

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. XX-XXXV

(E-Filed: January 29, 2010)

JOHN DOE/11 and JANE DOE/11,)	
as Representatives of the Estate of)	
CHILD DOE/11, Deceased,)	PUBLISHED
Petitioners,)	
)	Remand Decision, Additional Award
v.)	of Attorneys' Fees and Costs
)	
SECRETARY OF HEALTH AND)	
HUMAN SERVICES,)	
)	
Respondent.)	
_____)	

Richard Gage, Cheyenne, WY, for petitioner.

Glenn MacLeod, Department of Justice, Civil Division, Torts Branch, Washington, DC, for respondent.

DECISION ON REMAND AWARDING ADDITIONAL INTERIM ATTORNEYS' FEES AND ATTORNEYS' COSTS¹

Campbell-Smith, Special Master

¹ Because this document contains a reasoned explanation for the action of the undersigned, the document shall post on the website of the United States Court of Federal Claims in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has fourteen days within which to request the redaction "of any information furnished by that party (1) that is trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy." Rules of the United States Court of Federal Claims (RCFC), Appendix B, Vaccine Rule 18(b). In the absence of timely objection, the entire document will be made publicly available.

On April 8, 1999, petitioners, John Doe/11 and Jane Doe/11, as representatives of the Estate of Child Doe/11, filed a petition pursuant to the National Vaccine Injury Compensation Program² (the Act or the Program). Petitioners alleged that their daughter, a seven week-old, died during the evening of December 21, 1994, as a result of receiving a hepatitis B vaccination earlier that afternoon. On January 31, 2008, the undersigned issued a decision dismissing the petition, and petitioners timely sought review. Petitioners argued that the undersigned applied a legally erroneous “compelling proof” standard on causation, and that the undersigned’s fact finding was arbitrary and capricious.

On July 31, 2008, the Court of Federal Claims issued an opinion vacating the undersigned’s decision and remanding the case to the undersigned with instructions to allocate the burden of proof properly, to reweigh the evidence, and to address separately each of the three prongs of the causation test articulated in Althen v. Secretary of Health and Human Services, 418 F.3d 1274, 1278 (Fed. Cir. 2005). See Doe/11 v. Sec’y of Health and Human Servs., 83 Fed. Cl. 157, 176 (2008).

On October 29, 2008, the undersigned issued her decision on remand, again dismissing the petition, finding that petitioners had not established a prima facie case that the vaccine caused their daughter’s death. Doe/11 v. Sec’y of Health and Human Servs., No. 99-212V, 2008 WL 4899356 (Fed. Cl. Spec. Mstr. Oct. 29, 2008).

On December 1, 2008, petitioners sought review of the special master’s decision on remand, arguing that the undersigned had misapplied again the legal standard on causation, and that the undersigned’s fact finding was arbitrary and capricious.

On April 22, 2009, the Court of Federal Claims issued an opinion affirming the undersigned’s remand decision. Doe/11 v. Sec’y of Health and Human Servs., 87 Fed. Cl. 1 (2009). Judgment dismissing the petition was entered on April 24, 2009. On June 18, 2009, petitioners noticed an appeal of that decision to the Federal Circuit.

Prior to the dismissal of the petition and while petitioners’ motion for review was pending at the Court of Federal Claims, petitioners’ counsel filed, on March 13, 2009, an application for interim attorneys’ fees and costs. See Application for Award of Interim

² The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. § 300aa-10-§ 300aa-34 (2006) (Vaccine Act or the Act). All citations in this decision to individual sections of the Vaccine Act are to 42 U.S.C. § 300aa.

Attorneys' Fees and Reimbursement of Costs (Ps' Interim Fee App.). Petitioners requested \$183,353.83 in attorneys' fees and costs. See Ps' Interim Fee App. at 4. On April 30, 2009, respondent's counsel filed a response objecting to the number of hours expended by and the hourly rates charged by Mr. Gage. See Respondent's Response to Petitioners' Application for Award of Interim Attorneys' Fees and Reimbursement of Costs (R's Response to Ps' App.). Respondent's counsel also objected to the number of hours expended by and the hourly rate charged by petitioners' expert immunologist, Dr. Alan Levin. R's Response to Ps' App. at 5.

The undersigned issued an interim fees and costs decision on June 9, 2009, awarding petitioners \$12,985.48. That amount included attorneys' fees for the firm of Gage & Moxley of \$6,968.50,³ and incurred costs of \$6,016.98.⁴ Doe/11 v. Sec'y of Health and Human Servs. No. 99-212V, 2009 WL 1803457 (Fed. Cl. Spec. Mstr. June 9, 2009). The awarded amount of fees and costs was less than the amount requested. See id. Due to questions about the reasonableness of the remaining \$159,985.75⁵ in attorneys' fees and \$10,000.00 in attorneys' costs, the undersigned deferred consideration of the disputed portions of the interim fees and costs request until petitioners submitted their final petition for fees and costs.

On June 15, 2009, petitioners' counsel moved for review of the interim fees and costs decision. Petitioners' Memorandum in Support of Motion for Review of the Special Master's June 9, 2009, Interim Fees Decision (Ps' Motion for Review). As were petitioners' earlier review motions, petitioners' motion for review of the interim fee decision was assigned to the Honorable Mary Ellen Coster Williams. Judge Williams granted petitioners' motion for review, awarding fees for the period of time that the case was before her on review, and reversing, in part, the undersigned's interim fee decision.

