

Response to the Secretary's Objections to Petitioners' Request for Attorneys' Fees and Costs ("P. Reply"), filed October 21, 1999. Respondent filed a timely objection to petitioners' fee petition and contests the request on several grounds. Respondent's Opposition to Petitioners' Application for Attorney's Fees and Costs ("R. Opp."), filed October 8, 1999. First, counsel challenges Mr. Webb's hourly rate as unreasonable. R. Opp. at 1-16. Second, respondent considers the hours expended by Mr. Webb in prosecuting this case excessive. R. Opp. 16-21. Finally, respondent believes that Dr. Sheldon Gross's expert fee should be reduced to \$200 per hour, and that any increase in the expert's rate for trial testimony is inappropriate. R. Opp. at 21-22. Petitioners filed a reply to respondent's objections, and the fees issue is now ready for resolution.²

I. DISCUSSION

A. Curtis R. Webb's Hourly Rate

The parties' arguments and supporting documentation on this issue are nearly identical to the evidence submitted by Mr. Webb and respondent's counsel, David Terzian, in another fees case recently decided by the undersigned. See Erickson v. Secretary of HHS, No. 96-361V, slip op., 1999 WL __ (Fed. Cl. Spec. Mstr. Dec. 10, 1999)(to be published). Consequently, the court sees no reason to restate here the parties' positions and the court's analysis. Moreover, respondent presents no additional arguments in this case which convince the court to re-think its earlier findings. Therefore, for the reasons expressed in Erickson, the court finds Mr. Webb's \$175 hourly rate reasonable. However, Mr. Webb failed to reduce his hourly rate for four hours of travel engaged in on August 14, 1998; therefore, Mr. Webb's attorney's fees are **reduced by \$350** (i.e., 4 hours x \$87.50).

respondent's written request for publication, filed December 30, 1999. Respondent's Motion to Publish was granted on January 21, 2000.

¹ Specifically, petitioners request \$41,218.25 in attorney's fees and \$8,109.83 in costs incurred by Mr. Webb's firm. Petitioners did not incur any costs directly or pay a retainer. Petitioners' Statement Re: Costs, filed September 7, 1999. The final fee request includes the ten hours Mr. Webb expended on his reply brief and a reduction in fees for 13.5 hours of travel time. Mr. Webb also agrees that Dr. Sheldon Gross's expert fees should be reduced by \$50, which is reflected in the \$8,109.83 requested for costs.

² Although Special Master Wright did not find the Castillos' testimony credible, she nevertheless believed that Michael's parents testified in good faith. Castillo, 1999 WL 605690, at *13. The undersigned has no reason to doubt that this claim was brought in good faith and on a reasonable basis.

B. Curtis R. Webb's Hours Expended

Mr. Webb requests reimbursement for 262.8 hours.³ Respondent states that she “takes no position as to the reasonableness of the number of hours claimed by Mr. Webb in this case” and “[b]y taking no position . . . respondent is not conceding that the number of hours claimed are reasonable.” R. Opp. at 17, 20. Clearly, respondent’s four and half pages of argument show that she has taken a position; that is, that the hours expended here are unreasonable and out of line with similar Program cases and should be reduced accordingly. Although respondent does not state what would be a reasonable number of hours expended, she argues that more complex claims, including those appealed to the Federal Circuit, have consumed less time than is requested here. R. Opp. at 17. In further support, respondent notes that this case was straightforward, involved entitlement issues only, and “turned on credibility determinations, not complex legal, medical or procedural issues.” R. Opp. at 17, 19. Finally, respondent believes that Mr. Webb’s considerable experience and past research with Program claims, including causation-in-fact cases, should have resulted in a reduction of hours here. R. Opp. at 18-19.

In assessing the number of hours reasonably expended, the court must exclude those “hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.” Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). In making reductions, the court is not necessarily required to base his/her decision on a line-by-line evaluation of the fee application. Wasson v. Secretary of HHS, 24 Cl. Ct. 482, 484 (1991)(affirming the special master’s general approach to petitioner’s fee request where the entries and documentation contained in the 82 page fee petition were organized in such a manner that specific citation and review were rendered impossible), aff’d by unpublished opinion, 988 F.2d 131 (Fed. Cir. 1993). Moreover, the court may rely on its experience to ascertain the reasonableness of the hours expended in prosecuting a claim. Saxton v. Secretary of HHS, 3 F.3d 1517 (Fed. Cir. 1993); Wasson, 24 Cl. Ct. at 483.

