OFFICE OF SPECIAL MASTERS

No. 99-0774V

(Filed: August 26, 2002)

HOLDEN RUPERT, by his Mother and Next Friend, ANDREA RUPERT	*	
Petitioners,	*	**TO BE PUBLISHED**
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Ronald Homer, Boston, MA, for petitioners.
Michael Milmoe, Washington, D.C., for respondent.

DECISION ON REMAND

EDWARDS, Special Master

The case is before the special master on remand from the United States Court of Federal Claims. The Court found specifically that the special master "undertook the lodestar analysis" to award attorneys' fees and costs in this case when, after rejecting as "unpersuasive" most of the evidence that the parties proffered, he accepted affidavit statements from Stephen I. Lipman, Esq., "'as a direct, reliable indication'" that $365.00 an hour represents "'the prevailing market rate in Boston, Massachusetts, for a personal injury lawyer with over thirty years experience.'" *Rupert v. Secretary of HHS*, 52 Fed. Cl. 684, 689 (2002), quoting *Rupert v. Secretary of HHS*, No. 99-0774V, 2002 WL 360005 (Fed. Cl. Spec. Mstr. Feb. 14, 2002). However, the Court identified several errors in the special master's decision. First, the Court ruled that Mr. Lipman's affidavit "does not provide sufficient detail so as to support a finding that $365.00 an hour is the prevailing market rate for comparable attorneys" in Boston, Massachusetts. *Rupert*, 52 Fed. Cl. at 693. Second, the Court determined that the special master's conclusion that, compared to Mr. Lipman's hourly rate, petitioner's lower, requested hourly rates were "'not *per se* unreasonable,' but nevertheless not 'inherently reasonable for Program cases,' does not correlate to an express finding of a prevailing market rate." *Rupert*, 52 Fed. Cl. at 689, quoting *Rupert v. Secretary of HHS*, No. 99-0774V, 2002

WL 360005 (Fed. Cl. Spec. Mstr. Feb. 14, 2002). Third, the Court criticized sharply the special master's use of *Erickson v. Secretary of HHS*, No. 96-0361V, 1999 WL 1268149 (Fed. Cl. Spec. Mstr. Dec. 10, 1999), which proposes that once a special master fixes an hourly rate for a National Vaccine Injury Compensation Program (Program)[1] attorney based upon a local, prevailing market rate, the special master should confirm the appropriateness of the rate by balancing the rate against hourly rates that other Program attorneys throughout the nation receive. *Rupert*, 52 Fed. Cl. at 690-92. Fourth, the Court held that "the special master abused his discretion in awarding a $75.00 rate for petitioner's paralegals." *Id.* at 693. In the Court's view, the special master fashioned the paralegals' rate by adopting impermissibly "a perceived national market rate for paralegals." *Id.* at 693-94. Therefore, the Court directs the special master "to make an explicit finding of the prevailing market rate for a Vaccine Act or comparable attorney," and for paralegals, "practicing in Boston, Massachusetts." *Id.* at 694. If the special master cannot "make an explicit finding of the prevailing market rate for a Vaccine Act or comparable attorney," and for paralegals, "practicing in Boston, Massachusetts," then the Court directs the special master to "so state" and "within the bounds of his discretion, proceed to develop a reasonable rate." *Id.*