³ This award of attorneys' fees included fees awarded for work performed by Mr. Gage.

⁴ These costs included the costs incurred for the work performed by petitioners' expert pathologist, Dr. John Shane.

⁵ Petitioners' counsel requested \$159,985.75 in his original interim fee application for the period of time from January 2006 through March 2, 2009. When directed by the undersigned to provide the information on his expended hours and the tasks performed in a spreadsheet format, petitioners' counsel filed an attachment to Petitioners' Response to December 4, 2009 Order (Ps' Response). The information in the attachment reflected a request for fees totaling \$161,051.75. See Ps' Response, Attachment at 11. The undersigned looked not to the dollar amount requested but rather to the number of hours that petitioners' counsel expended in 2006 and 2007 to arrive at a determination of the number of hours in question.

See Doe/11 v. Sec’y of Health and Human Servs., 89 Fed. Cl. 661 (Nov. 10, 2009) (Opinion and Order).⁶

Judge Williams found that the undersigned’s decision “to award Richard Gage, P.C., no interim fees was an abuse of discretion.” Opinion and Order at 662. Judge Williams distinguished the undersigned’s deferral of consideration of the disputed portion of the interim fee request in this case from the undersigned’s deferral of consideration of the disputed portion of the interim fee request presented earlier in the case of Shaw v. Secretary of Health and Human Services, 88 Fed. Cl. 463 (2009). Id. at 665. Judge Williams explained that in Shaw, the undersigned had identified a portion of the contested fees “which would require further development of the record for resolution of the interim fee issue.” Opinion and Order at 662. But in the instant case, Judge Williams’ reasoned that because the record was complete, the undersigned should have awarded more of the requested interim fees, and should have addressed the concerns about the reasonableness of the number of hours billed and the hourly rates charged by reducing the hourly rate sought and the number of hours requested. Id.

Judge Williams found that of the 417.2 of the hours billed by Richard Gage, as a sole practitioner, 172.1 hours were billed for work and travel pertaining to the two motions for review litigated before her. See Opinion and Order at 667. Based on her review of petitioners’ interim fee petition and the supporting documentation, Judge Williams determined that the total hours requested by Mr. Gage for the work he performed before her were reasonable. Id. In accordance with this finding, Judge Williams awarded Mr. Gage 160.2 hours of work hours at a rate of \$239 per hour and 11.9 hours of travel time at a rate of \$120 per hour, for an award total of \$39,715.80. Id. at 668.

Judge Williams identified a balance of 245.1 uncompensated hours for which petitioners’ counsel sought interim fees. Id. at 667. These hours pertain to work performed by petitioners’ counsel while the claim was pending before the undersigned.⁷

⁶ Judge William’s noted that the undersigned’s award of \$12,985.48 was not challenged.

⁷ The undersigned submits that based on the numbers that Mr. Gage provided in his motion for review and in the interim fee petition, the total number of remaining uncompensated hours during the time period identified by Judge Williams is 244.8. Petitioners’ counsel requested 117.8 hours for 2006 and 127 hours for 2007. See Ps’ Motion for Review at 7-8, Ps’ Interim Fee App. at 8-15, and Petitioners’ Fee Chart attached to Petitioners’ Response to December 4, 2009 Order filed on December 23, 2009 (Ps’ Response) at 1-8. Accordingly, the undersigned uses this figure for the number of uncompensated hours on the pending interim fee

Persuaded that the undersigned’s familiarity with the work done in that phase of the litigation put the undersigned in a better position to make a determination as to what interim reimbursement may be reasonable, Judge Williams remanded the case to the undersigned “for a determination of an additional interim fee and cost award relating to proceedings before the Special Master.” Id. at 668.

This decision implements the Remand Order of Judge Williams.

I. DISCUSSION

A. An Award of Fees and Costs

Section 15(e)(1) of the Vaccine Act permits a special master to award reasonable attorneys’ fees and costs incurred in a proceeding on vaccine petition. 42 U.S.C. § 300aa-15(e)(1). Vaccine Rule 13 authorizes the Clerk of the Court to forward a filed request for attorneys’ fees and costs to the special master to whom the case was assigned for consideration and decision. Vaccine Rule 13, Rules of the Court of Federal Claims, Appendix B.

In interpreting the Vaccine Act’s use of the undefined phrase “reasonable attorneys’ fees,” see 42 U.S.C. 300aa-15(e)(1), the Office of Special Masters has applied a “lodestar” method of calculation that involves “multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.” See Avera, 515 F.3d 1343, 1347-1348 (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)). The reasonableness of both the requested hourly rate and the hours expended must be substantiated by petitioner through a proffer of persuasive evidence. Saxton v. Secretary of Sec’y of Health and Human Servs., 3 F.3d 1517, 1521 (Fed. Cir.1993). The relevant inquiry under the Vaccine Act is not whether the time claimed for the particular activity was spent, but whether the time spent was reasonable. Holton v. Sec’y of Health and Human Servs., 24 Cl. Ct. 391, 397 (1991). And the Supreme Court has observed that:

[a] request for attorney’s fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee. Where settlement is not possible, [however,] the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise “billing judgment” with respect to hours worked and should maintain billing time

petition.

records in a manner that will enable a reviewing court to identify distinct claims.

Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) (emphasis added).

If a fee petition reflects a request for an unreasonable number of hours expended, a reviewing special master may reduce the number of hours for which counsel is compensated. Saxton v. Sec’y of Health and Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993) (giving deference to the decision of a special master to reduce the number of hours compensated). In reducing the number of hours allowed, a trial court is not required to explain how many hours are appropriate for any given task. Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1259 (10th Cir. 2005); Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1202-03 (10th Cir. 1986) (affirming district court's reduction in the number of hours claimed for pre-trial preparation by 77 percent).

The authority to award an interim request for fees is derived from the Federal Circuit’s decision in Avera. In Avera, the Federal Circuit determined that the Vaccine Act permits the award of interim fees, but does not require an interim award in every case. 515 F.3d at 1352. Relevant factors in determining when an interim fee award might be appropriate include whether the case involved protracted proceedings, whether costly experts were retained, and whether petitioner would suffer undue hardship. See Avera, 515 F.3d at 1352.

As informed by Avera, the undersigned issued an interim fees decision on June 9, 2009, awarding attorneys’ fees for the first six years of the litigation (from 1999 through 2005) and also awarding an amount of costs that included the costs associated with retaining one of petitioners’ two expert witnesses. On November 10, 2009, Judge Williams issued the Opinion and Order compensating counsel for the period of time from January 2008 through March 2009.

B. The Pending Fees and Costs Request on Remand

After Judge Williams issued her Opinion and Order, the undersigned scheduled a status conference. See November 23, 2009 Order. The next day, on November 24, 2009, petitioners’ counsel filed a Supplemental Application for Award of Interim Attorneys’ Fees and Reimbursement of Costs (Ps’ Supp. App.) and requested \$66,151.78 for the work he had performed from March 12, 2009 through October 26, 2009. Ps’ Supp. App. at 5.

On November 30, 2009, the undersigned conducted a digitally-recorded status

conference advising counsel that her decision on remand would be limited to petitioners' interim fee request and would not consider the supplemental fee request. See December 4, 2009 Order (12/4/09 Order) memorializing the status conference.⁸ The undersigned noted that her original concerns about the reasonableness of petitioners' counsel's request for fees—to which she had adverted in the Order of Clarification that issued nearly two weeks before the undersigned's decision on interim fees and costs issued on May 22, 2009—remained the same. The undersigned stated in the Order of Clarification, that in addition to respondent's concerns regarding the reasonableness of petitioners' fee request, “it [was] also the view of the undersigned that the requested hourly rate and hours expended by both Mr. Gage and Dr. Levin warrant[ed] closer examination.” 12/4/09 Order at 2 citing Order of Clarification at 2.

Accordingly, during the status conference held following the issuance of Judge William's Opinion and Order in November 2009, the undersigned identified four areas of particular concern in the interim fee petition. The four areas of concern, as summarized, were: (1) the lumping together of different tasks without apportioning the time spent to the particular tasks performed,⁹ (2) the various charges that appeared to be excessive for

⁸ As expressed to counsel during the digitally recorded status conference and in the 12/4/09 Order that issued following the conduct of the status conference, the undersigned questioned the appropriateness of another interim fee award absent the involvement of additional counsel (as in the multiple interim fee awards in the autism test cases) and without a showing that the considerations set forth in Avera are implicated in the second interim fee request. Notably, during the eight month period of time for which supplemental fees are sought, there is no evidence that petitioners have incurred costs that have produced a hardship nor were experts retained. Rather, the request is for expenses and costs associated with petitioners' appeal of the dismissal of their claim. Whether successive interim fee requests as petitioners here have submitted are permitted under Avera is unclear to the undersigned.

⁹ This billing practice does not comport with the Guidelines for Practice Under the National Vaccine Injury Compensation Program Section XIV(A)(3) at 19 (Office of Special Masters, United States Court of Federal Claims, November 2004) (“Each task should have its own line entry indicating the amount of time spent on that task. Several tasks lumped together with one time entry frustrates the court's ability to assess the reasonableness of the request.”). See also Valdes v. Sec'y of Health and Human Servs., 89 Fed. Cl. 415, 424 (2009) (finding that the Special Master's reduction of costs was warranted because block billing prevented detailed review of the reasonableness of the requested costs); Broekelschen v. Sec'y of Health and Human Servs., No. 07-137V, 2008 WL 5456319, at *4-5 (Fed. Cl. Spec. Mstr. Dec. 17, 2008) citing cases from within the Vaccine Program that have criticized block billing. Jeffries v. Sec'y of Health and Human Servs., No. 99-670V, 2006 WL 3903710 *8 (Fed. Cl. Spec. Mstr. Dec. 15, 2006); Plott v. Sec'y of Health and Human Servs., No. 92-633V, 1997 WL 842543 * 5 (Fed. Cl.

the tasks performed, (3) the noted instances where the amount counsel billed in the petition was greater than the time spent on a task multiplied by the hourly rate requested, and (4) the billing rate charged for tasks that appeared to be administrative or paralegal in nature.¹⁰ See 12/4/09 Order at 3-5. The undersigned asked counsel to address the noted issues in writing to inform her evaluation of whether the number of hours expended during the time period from January 18, 2006, through January 31, 2008, was reasonable. See 12/4/09 Order at 2-3.