Turning to Mr. Webb’s fee petition, the course of the proceedings on this case spanned four years and four months. While it was petitioners’ burden to demonstrate actual causation, the claim was relatively straightforward. The case hinged on a finding by the special master that Michael suffered a seizure and a related regression of speech skills within seven days following his vaccination, based either on factual evidence from the medical records or Mr. and Mrs. Castillo’s testimony. Ultimately, Special Master Wright found the evidence lacking in this respect. Procedurally, this case progressed largely as expected, with only minor delays resulting from a change in respondent’s counsel and problems in scheduling Dr. Gross’s evaluation. Special Master

³ There appears to be a typographical error on page 1 of Mr. Webb’s fee petition which indicates only 116.8 hours were requested at \$175, rather than the correct figure of 119.1 hours. This latter figure brings the hours expended to 252.8, which is the amount initially requested on page 18 of Exhibit A. Counsel then increased this request by 10 hours, to 262.8 hours, for the time spent in responding to respondent’s fee objections. P. Reply at 14; Supplemental Affidavit of Curtis R. Webb, filed October 21, 1999, at 2-3.

Wright conducted only six status conferences and two hearings. Reviewing petitioners' fee application in light of these circumstances, the court agrees the time expended appears unreasonable. However, this court also is at a distinct disadvantage in reviewing the reasonableness of Mr. Webb's actions since Special Master Wright, and not the undersigned, presided over the entitlement phase. Even so, this court is required to conduct an independent review; doing so, it is apparent that over the course of this claim, Mr. Webb lists an excessive number of vague entries such as "reviewed file," "reviewed correspondence," and "prepared case for court."

In replying to respondent's general objections to the hours expended, Mr. Webb states:

The preparation and prosecution of the Petitioners' case required the Petitioners to: Present compelling evidence that Michael Castillo suffered a regression in speech skills immediately following the seizure which followed his September 29, 1992 DTP vaccination; and persuasive evidence that the September 29, 1992 DTP vaccination caused Michael Castillo's seizure disorder and developmental delay assuming that the Special Master credited their testimony that Michael Castillo suffered a regression in skills following the September 29, 1992 DTP seizure . . . [T]he case that requires the most time is one which requires a complete preparation of both fact testimony (especially fact testimony which is in addition to or in conflict with the medical records) and complex medical and scientific testimony, such as proof of causation in fact in a case arising from a DTP vaccination . . . The preparation of prior cases did not, however, allow [Mr. Webb] to forego research, analysis and argument directed at applying principles of the medical literature to the specific circumstances presented by Michael Castillo's claim.

P. Reply at 12-13. Mr. Webb also ascribes the hours expended to the complicated \$1,000 issue and Michael's poorly defined neurological condition, both factors which required significant investment of time and costs. Fee Petn. at 4-5.

The court finds Mr. Webb's explanation for the time expended unpersuasive; the Castillos' claim involved no more special circumstances or preparation than is faced by Mr. Webb in any other claim. Without a persuasive or even specific explanation of the entries, these repeated tasks (reviewing the file, reviewing correspondence, preparing the case for court) appear unnecessarily undertaken. While the court appreciates counsel's attention to the Castillos' claim, and indeed he has appeared to be a zealous advocate on their behalf based simply on the hours expended, his intimate knowledge of the case specifics should have eliminated the need for substantial time spent re-reviewing the case file, thus resulting in fewer hours. Where counsel have failed to establish the reasonableness of the hours spent, it is the undersigned's practice to reduce counsel's hours by a percentage, normally 25%; however, this is impractical in this instance given Mr. Webb's various hourly rates over the course of this case. Moreover, it would be unfair to penalize Mr. Webb with such a hefty reduction given that the undersigned's only contact and familiarity with this claim is in this fees phase. While respondent provides no specific amount to deduct from counsel's hours, the court agrees some reduction is in order. **Therefore, the court deducts 20 hours spread over the**

four-year course of this claim to eliminate what the court views as excessive time spent reviewing the file and reviewing correspondence. Roughly calculated, this amounts to five hours per year or \$3,137.50.⁴ The court believes this reduction is reasonable and provides petitioners with the benefit of the doubt for most of the hours expended.⁵

In addition, counsel requests 12.5 hours to compile his fee petition and reply brief. The court also finds this excessive. The 2.5 hours spent preparing the fee petition are granted, as are the 1.5 hours expended to review respondent's opposition brief and review and revise counsel's reply brief. However, the 8.5 hours spent on reviewing the file, researching legal matters, and drafting the reply legal brief are unreasonable in light of the fact that counsel filed a very similar brief in Erickson. Since the court already granted Mr. Webb four hours in that case for preparing the reply brief, it would be inappropriate for the court to award Mr. Webb twice for nearly the same research and drafting. Thus, Mr. Webb's request for 8.5 hours is reduced by half; **\$743.75 is hereby deducted** from counsel's fee petition.⁶