At the outset, the special master repeats the admittedly weak rationale for his statement that petitioner's requested hourly rates were not *per se* unreasonable. The special master observed simply that petitioner's requested hourly rates did not exceed the only probative evidence in the record before the special master regarding the rate that a comparable, Boston, Massachusetts attorney charges and receives in the normal course of business. *Rupert*, 2002 WL 360005, *8; *see also Slay v. Secretary of HHS*, 2001 WL 1168103, *2 (Fed. Cl. Spec. Mstr. Sept. 13, 2001)(special master found that the evidence supported a Program attorney's requested, $175.00 hourly rate because the rate was "less than the hourly rate" that friendly affiants charged). The special master understands certainly now the incorrect focus of his initial decision. Rather than awarding outright the local, prevailing market rates to which petitioner's attorneys are lawfully entitled, the special master attempted instead to justify in the Program's historical context rates to which respondent objected strenuously. As the Court noted: "[T]he Supreme Court repeatedly has affirmed the prevailing market rate as the 'centerpiece' of attorneys' fees and costs awards." *Rupert*, 52 Fed. Cl. at 688, citing *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989). And, as the Court noted, the Supreme Court has defined clearly the prevailing rate "as the rate 'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Rupert*, 52 Fed. Cl. at 687, citing *Blum v. Stenson*, 465 U.S. 886, 895-96, n. 11 (1984). Moreover, as the Court noted: "[T]he prevailing market rate is awarded regardless of the rate actually charged by the attorney." *Rupert*, 52 Fed. Cl. at 687, citing *Blum v. Stenson*, 465 U.S. at 895 (1984). Thus, as the Court noted, the lodestar calculation--the product of the prevailing market rate grounded in appropriate market evidence multiplied by the number of reasonable hours--yields a presumptively reasonable fee that should not be adjusted absent extraordinary circumstances. *Rupert*, 52 Fed. Cl. at 686-87, citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546,

[1] The statutory provisions governing the Vaccine Program are found in 42 U.S.C.A. §§ 300aa-1 *et seq.* (West Supp. 2002). For convenience, further reference will be to the relevant section of 42 U.S.C.A.

565-66 (1986). Indeed, the Court noted, an attorney deserves "'no more and no less.'" *Rupert*, 52 Fed. Cl. at 687, citing *Blanchard*, 489 U.S. at 93.

Upon receiving the Court's remand order, the special master canvassed the original record. During a status conference on June 11, 2002, the special master informed the parties that he required additional evidence regarding the range of prevailing market rates for a Vaccine Act or comparable attorney and for paralegals in Boston, Massachusetts, before he could address adequately the Court's remand order. Petitioner submitted supplemental affidavits from W. Paul Needham, Esq. (Mr. Needham); Arthur Licata, Esq. (Mr. Licata); and Mr. Lipman. Petitioner's exhibit (Pet. ex.) 20. In addition, petitioner submitted affidavits from Brian O'Connell, Esq. (Mr. O'Connell), a Wellesley, Massachusetts attorney with 15 years of experience who has prosecuted a Program petition; and Albert Zabin, Esq. (Mr. Zabin), a Boston-area attorney with 40 years of experience. *Id.* Respondent submitted affidavits from Thomas Lynch, Esq. (Mr. Lynch), a Boston attorney with 23 years of experience; Owen McGowan, Esq. (Mr. McGowan), an outer-suburban Boston attorney with 15 years of experience; Patrick Pisano (Mr. Pisano), a retired litigation manager for Chubb & Son, a large insurance company; and Barry Regan (Mr. Regan), Director of Claims and Risk Management for Eastern Dental Insurance Company. Respondent's exhibits (R. ex.) O-R.

The special master convened two hearings. Mr. Needham, Mr. Licata and Mr. O'Connell appeared in person on August 7, 2002, in Boston, Massachusetts, for petitioner. Mr. Lipman appeared by telephone on August 7, 2002, for petitioner. Mr. McGowan and Mr. Regan appeared in person on August 7, 2002, in Boston, Massachusetts, for respondent. Mr. Pisano appeared by telephone on August 7, 2002, for respondent. Mr. Lynch appeared by telephone on August 17, 2002, for respondent.

Both parties adduced competent evidence establishing that the prevailing market rates for medical malpractice, products liability and personal injury attorneys in Boston, Massachusetts, range from $105.00 an hour for a principal practicing predominantly insurance defense in the far suburbs of Boston, Transcript (Tr.), filed August 13, 2002, at 232, to $365.00 an hour for a principal practicing predominantly plaintiffs' personal injury in Boston, Tr. at 210-13, and upwards. *See* Tr. at 28-29, 83, 90, 218. In addition, both parties adduced competent evidence establishing that the prevailing market rates for paralegals in Boston, Massachusetts, range from $45.00 for a paralegal who performs insurance defense work in the Boston suburbs, *see* Pet. ex. 20A-1 ¶ 12 , to $100.00 an hour for a paralegal employed by a personal injury attorney in Boston, and upwards. Tr. at 218. From this competent evidence, the special master must interpolate a prevailing market rate for petitioner's attorneys and paralegals.