The undersigned indicated during the conduct of the status conference that the cited examples of the particular areas of concern were not exhaustive but rather were illustrative. The undersigned also made clear that “[a]bsent information from counsel, the undersigned [would not] award fees as requested for the tasks performed that are in question because the reasonableness of that portion of the fee request [could not] be determined.” 12/4/09 Order at 5.

On December 17, 2009, respondent’s counsel filed Respondent’s Response (R’s Response) to the Special Master’s Order Dated December 4, 2009. Respondent criticized petitioners’ counsel for failing to adequately explain the number of hours expended in this case. See R’s Response at 2. Respondent noted that petitioners’ use of block billing “precludes any meaningful examination of the reasonableness of the time claimed for each task,” and that petitioners’ counsel’s “repeated use of the term ‘file review’ is likewise too vague to allow meaningful review.” Id.

Respondent reiterated the earlier lodged objection to the high number of hours claimed by petitioners’ counsel in this case. R’s Response at 1-2. Respondent’s counsel argued that the number of hours that petitioners’ counsel spent was more than was “reasonably necessary”. R’s Response at 2. Respondent pointed, in particular, to the 55.7 hours in “trial prep” between March 14, 2006, and October 11, 2006. Id. Respondent also challenged the 77.7 hours Mr. Gage spent writing his post-hearing brief and the 38.7 hours he spent writing his post-hearing reply brief. Id.

Respondent asserted that the case was not a complex one and thus, did not require the number of hours that petitioners’ counsel expended on litigating the claim. See id. at

Spec. Mstr. April 23, 1997). As a practical matter, it impairs the undersigned’s ability to evaluate the reasonableness of the time spent performing various tasks.

¹⁰ The undersigned’s assessment of the reasonableness of the rates requested for these tasks, however, is hampered by petitioners’ counsel’s failure to describe the performed tasks more particularly.

2, 4-5 (stating that “[h]ere the medical records were limited; the case involved only two experts for each side and the legal issues were relatively straight forward. The entitlement hearing, which lasted only a day, resulted in a transcript of less than 400 pages.”). Respondent also objected to compensating Mr. Gage at an experienced attorney rate for performing tasks that were either paralegal or secretarial in nature. See R’s Response at 2-3.

On December 23, 2009, petitioners’ counsel filed Petitioners’ Response (Ps’ Response) to December 4, 2009 Order. See Ps’ Response. Petitioners’ counsel defended his longstanding personal practice of lump billing as sufficient for the Vaccine Program. See Ps’ Response at 2-3. Petitioners’ counsel responded to the undersigned’s expressed concern that various charges were excessive for the tasks performed. See Ps’ Response at 5.

Petitioners’ counsel also explained that although he retained paralegal services to assist him with the prosecution of this claim, he did not bill for any performed paralegal services. See Ps’ Response at 9. And he declined to delegate the performance of certain tasks—for which he did bill—to paralegals because he viewed the tasks as too important to be entrusted to someone other than himself. See Ps’ Response at 9.

Inferred from petitioners’ counsel’s filed response is an assertion that with this explanation of his billing habits, his requested fees are supported properly. Petitioners’ counsel did not address the hourly rate sought and hours billed by petitioners’ immunology expert, Dr. Levin.

From petitioners’ counsel’s response, it became clear to the undersigned that the evaluation of the reasonableness of the time charged for performing certain tasks was made much more difficult because the activities detailed in the billing records were either improperly identified or inaccurately described. For example, the references to counsel’s review of a series of orders in the billing records were, in fact, references to counsel’s review of an order reassigning the case to the undersigned, a pre-hearing order issued by the undersigned, and a pre-hearing witness list filed by respondent. As a further example, petitioners’ counsel billed for what he described as status conferences held on September 16, 21, and 22 of 2006. See Ps’ Interim Fee App. at 10. The undersigned understands the term status conference to refer to conferences between herself and counsel for the parties, and it is the customary practice of her chambers to make a minute entry in the electronic docket when status conferences are held. There are no such minute entries, however, on the court’s docket sheet that correspond to these dates, and without more detail in the billing entries, the undersigned cannot ascertain whether these conferences were substantive or administrative in nature.

Not only were the performed tasks misidentified in the submitted billing records, but the tasks were billed at times that were not always contemporaneous with the tasks that the docket sheet for this case and the filed materials in this case show occurred. For example, petitioners' counsel billed for filing an expert report and curriculum vitae on May 22, 2006. See Ps' Interim Fee App. at 9. The undersigned notes that no filing of an expert report appears on the court's docket sheet on May 22, 2006. Nor is the filing of an expert report reflected on the court's docket sheet in the month before or after May 2006. Further review of the docket, however, reveals that an expert report was filed on February 28, 2006, and the undersigned could find no corresponding entry on petitioners' fee application. As reflected in the Chart of Adjusted Time for 2006, the undersigned compensates petitioners' counsel at a reduced paralegal rate for the performance of the filing task.