C. Expert Fees

Petitioners request \$1,475 in expert fees for Dr. Sheldon Gross and \$1,350 in expert fees for Dr. Thomas Schweller. Dr. Gross's hourly rate is \$250 for chart reviews, \$200 for conducting an IME, and \$350 for trial testimony. Dr. Schweller charges \$150 for chart reviews and \$250 for trial testimony. P. Ex. B. Respondent objects to petitioners' request on two grounds. First, counsel considers Dr. Gross's \$250 hourly rate excessive and requests that his rate be reduced to \$200 in light of previous vaccine decisions which have found the lower rate to be the maximum hourly rate for qualified experts. Second, respondent believes Dr. Gross's increased rate of \$300 for hearing testimony violates governing vaccine law; thus, respondent requests that this fee also be reduced to \$200 per hour. Respondent does not address Dr. Schweller's fees. R. Opp. at 21-22. In their reply, petitioners maintain that Dr. Gross's hourly rate is reasonable, but agree to reduce Dr. Gross's overall fees by \$50 to reflect the adjustment in the rate charged for hearing testimony.

⁴ Twenty hours spread over four years and three different hourly rates was figured as follows: \$700.00 for year one (\$140 x 5 hours); \$750.00 for year two (\$150 x 5 hours); \$375.00 for year three at \$150 through December 31, 1997 (\$150 x 2.5 hours); \$437.50 for year three at \$175 which was instituted January 1, 1998 (\$175 x 2.5 hours); and \$875.00 for year four (\$175 x 5 hours).

⁵ Incidentally, Mr. Webb recently requested, and the special master awarded, 189.9 hours in a Table encephalopathy claim which spanned *nine* years. Haugh v. Secretary of HHS, No. 90-3128V, 1999 WL 525539 (Fed. Cl. Spec. Mstr. June 30, 1999). That case also required two hearings before the special master denied entitlement. Despite all the reductions in the Castillos' claim in fees and costs, the court believes it has been more than generous in this case.

⁶ Although in his reply Mr. Webb addressed several issues which were not part of the Erickson reply brief, these issues did not require additional research or involve sophisticated arguments.

The court disagrees with respondent that Dr. Gross's \$250 per hour rate is unreasonable under the Vaccine Act. As Special Master Hastings expressed in Childers v. Secretary of HHS, No. 96-194V, 1999 WL 514041, at *4 (Fed. Cl. Spec. Mstr. June 11, 1999), determining a reasonable expert fee under the Program is a difficult issue. Historically, reimbursement for expert witness fees has been "capped" at \$200 per hour under the assumption that because respondent routinely retained qualified experts at this rate, petitioners could as well. However, as Special Master Hastings stated, these assumptions are no longer valid:

I now believe that in fact it is an exceedingly difficult task for petitioners to obtain expert assistance with respect to Program cases. It appears that relatively few qualified medical experts are willing even to consider and evaluate these cases for petitioners. And some of those few experts who are willing to do so have consistently charged petitioners well in excess of \$225 per hour for their services. Some of those experts have represented that they routinely receive \$250 or even more per hour for their services in non-Program settings. In these circumstances, it now seems to me that it is reasonable for Program counsel to pay such rates for medical expert services . . . Indeed, I have come to worry that in declining in the past to compensate petitioners for more than \$225 per hour for expert assistance, in some cases I have restricted the ability of petitioners to obtain competent expert assistance, and in others I have simply forced petitioners' counsel to pay for the additional amounts to these experts out of their own pockets.

Childers, 1999 WL 514041, at *4. See also Hayden v. Secretary of HHS, No. 91-643V, 1998 WL 430081 (Fed. Cl. Spec. Mstr. July 10, 1998); Mandel v. Secretary of HHS, No. 92-260V, 1998 WL 211914 (Fed. Cl. Spec. Mstr. April 2, 1998). Mr. Webb indicates that \$250 is Dr. Gross's standard hourly rate. P. Reply at 14. In addition, Dr. Gross's participation was necessary to the progression of this case. Special Master Wright states in her entitlement decision: "Following Mrs. Castillo's testimony regarding regression in Michael's motor functioning, Dr. Spiro, respondent's expert, suggested an examination would be helpful to assess the level of Michael's deficits. Tr. at 119-21. For that reason, the first hearing was adjourned so that a pediatric neurologist could perform an evaluation on Michael. Dr. Gross performed that evaluation." Castillo v. Secretary of HHS, No. 95-652V, 1999 WL 605690, at * 5, n. 11 (Fed. Cl. Spec. Mstr. July 19, 1999). Dr. Gross spoke with Mrs. Castillo on two occasions regarding the events surrounding her son's vaccination, examined Michael, and "ordered a series of blood and urine tests as well as a chromosomal analysis." Castillo, 1999 WL 605690, at *5. In addition, Dr. Gross reviewed Michael's medical records, prepared an expert report, and testified at trial. Thus, "petitioner[s'] counsel was in effect required to pay the rates requested, or forego very important testimony that would aid his client's case. Petitioner[s'] counsel paid the requested rates, and did so reasonably, in my view." Childers, 1999 WL 514041, at *5. Moreover, that Special Master Wright ultimately found Dr. Gross's testimony "equivocal" and therefore "virtually useless" does not persuade me that the requested witness fees should not be

