission of Petitioner's Expert Report, filed April 15, 1999; a supplemental report in July 1999, *see* Submission of Petitioner's Expert Report of Bonnie S. Dunbar, Ph.D. and Supplemental Statement of J. Barthelow Classen, M.D., M.B.A., filed August 6, 1999; an affidavit supporting Mr. Rippy's motion for third-party discovery, *see* Affidavit of J. Barthelow Classen, M.D., M.B.A., filed March 31, 2000; and a supplemental affidavit supporting Mr. Rippy's motion for third-party discovery. *See* Notice of Filing Supplemental Affidavit of J. Barthelow Classen, M.D., M.B.A., filed June 23, 2000. In addition, Mr. Small's time records reflect that Mr. Small and Dr. Classen consulted occasionally by telephone regarding the case. Further, Mr. Small's time records reflect that Mr. Small sent to Dr. Classen at least six letters during the course of proceedings. The special master may assume surely that Dr. Classen reviewed the letters.<sup>6</sup>

Nevertheless, Dr. Classen's billing submissions do not justify Dr. Classen's claim of 94.02 hours. Dr. Classen has proffered four documents: a summary invoice, *see* Fee Petition,

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<sup>5</sup> Indeed, the special master encouraged respondent to pursue an informal resolution of the case despite Dr. Classen's designation as one of Mr. Rippy's medical experts.

<sup>6</sup> Dr. Classen accounts for reviewing in June 2000 a letter from Mr. Small. *See* Fee Petition, Attachments. However, the special master cannot discern what letter Dr. Classen reviewed because Mr. Small's time records do not indicate that Mr. Small sent to Dr. Classen a letter in June 2000. *See* Fee Petition at 11-12.

Attachments; a letter identifying tasks that he performed during broad ranges of dates, *see* Fee Petition, Attachments; a tally that lists simply dates, start times, stop times, hours and minutes, *see* Fee Petition, Attachments; and a statement of “[a]pproximate time” devoted to tasks that he performed during broad ranges of dates. Reply, Attachments. None of the submissions assists particularly the special master. Dr. Classen’s tally does not contain any description of the tasks associated with the listed dates and times. Moreover, Dr. Classen’s tally indicates that Dr. Classen started and stopped often work in small segments, sometimes in increments as little as one minute. As Chief Special Master Golkiewicz noted in *Presley*, Dr. Classen’s “sporadic work pattern is inherently inefficient,” leading obviously to “greater time needed to complete a task.” *Presley v. Secretary of HHS*, No. 98-0417V, slip op. at 9, n.8 (Fed. Cl. Spec. Mstr. July 12, 2005)(<http://www.uscfc.uscourts.gov/Unpublished%20Decisions/Golkiewicz.Presley2.PDF>). In addition, Dr. Classen’s statement of time appears to have been generated retrospectively, unsupported by actual time records. *See, e.g., Presley v. Secretary of HHS*, No. 98-0417V, slip op. at 9 (Fed. Cl. Spec. Mstr. July 12, 2005)(<http://www.uscfc.uscourts.gov/Unpublished%20Decisions/Golkiewicz.Presley2.PDF>).

Likewise, Dr. Classen’s self-promotion as an expert in vaccines and autoimmunity does not justify Dr. Classen’s claim of 94.02 hours. Indeed, as Chief Special Master Golkiewicz observed in *Presley*, Dr. Classen’s status as an “expert” is not consistent “with [Dr. Classen’s] request for an extremely large number of hours.” *Presley v. Secretary of HHS*, No. 98-0417V, slip op. at 7 (Fed. Cl. Spec. Mstr. July 12, 2005)(<http://www.uscfc.uscourts.gov/Unpublished%20Decisions/Golkiewicz.Presley2.PDF>). Rather, “[i]f in fact Dr. Classen does possess such a high level of expertise, it follows that he should require fewer hours to perform” his work. *Id.*, citing *Plott v. Secretary of HHS*, No. 92-0633V, 1997 WL 842543, at \*2 (Fed. Cl. Spec. Mstr. Apr. 23, 1997).

The special master determines that he must invoke his experience to reduce Dr. Classen’s hours to an appropriate number. The special master’s experience encompasses, at a minimum, the special master’s 14-year tenure; the special master’s involvement in *Britton* and the special master’s understanding of *Baker* and of *Presley*. Based upon his experience, the special master allows 12.5 hours for the preparation of Dr. Classen’s initial report in the case; 3 hours for the preparation of Dr. Classen’s supplemental report in the case; 3 hours for the preparation of Dr. Classen’s initial affidavit supporting third-party discovery; 1 hour for the preparation of Dr. Classen’s supplemental affidavit supporting third-party discovery; 10 hours for correspondence and telephone consultations with Mr. Small; and .5 hours for preparation of Dr. Classen’s billing submissions. Thus, the special master grants 30 hours for Dr. Classen’s participation in the case.

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment in Mr. Rippy’s favor for \$34,284.69. The sum represents the total of \$28,284.69 in

attorney's fees and attorney's costs<sup>7</sup> and \$6,000.00 in medical expert's fees.<sup>8</sup> The judgment shall provide that Mr. Small may collect \$34,284.69 from Mr. Rippy.<sup>9</sup> Under Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

The clerk of court shall send Mr. Rippy's copy of this decision to Mr. Rippy by overnight express delivery.

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John F. Edwards  
Special Master

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<sup>7</sup>  $(\$21,756.00 + \$7,128.69) - \$600.00$ .

<sup>8</sup> 30 hours x \$200.00/hour.

<sup>9</sup> The calculation assumes that, in keeping with typical Program practice, Mr. Small is responsible for disbursing \$6,000.00 to Dr. Classen for his fee.