Another example of a task that was billed at a time that was markedly removed from any such task on the docket sheet, is found in petitioners' billing entry for June 29, 2006. On that date, petitioners' counsel billed for tasks that included review of a "notice from the court." Ps' Interim Fee App. at 5. Close examination of the court's docket suggests that petitioners' counsel may have been referring either to his review of a scheduling order that was filed on May 26, 2006, or his review of respondent's expert report, which was filed on May 12, 2006. Again, petitioners' counsel's failure to identify with more specificity what task he was performing makes an evaluation of the reasonableness of time spent more difficult because the amount of time deemed reasonable for the reviewing of an expert report is very likely to differ from the time deemed reasonable to review a scheduling order or a notice from the court. A look at the court's docket provides some assistance in ascertaining what petitioners' counsel was describing. But assessing the reasonableness of counsel's time spent on this task is hampered further by the fact that this task is lumped in with other tasks, including "Message from Clerk, Called Clerk, [and] Trial Prep." Ps' Interim Fee App. at 5. Counsel billed 1.3 hours for these tasks. Id. As reflected in the Chart of Adjusted Time for 2006, the undersigned compensates petitioners' counsel at a reduced paralegal rate for the performance of a portion of the block billed tasks.

The undersigned has carefully considered the responsive filings of counsel addressing the areas of concern identified in the undersigned's order of December 4, 2009. Informed by the responses of counsel, the undersigned now turns to address the outstanding fee request for Mr. Gage and the outstanding costs request for Dr. Levin.

1. Fees for Mr. Richard Gage, Petitioners' Counsel

In the filed interim fee petition, petitioners' counsel requested \$159,985.75 for

work that he performed after he left the Gage & Moxley firm. Due to questions concerning the reasonableness of this portion of the requested fees and the parties' inability to resolve this portion of the fee request, the undersigned deferred consideration of petitioners' counsel's request for this sum. On petitioners' motion for review, Judge Williams awarded Mr. Gage \$39,715.80 of this contested amount. Opinion and Order at 668. She remanded the remainder of the outstanding fee request to the undersigned for the determination of an interim award. She set the rate at which Mr. Gage is to be compensated for work performed in 2006 at \$219 per hour and for work performed in 2007 at \$233 per hour. Opinion and Order at 667. The undersigned's charge on remand is to consider the portion of the fee request that pertains to the work Mr. Gage performed in 2006 and 2007.

Petitioners' counsel's filings with the court indicate that petitioners' counsel billed 117.8 hours in 2006 and 127 hours in 2007. See Ps' Motion for Review at 7-8, Ps' Interim Fee App. at 8-15, and Petitioners' Fee Chart attached to Petitioners' Response to December 4, 2009 Order filed on December 23, 2009 (Ps' Response) at 1-8. Of the requested hours for the year 2006, petitioners' counsel billed 12.5 hours of travel time in 2006. Ps' Interim Fee App. at 11. The rate awarded for travel as determined by Judge Williams in the Remand Order is \$110 per hour for 2006. See Opinion and Order at 9. Thus, the maximum number of non-travel hours, in 2006 and 2007, for which petitioners' counsel can be compensated on remand is 232.3 hours.

After careful review of the interim fee petition and as informed by the responses received from counsel, the undersigned decides that an award of fees to counsel at the rates defined by Judge Williams is appropriate for certain hours expended for tasks that are not administrative in nature and for the hours that do not constitute travel hours. The undersigned is of the view that this case became a more involved one due to the substantial volume of medical literature filed in support of the opinions offered by the parties' four experts (two experts for each party) in the areas of pathology and immunology. But the undersigned shares the view of respondent's counsel that the number of hours that petitioners' counsel billed for certain tasks is high in this case, particularly given Mr. Gage's long experience with the Vaccine Program.

Having conducted a closer examination of the fee petition, however, the undersigned notes that counsel has failed to bill at all for the conduct of other tasks. For example, one status conference that the undersigned conducted on September 26, 2006, in this case with counsel for twenty-five minutes wholly failed to appear in petitioners' counsel's billing entries. A further example of what appears to be an instance of underbilling occurs on October 23, 2006, where petitioners' counsel billed 0.5 hours for "status conference, file review, called expert." Ps' Interim Fee App. at 11. A

comparative review of the court's electronic docket sheet reveals that the referenced status conference itself lasted 0.5 hours.

The challenge in evaluating petitioners' interim fee application in this case arises from a lack of contemporaneous billing, misidentified or inadequately identified tasks performed, and block billing. The undersigned observes that these billing practices of petitioners' counsel created considerable uncertainty about what was performed when and thereby frustrated the assessment of the reasonableness of the time counsel spent performing the described tasks. Petitioners' counsel's disordered billing conventions needlessly complicated the process of evaluating the interim fee petition. Petitioners' counsel's billing conventions, specifically, petitioners' counsel's failure to describe activities sufficiently enough to allow for the reasonableness of the amount of time expended on specific tasks to be assessed, have been noted previously and have been drawn to this counsel's attention as unacceptable. See Hall v. Sec'y of Health and Human Servs., No. 02-1052V, 2009 WL 3423036, *27 (Fed. Cl. Spec. Mstr. Oct. 6, 2009) (reducing petitioners' counsel's hours for the year in question by ten percent for vague billing entries).

