

Appeal No. 2010-5089

United States Court of Appeals
for the
Federal Circuit

KIT CARSON, a minor child, by his parents and natural guardians,
AMY CARSON and STACEY CARSON,

Petitioners-Appellants,

– v. –

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
IN 02-VV-873, JUDGE MARY ELLEN COSTER WILLIAMS

**BRIEF OF *AMICUS CURIAE* AUTISM INTERNATIONAL
ASSOCIATION, INC., d/b/a AUTISM ONE IN SUPPORT OF
COMBINED PETITION FOR REHEARING AND
REHEARING *EN BANC***

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October 29, 2013

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Carson v. H.H.S.

No. 2010 - 5089

CERTIFICATE OF INTEREST

Counsel for Amicus Curiae Autism International Association, Inc., doing business as Autism One certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Autism International Association, Inc. doing business as Autism One
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Not applicable.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

Not applicable.
4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Robert J. Krakow of Law Office of Robert J. Krakow, P. C.

October 29, 2013

Date



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TABLE OF CONTENTS

	<i>Page</i>
CERTIFICATE OF INTEREST.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF INTEREST OF AMICUS CURIAE.....	1
INTRODUCTION AND SUMMARY.....	1
ARGUMENT.....	3
A. Speech Delay Is Not An Accurate Marker of the Onset of Autism and Should Not Be Used to Determine When a Claim Accrues.....	3
B. The Statute of Limitations Should Begin on Determination of “Manifestation of Onset” Based on Contemporaneous Medical Information Objectively Recognizable by the Medical Profession At Large.....	7
CONCLUSION.....	10
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Page(s)

Cases

Carson v. Sec’y of Health & Human Servs.,
727 F.3d 1365, 1373 (Fed. Cir. 2013).....5, 6, 9, 10

Markovich v. Sec’y of Health & Human Servs.,
447 F.3d 1353, 1361 (Fed. Cir. 2007).....3, 6, 8, 9

Setnes v. United States,
57 Fed.Cl. 175, 181 (2003))..... 6, 7, 8

Wilkerson v. Sec’y of Health & Human Servs.,
593 F.3d 1343 (Fed. Cir. 2010).....6, 9

Rules

Rule 35 of the Federal Rules of Appellate Procedure.....1

Medical Literature

Anke Buschmann et al.,
Children with Developmental Language Delay at 24 Months of Age,
50 J. Developmental Med. & Child Neurology 223 (2008).....4

Ulla Ek et al., *Teenage Outcomes after Speech
and Language Impairment at Preschool Age*,
8 Neuropsychiatric Disease and Treatment 221 (2012).....4

Alexander K.C. Leung and C. Pion Kao,
Evaluation and Management of the Child with Speech Delay,
59 Am. Fam. Physician 3121 (1999).....4

Weismer et al., *Early Language Patterns of Toddlers on the Autism
Spectrum Compared to Toddlers with Developmental Delay*,
40 J. Autism Dev. Disor. 1259 at 1260 (2010).....5

STATEMENT OF INTEREST OF AMICUS CURIAE

Based upon my professional judgment, I believe the Panel decision in this appeal requires an answer to one or more precedent-setting questions of exceptional importance: Whether speech delay, a common childhood occurrence, is a “first symptom” of autism for purposes of accrual of a claim.

This Court has held that speech delay, without more, is a first symptom of vaccine injury, thereby triggering the statute of limitations under the Vaccine Act as the first symptom objectively recognizable as a sign of a vaccine injury by the medical profession at large, even though neither Kit Carson’s (hereinafter Kit) pediatricians or his parents identified autism at that time.

Since variation in speech development in children is recognized as normal, its occurrence is within the parameters of normal childhood development. Autism occurs in children without symptoms of speech delay who have normal speech and language. Only a small percentage of all children with speech delay develop autism. Speech delay alone, therefore, is not an appropriate trigger for the accrual of a claim or the running of the limitations period in a case where autism is the condition that a petitioner claims is the outcome of a vaccine injury.