In advocating an award of rates at the lower end of rates for a submarket of insurance defense attorneys in Boston, Massachusetts, Respondent's Response to the Special Master's Order of June 12, 2002 (R. Response), filed July 15, 2002, at 7; Respondent's Sur-reply to the Petitioner's Reply to Respondent's Response to the Special Master's Order of June 12, 2002 (Surreply), filed August 2, 2002, at 11, respondent casts itself as "an institutional client," like an insurance carrier, who provides "volume business" guaranteeing a steady stream of income to petitioner's attorneys. Surreply at 3, 5; *see also* Response at 4-5. The analogy is grossly absurd. Indeed, the distinction between a defense attorney's large institutional client and respondent, and the distinction between

a defense-based practice and a petitioner-based practice, are crucially important. Several witnesses testified that rates for insurance defense work are "market driven." *See* Tr. at 147, 183, 235; *see also* Tr. at 265, 289. The witnesses explained that when an insurance carrier enters a particular geographic area, the insurance carrier negotiates in arms-length deals the rates that the carrier will pay for legal work. Tr. at 265, 289. The witnesses agreed that one significant factor in negotiations resulting in the modest rates that defense attorneys receive is the number of cases that an insurance company may refer ultimately to a firm. Tr. at 147, 194-95, 235, 276-77, 296-97. Indeed, Mr. O'Connell indicated that he charges higher rates to other "big institutional" clients who offer potentially less work. Tr. at 195. In addition, the witnesses agreed that a second significant factor in rate negotiations resulting in the modest rates that defense attorneys receive is the "component of regular payment." Tr. at 147; *see also* Tr. at 258, 277. As Mr. McGowan offered, there is little inherent risk to defense work because as soon as an insurance carrier refers a case to him, he is able to generate billable hours of work. Tr. at 258. Further, the witnesses agreed that a third significant factor in rate negotiations resulting in the modest rates that defense attorneys receive is the large number of attorneys who are willing to perform legal work at the rates that an insurance company pays. *See, e.g.*, Tr. at 147, 235.

While respondent may be a behemoth institution, respondent does not participate in any market negotiations to retain Program attorneys. Thus, unlike an insurance carrier with its defense counsel, respondent does not possess privity, much less leverage, in setting market rates with Program attorneys. Moreover, respondent does not enjoy with Program attorneys the attorney-client relationship that an insurance carrier enjoys with its defense counsel. Rather, respondent--the adversary in all Program cases--is merely the statutory payor of attorneys' fees and costs.

Respondent states that "[t]he private practice of law is a business." Surreply at 10. Yet, by asserting that Program practice is "virtually" risk-free because the Program allows under most circumstances an award of attorneys' fees and costs to a petitioner who does not prevail, respondent ignores a fundamental difference between two business models. An insurance defense-based practice does not involve risk because an attorney expects compensation for *all* of the reasonable hours that the attorney spends advising an insurance carrier who is a client. In contrast, the Program's fee-shifting scheme reduces a Program attorney's risk only to the extent that the attorney receives fees and costs for those losing cases that the attorney brings upon a reasonable basis and in good faith. However, to maintain a practice, the Program attorney must solicit business from injured individuals. Once the Program attorney attracts a potential client, the Program attorney must advise that potential client about the potential client's legal rights. Then, the Program attorney must devote attorney hours and financial resources to investigating the factual and medical bases of a potential claim by reviewing medical records and by consulting medical professionals. If the Program attorney concludes that the potential claim does not have merit, the Program attorney cannot institute a Program action. Thus, the Program attorney cannot receive fees and costs for the attorney's investment in the case. Therefore, the Program attorney does encounter considerable risk in Program practice. Just as the insurance defense attorney's rate reflects the absence of risk, the Program attorney's rate must reflect the presence of risk. After all, a Program attorney's rate should be sufficient "to attract competent counsel." *Blum*, 465 U.S. at 893-94. Both Mr. McGowan and Mr. Lynch--respondent's witnesses--suggested that they could not sustain a financially-viable

practice at insurance defense rates if they did not receive compensation for hours that they spent developing a case that they decided not to pursue. *See* Tr. at 261 (acknowledging that "general rate for non-insurance clients" is "a lot higher"); Tr., filed August 19, 2002, at 340-41.