Furthermore, a facial examination of petitioners' counsel's requested hours for the tasks performed in this case, suggests to the undersigned—based on her experience in other Program cases—that counsel did not perform the tasks as efficiently as might be expected from counsel with nineteen years of Vaccine Program experience, particularly from counsel who seeks a premium hourly rate for his efforts. In the view of the undersigned, when a fee applicant fails to submit ordered and detailed billing records—a failure that significantly complicates the determination of whether the hours expended for the tasks performed was reasonable and unduly hinders the judicial review of a fee petition—a reduction in the number of counsel's compensated hours is merited. But after thoughtful consideration and at the hourly rates that have been determined to be reasonable by Judge Williams, the undersigned declines to disturb—with one exception—the number of hours for which petitioners' counsel seeks interim reimbursement in this case. By publication of this decision, however, counsel is put on notice that such billing practices will not continue to be tolerated, and such billing practices can be expected to provoke a reduction in the number of hours for which counsel is paid.

The one exception to the foregoing pertains to the hours billed for preparation of petitioners' post-hearing brief. The post-hearing brief is a document of 25 pages in length, more than half of which (specifically, thirteen pages) are block quotes taken directly from the transcript. See Petitioners' Post Hearing Memorandum (Ps' Post-hearing Brief) filed June 12, 2007. The post-hearing brief also consists of four pages of recited legal standards that, for an experienced practitioner such as Mr. Gage, would not

be expected to require a substantial investment of time to draft. Ps' Post-Hearing Brief at 2-6. Petitioners' counsel billed almost 80 hours for the preparation of the document, which did not include his review of the transcript. See Ps' Interim Fee App. at 13-14 (crediting any time billed for work associated with working on the brief, noting that this sometimes included other activities because of counsel's practice of block billing). Counsel entered separate billing entries for the review of the transcript. See Ps' Interim Fee App. at 13 (noting the billing entries for April 30, 2007; May 2, 2007; May 23, 2007; and May 25, 2007). Finding the hours expended to produce the post-hearing brief in question inexplicably excessive and unreasonable, the undersigned compensates counsel for only 27.7 hours of the requested 77.7 hours¹¹ (a reduction of 50 hours).

Moreover, the undersigned declines to compensate counsel at full attorneys' rates for all of the requested hours. As the undersigned stated earlier, petitioners' counsel has billed for tasks that appear to be of an administrative or paralegal nature. See 12/4/09 Order at 4. A proper assessment of the reasonableness of the rates requested for these tasks has been hampered by petitioners' counsel's failure to describe the tasks with particularity. Id. And in petitioners' responsive filing, petitioners' counsel stated that while he relied on paralegal services, he did not bill for the services performed by paralegals. See Ps' Response at 9. Rather, he explained that for the tasks in question he declined to delegate them to paralegals because the tasks required special care. See id. The applicable case law, however, informs that the rate at which such work is compensated turns not on who ultimately performed the task but instead turns on the nature of the task performed. See Missouri v. Jenkins, 491 U.S. 274, 288 (1989)

Paralegal tasks have been found to include such things as writing letters to the Clerk's Office, medical record request/authorization letters, taking calls from the client regarding appointment dates/times or other simple matters, and letters or faxes to the client/others simply enclosing copies of notices/orders/letters received. Scoutto v. Sec'y of Health and Human Servs., No. 90-3576V, 1997 WL 588954, *2 (Fed. Cl. Spec. Mstr. Sept. 5, 1997). Paralegal tasks also have been found to include the preparation of exhibits for filing, preparation of notices of filing exhibits, organization of exhibits, coordinating initial discovery—including collecting medical records, organizing medical records, summarizing medical records and preparing routine pleadings. Barnes v. Sec'y. of Health and Human Servs., No. 90-1101V, 1999 WL 797468, *4 (Fed. Cl. Spec. Mstr. Sept. 17, 1999); Rupert v. Sec'y of Health and Human Servs., No. 99-774V, 2002 WL 360005, *5 (Fed. Cl. Spec. Mstr. Feb. 14, 2002), remanded on other grounds, 52 Fed. Cl. 684 (2002).

¹¹ The undersigned observes that in contrast to the post-hearing brief that chiefly contained block quotes from the transcript, the reply brief filed by petitioners' counsel critically addressed the filed medical literature in the case.

The Supreme Court has made clear that it is the nature of the work, not the title or education of the person performing it, that determines whether it is legal, paralegal, or secretarial/clerical in nature and the reasonable hourly rate at which the work is to be compensated. Missouri v. Jenkins, 491 U.S. at 288.

The undersigned does not award attorney rates for the paralegal work that petitioners' counsel performed. The undersigned does not challenge counsel's choice to perform personally the identified administrative or paralegal tasks, but the undersigned cannot compensate counsel at full attorney rates for performing these tasks. Instead, the undersigned must apply paralegal rates for the time spent performing such tasks.

The undersigned identifies in the following charts instances of either performed tasks that are administrative in nature or billing entries with insufficient detail to permit the undersigned to ascertain whether the task is an administrative one or a legal one. The described tasks in the following charts, which are taken directly from petitioners' counsel's fee application, are recognized in the case law as either administrative or paralegal in nature. See e.g., Valdes v. Sec'y of Health and Human Servs., 89 Fed. Cl. 415, 425 (2009) (Special Master's reliance on his experience with Vaccine Program was appropriate, in determining that time billed by associate of Vaccine Act claimant's counsel for obtaining medical records was more consistent with paralegal duties, and thus, approval of fee request at paralegal rate was warranted).