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Court made this finding even though Kit was not diagnosed with any disorder and saw medical specialists for evaluations through 2000 with inconclusive determinations as to whether he had autism. On April 26, 2001, Kit was diagnosed with autism. His parents filed a petition on July 22, 2002.

Autism One argues in this brief that speech delay is an unsuitable marker for the onset of autism, especially for determining when a claim accrues. Speech delay is a symptom of many disorders and, in many cases, is the harbinger of nothing abnormal. Because speech delay more often than not is unrelated to autism and because it is not a sufficiently clear marker giving medical professionals and parents notice that a child may have autism, it is inappropriate to serve as a defining symptom starting the 36-month limitations period.

ARGUMENT

A. Speech Delay Is Not An Accurate Marker of the Onset of Autism and Should Not Be Used to Determine When a Claim Accrues

In *Markovich v. Sec’y of Health & Human Servs.*, 447 F.3d 1353, 1361 (Fed. Cir. 2007), this Court established the standard for determining when the statute of limitations accrues, finding that the 36-month limitations period starts at the time of the first event objectively recognizable as a sign of a vaccine injury by the medical profession at large.

The medical literature shows that language delay, including speech delay, is a very common problem among children. An extraordinarily high proportion of

children experience speech and language delay – it is identified in more than 15 percent of children between the ages of 24 and 29 months. Anke Buschmann et al., *Children with Developmental Language Delay at 24 Months of Age*, 50 J. Developmental Med. & Child Neurology 223 (2008).¹ Speech delay is not only highly prevalent, it is often identified in children with normal development.

In a study of preschool aged children assessed with speech and language impairments and no other diagnosis, a ten-year follow-up study revealed that of the original 23 children in the study only 9 had a diagnosis of autism or clear autistic traits. Ulla Ek et al., *Teenage Outcomes after Speech and Language Impairment at Preschool Age*, 8 Neuropsychiatric Disease and Treatment 221 (2012).² There are many explanations for speech delay; a minority of children with speech delay are eventually diagnosed with autism. Common causes of speech delay include mental retardation, hearing loss, psychosocial deprivation, cerebral palsy and bilingualism. Alexander K.C. Leung and C. Pion Kao, *Evaluation and Management of the Child with Speech Delay*, 59 Am. Fam. Physician 3121 (1999).³ Speech delay, however,

¹ The abstract of this paper may be found at url:
<http://onlinelibrary.wiley.com/doi/10.1111/j.1469-8749.2008.02034.x/abstract;jsessionid=6C5BC1F3AD4E49F7C73F333ABD4363CE.f02t02>

² The PDF full text of this paper may be found at url:
<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3373203/>

³ The full text of this paper may be found at url:
<http://www.aafp.org/afp/1999/0601/p3121.html>

may resolve itself over time, presenting no disorder at all. As a result, speech delay is often not a symptom of any disorder.

While children with autism may often have speech issues, when viewed in isolation, speech delay is not a valid first symptom or manifestation of onset of autism. The dissent noted that “[i]t is undisputed that speech delay alone is not objectively recognizable by the medical community as a first symptom of autism.” *Carson v. Sec’y of Health & Human Servs.*, 727 F.3d 1365, 1373 (Fed. Cir. 2013). It is impossible to conclusively predict whether a child with speech delay will later develop autism. There is limited medical literature regarding language development in autistic children under three years of age. Weismer et al., *Early Language Patterns of Toddlers on the Autism Spectrum Compared to Toddlers with Developmental Delay*, 40 J. Autism Dev. Disor. 1259 at 1260 (2010).⁴ Other symptoms indicating autism are often not present at the time of the speech delay, but appear months or years later. As the dissent states, “delayed speech is often normal and is not objectively recognizable as a sign of possible vaccine injury unless accompanied by other abnormal behavior.” *Carson* at 1373. Autism is a complex disorder characterized by a constellation of behaviors resulting in core deficits across three domains of child development (social interaction, communication and repetitive or stereotypic behavior) that develops “insidiously