reimbursed at \$250 per hour.⁷ For the reasons stated, Drs. Gross's and Schweller's hourly rates of \$250 and \$150 respectively are reasonable and the requested expert fees are granted, except for the modifications described below.

The court concurs with the parties that an expert may not increase their hourly rate for trial testimony. Accordingly, Dr. Gross's expert fees are reduced by \$100 to reflect the difference in the rate charged (\$350 per hour) and the rate allotted (\$250 per hour) for one hour of testimony. In addition, Dr. Schweller's expert fees are reduced by \$300 for the same reason; Dr. Schweller charged \$250 per hour for three hours of testimony when his regular hourly rate is \$150.⁸ While \$400 is the amount by which petitioners' costs should be reduced, Mr. Webb's final fee request already deducted \$50 for Dr. Gross's overcharge. Thus, it would only be appropriate to further decrease counsel's fee petition by \$350 in this instance. **Therefore, Mr. Webb's costs are reduced by an additional \$350.**

D. Other Costs Incurred

Petitioners seek a total of \$8,109.83 in costs (inclusive of the expert fees). Respondent cites no other objections to the costs incurred. Nevertheless, the court is required to independently review the reasonableness of the request. Although petitioners did not submit receipts or other documentation for the majority of the expenses incurred, the court is satisfied that the costs expended were related to proceedings on this case and were, for the most part, reasonable. The court finds petitioners' request unreasonable in only one other instance: the court **reduces petitioners' application by \$169.15** which reflects the difference between the costs requested for lodging at the Colonial Inn (\$847.15) and the amount documented or explained (\$678). While the court suspects that some of this difference can be attributed to local or state taxes on the hotel charges, the court has no evidence to calculate the amount.

⁷ As petitioners' counsel convincingly explains in his reply, Dr. Gross was "called by the Petitioners to provide a description of Michael Castillo's condition. The Petitioners asked Dr. Gross to examine Michael Castillo because the Special Master felt that the medical records did not adequately describe his condition. The Petitioners did not ask Dr. Gross to provide an opinion as to whether or not the DPT vaccination caused Michael Castillo's seizure disorder and developmental delays." P. Reply at 13.

⁸ Respondent states in her opposition that Dr. Gross's testimony rate was \$300 per hour. R. Opp. at 21. The bill submitted clearly shows Dr. Gross charged \$350 per hour. Thus, petitioners should have acquiesced to reducing Dr. Gross's expert fees by \$100, not \$50. In addition, neither party recognized that Dr. Schweller also improperly increased his fees for trial.

E. Summary of Fees and Costs Awarded

Total fees requested:	\$41,218.25
Fees reduced or deducted :	- 350.00 (hourly rate reduction for travel time)
	- 3,137.50 (20 hours deducted from hours expended)
	- <u>743.75</u> (4.25 hours deducted on the reply brief)
Total fees awarded:	\$36,987.00

Total costs requested:	\$8,109.83
Costs reduced or deducted:	- 350.00 (expert fees)
	- <u>169.15</u> (Colonial Inn lodging expenses)
Total costs awarded:	\$7,590.68

II. CONCLUSION

After a thorough review of the fee application and respondent's objections, petitioners are awarded \$36,987 in attorney fees and \$7,590.68 in costs.

Accordingly, pursuant to Vaccine Rule 13, petitioners are hereby awarded a total of \$44,577.68 in attorney's fees and costs.⁹ The Clerk of the Court is directed to enter judgment in accordance herewith.¹⁰

IT IS SO ORDERED.

Gary J. Golkiewicz
Chief Special Master

⁹ This amount is intended to cover *all* legal costs. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. It should be noted that §15(e)(3) prevents an attorney from charging or collecting fees (including costs) which would be in addition to the amount awarded herein. See generally Beck v. Secretary of HHS, 924 F.2d 1029 (Fed. Cir. 1991).

¹⁰ The parties may expedite entry of judgment by filing notices renouncing their right to seek review in this matter.