The undersigned has identified 4.5 hours of charged attorney time that she believes should be compensated more appropriately at paralegal rates.¹² The undersigned notes that many of the identified tasks are calls placed to or received from either a law clerk or the Office of the Clerk of the Court, and such calls are necessarily administrative in

¹² Guided by the paralegal rates awarded in other Program cases prosecuted by counsel located in Cheyenne, Wyoming, the undersigned has determined that the appropriate paralegal rate for 2006-2007 is \$100.00 per hour. See Masias v. Sec'y of Health and Human Servs., No. 99-697V, 2009 WL 899703 *5 (Fed. Cl. Spec. Mstr., March 12, 2009) (based on rate awarded to paralegal, Julie Hernandez). The undersigned is aware that Ms. Hernandez was awarded \$130 per hour after her admission to the bar. However, the undersigned believes that Ms. Hernandez was awarded that rate on the basis of her performing legal work as an associate. See id. at 4-5, but see also Avila v. Sec'y of Health and Human Servs., No. 05-685V, 2009 WL 2033063 *5 (Fed. Cl. Spec. Mstr., June 26, 2009), aff'd, --- Fed. Cl. ---, 2009 WL 5197843 (2009) (decision that "absent better evidence in the record concerning appropriate 'Cheyenne rates' for . . . associates and paralegal[s], in this case [he would] award \$130 per hour for the services of the associates, and \$85 per hour for the paralegal services").

nature because court personnel are prohibited from issuing legal advice and must refrain from addressing substantive legal issues with counsel. See Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges 8 (Sylvan A. Sobel ed., Federal Judicial Center 2007).

Chart of Adjusted Time For Administrative or Paralegal Tasks–2006		
Date	Task	Time Requested/Time Awarded
1-18-2006	Call from Clerk	P billed 0.1 hours/ 0.1 hours awarded at paralegal rate
1-23-2006	Call from Clerk	P billed 0.1 hours/ 0.1 hours awarded at paralegal rate
1-31-2006	Call from Client	P billed 0.1 hours/ 0.1 hours awarded at paralegal rate
2-13-2006	Call from Client, Phone with Clerk	P billed 0.5 hours./P awarded 0.3 hours at full rate and 0.2 hours at paralegal rate
2-15-2006	Call from David Mundy [Court Law Clerk]	P billed 0.1 hours/P awarded 0.1 hours at paralegal rate
5-22-2006	Filed Expert Report and CV	P billed 0.2 hours/0.2 hours awarded at paralegal rate
5-23-2006	Letter and Slides to Glen	P billed 0.2 hours/0.2 hours awarded at paralegal rate
6-29-2006	Notice from Court, Message from Clerk, Called Clerk, Trial Prep	P billed 1.3 hours/P awarded 1 hour at full rate and 0.3 hours at a paralegal rate

7-31-2006	Phone with Clerk	P billed 0.2 hours/0.2 hours awarded at paralegal rate
8-14-2006	Phone with Clerk	P billed 0.1 hours/0.1 hours awarded at paralegal rate
8-28-2006	Returned Call From Glen Macleod, Returned Call from David Mundy	P billed 0.2 hours/P awarded 0.1 at full rate and 0.1 hours at paralegal rate.
10-20-2006	Worked on File, Sent Exhibits, Correspondence to Experts	P billed 2.7 hours/P awarded 1.7 at full rate and 1 hour at paralegal rate

In summary, the total number of hours billed for 2006 is 117.8. Of those hours, the undersigned awards Mr. Gage 102.6 hours of attorney time billed at the rate of \$219 per hour, 2.7 hours of paralegal time billed at \$100 per hour, and 12.5 hours of travel time billed at \$110 per hour.

The undersigned awards petitioners' counsel \$24,114.40 in fees for the year 2006.

Chart of Adjusted Time For Administrative or Paralegal Tasks–2007		
Date	Task	Time Requested/Time Awarded
3-2-2007	Call From Clerk, Called Expert, Phone with Glen MacLeod	P billed 0.3 hours/P awarded 0.2 hours at full rate and 0.1 hours at paralegal rate
5-9-2007	Worked on Brief, Reviewed Medical Literature, Phone with Respondent's Counsel, Phone with Clerk, Called Dr. Shane	P billed 5.2 hours/P awarded 5 hours at full rate and 0.2 hours at paralegal rate
5-29-2007	Phone with Dr. Shane, Filed Supplemental Expert Report, Research, Drafted Documents	P billed 2.5 hours/P awarded 2 hours at full rate and 0.5 hours at paralegal rate

6-8-2007	Finalized and Filed Brief	P billed 6.5 hours/P awarded 6 hours at full rate and 0.5 hours at paralegal rate
8-17-2007	Finalized Brief, Redrafting of Brief, Filed Brief	P billed 6 hours/P awarded 5.5 hours at full rate and 0.5 hours at paralegal rate

In summary, the total number of hours billed for 2007 is 127 hours. Of those hours, the undersigned has deducted 50 hours from the time billed to prepare petitioners' post-hearing briefing. Thus the undersigned awards Mr. Gage 75.2 hours of attorney time billed at the rate of \$233 per hour and 1.8 hours of paralegal time billed at \$100 per hour.