⁴ The PDF full text of this paper may be found at url:
<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2941531/pdf/nihms198108.pdf>

over time.” *Setnes v. United States*, 57 Fed.Cl. 175, 181 (2003). In short, there is no single symptom heralding the onset of autism. In most cases the precise date of onset is unknown. As noted in *Setnes* at 179,

As distinguished from other medical conditions, however, the beginning stage of autism cannot be reduced to a single, identifiable symptom. Many of the initial ‘symptoms’ are subtle and can be easily confused with typical childhood behavior. Where there is no clear start to the injury, such as in cases involving autism, prudence mandates that a court addressing the statute of limitations not hinge its decision on the ‘occurrence of the first symptom.

Because variations in speech development are recognized as normal it is inappropriate to use speech delay as the first symptom of possible vaccine injury. The Panel majority’s decision agrees that “[t]here is no question that speech delay can be indicative of several conditions, and in some circumstances may even be normal.” *Carson* at 1370. Since speech delay can be considered normal, it “is not objectively recognizable as a sign of possible vaccine injury unless accompanied by other abnormal behavior.” *Carson* at 1373.

It is unjust to mark the start of the 36-month statute of limitations by symptoms that are indistinguishable from symptoms of normal behavior. As stated in the dissent, “A limitations period cannot start to run before the existence of the cause of action that it limits.” *Carson* at 1370. When Kit was evaluated for speech delay, his multiple medical professionals did not indicate autism. Unlike *Markovich* or *Wilkerson v. Sec’y of Health & Human Servs.*, 593 F.3d 1343 (Fed.

Cir. 2010), the vaccine injury was not clearly apparent to the medical professional at large. There was, therefore, no notice to the medical profession at large or petitioners of any first event objectively recognizable as a sign of a vaccine injury.

By dismissing petitioner’s claim as time-barred under the current circumstances, petitioners are being penalized for not having notice or knowledge of the onset of a possible vaccine injury where even the medical profession at large had no such knowledge. As the *Setnes* Court noted, “It is one thing to be unaware that an obvious injury or its onset was caused by a vaccination. It is quite another to lack knowledge, through no assignable fault, of the existence of the onset. This is especially true where the treating physician does not associate the behavior as an onset of an injury.” *Setnes* at 181. To determine that the limitations period is triggered when the petitioners and medical profession at large had no notice or knowledge that a vaccine injury occurred – and no medical diagnosis existed – is unjust.

B. The Statute of Limitations Should Begin on Determination of “Manifestation of Onset” Based on Contemporaneous Medical Information Objectively Recognizable by the Medical Profession At Large.

Courts should construe a statute to give meaning and effect to all the terms of the statute. *Setnes* at 180 and cases cited therein. Accordingly, the disjunction of “occurrence of first symptom” or “manifestation of onset” means there are two distinct events that trigger the statute of limitations with two different meanings.

Markovich at 1357. Indeed, as noted by the *Markovich* Court, there is a difference between a “symptom” and “manifestation of onset.” The *Markovich* Court stated that a symptom “may be indicative of a variety of conditions or ailments, and it may be difficult for lay persons to appreciate the medical significance of a symptom with regard to a particular injury.” Whereas, a manifestation of onset “is more self-evident of an injury and may include significant symptoms that clearly evidence an injury.” *Id.* In autism cases, “where the symptoms of autism develop ‘insidiously over time’ and the child’s behavior cannot readily be connected to an injury or disorder, the court may rely on the child’s medical or psychological evaluations for guidance in ascertaining when the ‘manifestation of onset’ occurred.” *Setnes* at 181.