Respondent implies that there exists in Boston, Massachusetts, a ready market of attorneys who can prosecute effectively Program cases at rates equivalent to insurance defense rates.[2] Describing the Program as "a claim program run by the government," Tr. at 238, Mr. McGowan stated that he "would take" a Program case at a rate "similar to the rates" that he receives from his "insurance clients." Tr. at 240-41. Describing the Program as "more of an administrative process," Mr. Lynch stated that he, too, would accept a Program case at his insurance defense rates. Tr. at 323. In the special master's view, Mr. McGowan's and Mr. Lynch's attestations ring hollow. Expressing a classic free-market philosophy, Mr. McGowan admitted that he "would want to get the highest rate" that he could charge and receive. Tr. at 240. And, the special master decides that Mr. Lynch failed to reconcile persuasively his testimony that he does not "venture out of an area" of law that he is "secure in," Tr. at 316, with his ready assent that he would represent a claimant at his insurance defense rates in a Program with which he has no identifiable experience. *See* Tr. at 338-40. Moreover, because Mr. McGowan and Mr. Lynch based their testimony upon a hasty review of a booklet that the Office of Special Masters has published, and upon apparently brief discussions with respondent's attorneys, Tr. at 237-38, 321-22, it is obvious to the special master that they just do not appreciate the intricacies of representing an individual client in the Program. Their understanding does not comport surely with the United States Court of Appeals for the Federal Circuit's solid pronouncement that the Program is "a *complex* piece of legislation" that "creates a *major* Federal compensation program." *Amendola v. Secretary of HHS*, 989 F.2d 1180, 1182 (Fed. Cir. 1993)(emphasis added). In addition, their understanding does not comport with the special master's experience during his nearly 11 years of service.[3] Further, their understanding does not

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[2] By referring to a list of attorneys who have expressed interest in representing possibly petitioners who file their petitions *pro se* that the clerk of court maintains, respondent implies apparently also that there exists a ready, *national* market of attorneys who can prosecute effectively Program cases. *See, e.g.*, Tr. at 111-16. The special master does not consider the list to be relevant to the sole issue on remand: the prevailing market rate for a Vaccine Act or comparable attorney in Boston, Massachusetts.

[3] Quite frankly, the special master deems respondent's contention that the Program is a rudimentary process to be offensive to petitioners who have faced increasingly difficult standards as a result of two administrative revisions of the Table; to those petitioners' attorneys who have dedicated their time and talent to the vindication of their clients' substantive legal rights; and to the special masters who have through years of effort developed the expertise in Program cases that Congress envisioned. If respondent believes truly that the Program is a rudimentary process, then one must question seriously why the government employs a cadre of experienced and well-compensated attorneys, as well as a full complement of support staff, and why the government devotes abundant resources--presenting sometimes as many as three or four medical experts in a case, *see, e.g.*, *Malloy v. Secretary of HHS*, No. 99-0193; *Franklin v. Secretary of HHS*, No. 99-
(continued...)

comport with Mr. O'Connell's exquisitely clear testimony about his challenging experiences in prosecuting a Program case through a petition for *certiorari* to the United States Supreme Court. Tr. at 142-46, 148-50, 152-54.