The undersigned awards petitioners' counsel \$17,701.60 in fees for 2007.

2. Incurred Costs for Dr. Alan Levin, Petitioners' Immunology Expert

Under the Vaccine Act, petitioners are entitled to an award for the reasonable costs incurred. 42 U.S.C. § 300aa-15(e). The only cost outstanding, although not specifically addressed by Judge Williams in her Opinion and Order, is the cost of retaining petitioners' expert immunologist, Dr. Alan Levin. Petitioners' counsel requested \$10,00.00 for 25 hours of work performed by Dr. Levin. Respondent objected to both the number of hours claimed and to the hourly rate sought, as excessive. R's Response to Ps' App. at 14. Respondent asserted that Dr. Levin:

has been previously awarded \$300.00/hr for his services. See Isom v. Sec'y of Health and Human Servs., No. 94-770V, 2001 WL 101459 *4 (Fed. Cl. Spec. Mstr. Jan. 17, 2001). Respondent maintains that the special master should award an hourly rate for Dr. Levin in line with the rate awarded in Isom.

Id. at 15.

Petitioners bear the burden of producing evidence, not just argument, to support a request for fees and costs. The failure to submit evidence can justify the denial of an award of fees and costs. See Naporano Iron and Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987) (the Equal Access to Justice Act); Presault v. United States, 52 Fed. Cl. 667, 670, 679 (the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970); Gardner-Cook v. Sec'y of Health and Human Servs., No. 99-480V, 2005 WL

6122520, at *4 (Fed. Cl. Spec. Mstr. June 30, 2005). Because petitioners have failed to submit any evidence supporting the requested hourly rate for Dr. Levin, the undersigned compensates Dr. Levin at a rate of \$300 per hour. This rate is reasonable and consistent with recent awards he has received in the Vaccine Program. See Friedman v. Sec'y of Health and Human Servs., No. 02-1467V, 2009 WL 4975267, at *14 (Fed. Cl. Spec. Mstr. Dec. 4, 2009), appeal docketed on January 4, 2010.

As evidenced by the awards that Dr. Levin has received in other Program cases, the undersigned finds that \$300.00 per hour is a reasonable hourly rate for Dr. Levin. The undersigned also finds that the 17 hours that Dr. Levin spent preparing his expert opinion and accompanying materials and reviewing the expert report and materials submitted by respondent's immunologist as well as the eight hours that Dr. Levin spent participating in the hearing were reasonable given the volume of materials submitted in this case. Accordingly, Dr. Levin shall be compensated for the 25 hours requested at a reduced rate of \$300.00.

The undersigned awards costs in the amount of \$7,500.00 for the work Dr. Levin performed on this case.

II. CONCLUSION

In the June 9, 2009 interim fee decision, the undersigned awarded petitioners attorneys' fees in the amount of \$6,968.50 and costs in the amount of \$6016.98. Judge Williams subsequently awarded additional interim compensation in the amount of \$39,715.80. Now, further to the Opinion and Order issued by Judge Williams in November 2009, the undersigned awards \$41,816.00 in attorneys' fees and \$7,500.00 in attorneys' costs. The total amount of compensation for interim attorneys' fees and costs is presented in the following tables.

Summary of Interim Award of Attorneys' Fees	
Attorneys' fees awarded in original interim fees decision (for 1999-2005)	\$6,968.50
Attorneys' fees awarded by Judge Williams (for 2008-2009) [Judgment for this awarded amount has entered already]	\$39,715.80
Additional fees awarded to Mr. Richard Gage (for 2006-2007)	\$41,816.00
TOTAL ATTORNEYS' FEES	\$88,500.30

Summary of Interim Award of Incurred Costs	
Incurred costs awarded in June 9, 2009 interim fees decision	\$6,016.98
Additional costs awarded for Dr. Levin's expert testimony	\$7,500.00
TOTAL ATTORNEYS' COSTS	\$13,516.98

The undersigned determines that there is no just reason to delay the entry of judgment on an award of interim attorneys' fees and costs. Therefore, in the absence of a motion for review filed under Appendix B of the Rules of the United States Court of Federal Claims, the Clerk of the Court **shall enter judgment in petitioners' favor in the amount of \$62,301.48.**^{13, 14} Under Vaccine Rule 11(a), the parties may expedite entry of

¹³ This amount reflects \$6,968.50 in interim attorneys' fees and \$6,016.98 in interim attorneys' costs previously awarded in the undersigned's June 9, 2009 Decision on Interim Fees and Costs but for which no judgment was entered and \$41,816.00 in interim attorneys' fees for work performed in 2006-2007 and \$7,500.00 in interim attorneys' costs.

¹⁴ This amount is intended to cover all legal expenses incurred through the dates stated herein. This award encompasses all charges by the attorney against a client, "advanced costs," as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would be in addition to the

judgment by filing a joint notice renouncing the right to seek review.

IT IS SO ORDERED.

s/ Patricia E. Campbell-Smith
Patricia E. Campbell-Smith
Special Master

amount awarded herein. See generally Beck v. Sec'y of Health and Human Servs., 924 F.2d 1029 (Fed. Cir. 1991).