For the sake of fairness in determining when the limitations period starts, the Court must conduct an evaluation of the contemporaneously available medical information objectively recognizable by the medical profession. Symptoms may be ambiguous and insignificant when viewed based on the contemporaneously available information. Symptoms may not have matured sufficiently to determine whether there is a vaccine injury. Only with the benefit of hindsight can the medical profession at large view the entire medical record of an injury or disorder. The dissent properly noted, however, that “[h]indsight is not properly invoked to retrospectively make ‘objectively recognizable’ what the medical community did

not recognize and could not recognize, other than retrospectively.” *Carson* at 1373. As demonstrated here, the retrospective analysis performed by the Court is inconsistent with the views of multiple medical doctors who evaluated Kit. When viewed based on the contemporaneously available information, there is no support for a finding that medical profession at large would have recognized Kit’s symptoms as a vaccine injury. A retrospective analysis lends itself to *post hoc* cherry picking of facts allowing an unrealistic identification of a first symptom of injury and an unfair marker for accrual of a claim. A retrospective analysis would unjustly permit dismissal of claims as untimely in circumstances where no medical professional could have contemporaneously identified a vaccine injury.

The issue of timely filing in autism cases is significant. The Office of Special Masters has processed a large number of motions seeking dismissal of autism cases based on an allegation of untimely filing. *Wilkerson v. Sec’y of Health & Human Servs.*, No. 05-232V, 2008 WL 4636329, at 2 (Fed. Cl. Sept. 30, 2008). The Court’s decision carries great weight as it would result in the dismissal of numerous autism petitions on the grounds of untimely filing. Can the *Markovich* Court be correct in assuming that Congress would choose to commence the statute of limitations at a point in time when symptoms like speech delay are indistinguishable from typical childhood behavior, and the medical profession at large is unable to recognize with reasonable certainty the nature of the injury or

disorder? Such an interpretation of the Vaccine Act operates as an injustice to petitioners. Petitioners would be unaware that they had a claim before their right to bring the claim expired. As the dissent notes, “It cannot have been legislative intent that Vaccine Act compensation is available on the first appearance of a ‘symptom’ that ‘may even be normal.’ Neither can it have been the legislative intent that the period of statute of limitations starts to accrue during a period of normal behavior or unresolved symptoms of unknown significance.” *Carson* at 1370.

It is unreasonable to find that a claim would have accrued when Kit was within the parameters of normal development. It is unjust to dismiss Kit’s claim as untimely based on a finding of the first symptom of autism when multiple medical professionals did not observe autism. Accordingly, this Court should find that Kit’s claim accrued and the limitations period began on April 23, 2001, as the first event objectively recognizable as a sign of Kit’s vaccine injury by medical professionals.

CONCLUSION

Accordingly, a rehearing by this panel or rehearing en banc is warranted.

Respectfully submitted,



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Form 19

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Robert J. Krakow

(Signature of Attorney)

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(State whether representing appellant, appellee, etc.)

October 29, 2013

(Date)

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**United States Court of Appeals
for the Federal Circuit**

Carson v. Secretary of Health and Human Services, Case No. 2010-5089

I, Maryna Sapyelkina, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained bylaw Office of Robert J. Krakow, Attorneys for *Amicus Curiae* Autism International Association, Inc., d/b/a Autism One to print this document. I am an employee of Counsel Press.

On the **29th Day of October, 2013**, counsel for *Amicus Curiae* has authorized me to electronically file the within **Brief of Amicus Curiae Autism International Association, Inc., d/b/a Autism One in Support of Combined Petition for Rehearing and Rehearing *En Banc*** with the Clerk of the Court using the CM/ECF System, which will serve via e-mail notice of such filing to any of the following counsel registered as CM/ECF users:

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Upon acceptance by the Court of the e-filed document, six paper copies will be filed with the Court, via Federal Express, within the time provided in the Court's rules.

October 29, 2013

/s/ Maryna Sapyelkina
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