Respondent contends that "the rates of defense counsel have even greater import in the analysis of the prevailing market rate as they are the only attorneys practicing [medical malpractice, personal injury and products liability] who actually charge by the hour." Response at 3. Respondent is wrong. While plaintiffs' attorneys work usually on a contingency basis, there is ample, acceptable evidence in the record that allows the special master to determine a range of prevailing market rates for Vaccine Act or comparable attorneys in Boston, Massachusetts. Mr. Needham, Mr. O'Connell and Mr. McGowan testified that they represent plaintiffs and defendants in a variety of matters. *See* Tr. at 23-25, 135, 232. They offered that they work typically on a contingency basis in personal injury cases. *See* Tr. at 26, 136, 242. Nevertheless, they testified that they charge individual clients more than insurance defense rates in cases that are not covered by a contingency arrangement. Tr. at 31, 47, 140, 261. Mr. Licata testified that he represents plaintiffs in "very complex personal injury cases" on a "[c]ontingency fee basis." Tr. at 88. However, he stated that he has charged periodically individual clients an hourly rate for "good counsel." Tr. at 89. The rates that Mr. Needham, Mr. Licata, Mr. O'Connell and Mr. McGowan charge individual clients--a reflection of how each attorney values his time and a reflection of rates that the market will bear obviously--is appropriate and relevant to the sole issue in this case: the prevailing market rate in Boston, Massachusetts. Indeed, in *Blum*, the United States Supreme Court recognized that "the rates" that attorneys charge "in private representations" may be pertinent to the determination of a proper prevailing market rate. *Blum*, 465 U.S. at 896. Regardless, Mr. Lipman testified that "more recently," he has begun to represent "some cases on an hourly basis in the personal injury field." Tr. at 212. Mr. Lipman said that his rates range from $250.00 an hour in a case that he received in an unusual referral to $365.00 an hour. Tr. at 213, 224. And, Mr. O'Connell testified that he sought $200.00 an hour for the only Program case he has handled. Tr. at 146. Mr. O'Connell explained that he chose the rate by estimating a rate that the Program and the Department of Justice would view as "fair." Tr. at 198.

The special master decides that the rates applicable to the submarket of insurance defense attorneys in Boston, Massachusetts, do not assist him in identifying the range of prevailing market rates for a Vaccine Act or comparable attorney in Boston, Massachusetts. *See Norman v. Housing Authority of the City of Montgomery*, 836 F.2d 1292, 1305 (11th Cir. 1988)(insurance defense rates "seem almost universally below the average," and "long-standing relationships with" a client "may cause the rates to be depressed"). Instead, the special master settles upon Mr. Needham, Mr. Licata and Mr. Lipman with their numerous years of experience as suitable benchmarks for Mr. Conway.[4]

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[3](...continued)
0855V--to defend so vigorously Program claims.

[4] The special master realizes that respondent may criticize Mr. Needham, Mr. Licata and Mr. Lipman for being "friendly" witnesses. Yet, as officers of the Court, they were obliged to provide (continued...)

And, the special master settles upon Mr. O'Connell and Mr. McGowan with their 15 years of experience each as suitable benchmarks for Mr. Homer.[5]

Based upon persuasive, wholly believable, sworn testimony from Mr. Needham, from Mr. Licata and from Mr. Lipman, the special master finds that the prevailing market rate for a Vaccine Act or comparable attorney in Boston, Massachusetts, of Mr. Conway's caliber ranges from $250.00, Tr. at 31, to over $365.00 an hour. Tr. at 218.[6] The special master places Mr. Conway within that range at $300.00 an hour. The rate accounts for Mr. Needham's recognition that, by choice, he charges rates below the current market level, Tr. at 31, and for the flexibility that Mr. Lipman expressed exists in his rates. Tr. at 227-228.

Based upon persuasive, wholly believable, sworn testimony from Mr. O'Connell and from Mr. McGowan, the special master finds that the prevailing market rate for a Vaccine Act or comparable attorney in Boston, Massachusetts, of Mr. Homer's caliber ranges from $175.00 in the outer suburbs, Tr. at 261, to $250.00 an hour in closer suburbs, Tr. at 140-141, to over $300.00 an hour in urban Boston. Tr. at 156.[7] The special master places Mr. Homer within that range at $250.00 an hour. The rate accounts particularly for the rate that Mr. O'Connell--a novice in Program cases--sought in *O'Connell v. Secretary of HHS*, No. 96-0063V. Indeed, the special master suspects that if Mr. O'Connell had calculated a rate based upon real market principles, Mr. O'Connell would have requested a higher rate. *See, e.g.*, Tr. at 198.[8]

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[4](...continued)
truthful testimony. *See, e.g.*, Tr. at 93-94; *see also Willis v. United States Postal Service*, 245 F.3d 1333, 1341 (Fed. Cir. 2001).

[5] The special master realizes that respondent may criticize Mr. O'Connell for being a "friendly" witness. However, the special master is relying also upon Mr. McGowan--respondent's witness--to establish the prevailing market rate in Boston, Massachusetts, for the representation of a client who is not an insurance carrier.

[6] In his initial decision, the special master discussed comprehensively his opinion of Mr. Conway's skills and of Mr. Conway's value to the Program. *Rupert*, 2002 WL 360005, *10.

[7] In his initial decision, the special master discussed comprehensively his opinion of Mr. Homer's skills and of Mr. Homer's value to the Program. *Rupert*, 2002 WL 360005, *10.

[8] The special master declines to reduce either Mr. Conway's rate or Mr. Homer's rate based upon a perception that "litigation under the Vaccine Act does not compare to the kind of 'skill, experience, and reputation' required of those attorneys who can command the highest market rates." *Rupert*, 52 Fed. Cl. at 691, citing *Morris v. Secretary of HHS*, 20 Cl. Ct. 14, 30 (1990); *Zeagler v. Secretary of HHS*, 19 Cl. Ct. 151, 153-54 (1989). Indeed, a reduction based upon the perception does not appear consistent with the concept of prevailing market rates. The value of an attorney's time is just that--the value of the attorney's time whether a case is simple or difficult. Nevertheless,
(continued...)

The range of prevailing market rates for paralegals in cases other than insurance defense in Boston, Massachusetts, does not vary as greatly as the range of prevailing market rates for attorneys in cases other than insurance defense in Boston, Massachusetts. Mr. Needham offered that he bills between $80.00 an hour and $95.00 an hour for paralegal time, depending upon "what somebody's willing to pay." Tr. at 71. Mr. O'Connell stated that his firm bills "usually in the neighborhood of $85.00 an hour" for paralegal time. Tr. at 141. Mr. Lipman indicated that he bills $100.00 an hour for paralegal time. Tr. at 218. Mr. Lipman considered his paralegal billing rate to be "in the center" of a range in Boston, Massachusetts. *Id.* In his initial decision, the special master analyzed erroneously his award of $75.00 an hour for petitioner's paralegals. *Rupert*, 52 Fed. Cl. at 693. The record supports now more than adequately an award of $85.00 an hour.

Petitioner seeks attorneys' fees for proceedings on respondent's motion for review and for proceedings on remand. Mr. Conway claims 55.1 hours. Mr. Homer claims 23 hours. The paralegals claim 35.6 hours. In addition, petitioner seeks $269.43 in costs. Respondent objects to several items.

The special master has reviewed carefully petitioner's supplemental fee statements. He denies several of Mr. Conway's and Mr. Homer's time entries as unreasonable: a conference call on
July 10, 2002, with a Program attorney who is not associated with this case; a case meeting on August 6, 2002; and travel time on August 7, 2002. In addition, the special master denies $129.00 in costs for a flight on August 7, 2002.

CONCLUSION

[8](...continued)
the lodestar includes a component that considers the skill necessary to prosecute a case: the concept of a reasonable number of hours. Every case is going to involve a similar number of hours for the initial investigation. However, cases that are conceded and settled quickly should require fewer hours than cases that are complex and hotly contested. In addition, a more experienced Program attorney will likely log fewer hours that a less experienced attorney. In fact, in this case, the special master denied quite a number of hours, reasoning that the hours were not necessary based upon his view of the attorneys' skills and experience.

Petitioner is entitled to $13,412.50 in attorneys' fees[9] and $2,160.00 in costs for proceedings on the petition. Petitioner is entitled to $24,706.00 in attorneys' fees and $115.03 in costs for proceedings on respondent's motion for review and for proceeding on remand.[10] Therefore, petitioner is entitled to $40,393.53.

The special master's secretary shall provide a courtesy copy of this decision on remand to the parties by facsimile.

John F. Edwards
Special Master

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ATTORNEY	HOURS	RATE	TOTAL
KEVIN CONWAY	14.5	$300.00	$4,350.00
RONALD HOMER	15	$250.00	$3,750.00
PARALEGALS	62.5	$85.00	$5,312.50
			$13,412.50

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ATTORNEY	HOURS	RATE	TOTAL
KEVIN CONWAY	54.6	$300.00	$16,380.00
RONALD HOMER	21.2	$250.00	$5,300.00
PARALEGALS	35.6	$85.00	$3,026.00
			$24,706.00