OFFICE OF SPECIAL MASTERS

No. 99-97V

Filed: March 25, 2004

CIARA CEBALLOS, an Infant, by her Natural Parents TIMOTHY and MICHELLE CEBALLOS, Petitioners,	*	
v.	*	**TO BE PUBLISHED**
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.	*	

Stanley P. Kops, Bala Cynwyd, Pennsylvania, for petitioners.

David L. Terzian, U.S. Department of Justice, Washington, D.C., for respondent.

ATTORNEY'S FEES AND COSTS DECISION

GOLKIEWICZ, Chief Special Master

I. Procedural Background

On March 1, 1999, petitioners, Timothy and Michelle Ceballos, filed a petition on behalf of their daughter, Ciara, alleging that Ciara's polio was caused by the November 10, 1997 administration of an oral polio vaccine. See Petition, filed March 1, 1999. Respondent subsequently conceded in his Rule 4 Report that Ciara was entitled to compensation under the Vaccine Act. See Respondent's Report, filed June 1, 1999. On June 25, 1999, the court issued a Damages Order to provide the parties with guidance and a schedule for resolving the damages portion of the case. See Order, filed June 25, 1999. Petitioners filed their life care plan on

September 17, 2001. Thereafter, the parties engaged in frequent settlement discussions, which included a mediation session with the undersigned, and ultimately resolved all but two issues: (1) the appropriate amount to be awarded for pain and suffering pursuant to 42 U.S.C. 300aa-15(a)(4),[1] and (2) the naming of a qualified medical administrator who would assist petitioners with the disbursement of the portion of their award that is held in trust for the benefit of Ciara Ceballos. See Damages Decision, filed May 7, 2002. The court considered the parties' positions on these two issues during a telephonic hearing conducted on April 22, 2002. At the close of arguments, the undersigned issued a bench ruling, which was later memorialized in an unpublished Damages Decision. See Damages Decision, filed May 7, 2002. The court found that petitioners, on behalf of Ciara Ceballos, were entitled to an award under the Vaccine Program to provide for compensable expenses, past and future pain and suffering, and lost wages.[2] See Damages Decision, filed May 7, 2002.

On December 20, 2002, petitioners filed an application for attorney's fees and costs that contained no specific documentation for either claimed hours or costs. See Counsel's Certification in Support of the Fee Petition ("P. Fee Petn."), filed December 20, 2002. During a status conference held on January 8, 2003, respondent reported that he could not respond to petitioners' fee petition due to the lack of documentation. The undersigned requested that petitioners' counsel provide theses details, as memorialized in the court's Order of January 9, 2003, which directed petitioners' counsel to file "all documentation reflecting the hours worked in this case. . . [and] supporting documentation for costs claimed." See Order, filed January 9, 2003. Pursuant to the same Order, respondent's counsel was ordered to "specifically [address] the appropriateness of petitioners' counsel's claimed hourly rate." Id.

On February 4, 2003, petitioners' counsel filed a response to the court's order that listed costs in more detail, but did not provide additional documentation for these costs. See Counsel's Certification in Support of the Fee Petition ("P. Cert. Support Petn."), filed February 4, 2003. Specific documentation for hours spent on the case also remained unfiled. During a status conference held on February 10, 2003, petitioners' counsel explained the difficulty in providing the requested documentation. Respondent's counsel failed to address the January 9, 2003 Order. Accordingly, on February 14, 2003, the court issued an Order directing the parties to file their

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[1] The National Vaccine Injury Compensation Program comprises 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.A. §§ 300aa-1 et seq. (West 1991 & Supp. 2000). Hereinafter, individual section (§) references will be to 42 U.S.C.A. § 300aa of the Act.

[2] The court found Ciara Ceballos entitled to the full amount of pain and suffering allowable under the Act, $250,000.00, subject to discounting to present value. The court also concluded that a lump sum of $6,500,000.00 was to be deposited in a government-funded, inter-vivos, irrevocable, reversionary medical trust in order to fully fund the items of compensation set forth in petitioners' life care plan filed on September 17, 2001. See Damages Decision, filed May 7, 2002.

respective responses to the court's January 9, 2003 Order by March 17, 2003. See Order, filed February 14, 2003. Respondent's counsel filed a reply to this Order on February 20, 2003. See Respondent's Notice of Filing ("R. Notice"), filed February 20, 2003. On March 11, 2003, petitioners' counsel sent costs documentation via mail.[3] See Petitioners' Letter and Cost Documentation ("P. Cost. Doc."), dated March 11, 2003. Petitioners' counsel filed a Further Petition of Counsel for an Award of Counsel Fees and Costs on March 28, 2003. See Further Petition of Counsel for an Award of Counsel Fees and Costs with Exhibits Attached ("P. Further Petn. I"), filed March 28, 2003.

On April 28, 2003, a status conference was held. At this conference, the court suggested to the parties tentative ranges of award that would constitute a reasonable resolution of this matter and encouraged settlement. Pursuant to this status conference, the court's Order of April 29, 2003 directed the parties to file a status report within thirty days indicating how they intended to proceed with the case. See Order, filed April 29, 2003.

On May 27, 2003, a status conference was held. At this conference, the parties reported differences about how to proceed with possible mediation.[4] The undersigned offered advice, including using a Court of Federal Claims Judge. By court Order of May 29, 2003, the undersigned requested that the parties brief the issue of "relevant community." See Order, filed May 29, 2003.

On June 13, 2003, respondent's counsel indicated that the parties had agreed to mediation before a judge of the Court of Federal Claims. However, respondent reported on June 16, 2003, that attempts at a mediated settlement had failed.

Pursuant to a status conference held on July 17, 2003, the court ordered petitioners' counsel to file all evidence supporting his claimed hourly rate. On July 21 and August 22, 2003, petitioners' counsel filed additional evidence in support of his requested hourly rate. See Further Petition of Counsel for an Award of Counsel Fees and Costs with Exhibits Attached ("P. Further Petn. II"), filed July 21, 2003; Further Petition of Counsel for an Award of Counsel Fees and Costs with Exhibits Attached ("P. Further Petn. III"), filed August 22, 2003.

Respondent filed a Motion for the Special Master to Order Petitioners to Answer Interrogatories Pertinent to their Counsel's Practice on September 9, 2003, and Petitioners' Counsel's filed his Response to Respondent's Motion on September 22, 2003. See Respondent's Motion for the Special Master to Order Petitioners to Answer Interrogatories Pertinent to their Counsel's Practice, filed September 9, 2003; Petitioners' Counsel's Response to Respondent's

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[3] These documents were mailed but not filed with the court. By leave of the court, these documents were filed on March 23, 2004.

[4] Petitioners' counsel requested mediation with the undersigned, as was done at respondent's suggestion with the merits of the case. Respondent's counsel requested an outside mediator.

Motion for the Special Master to Order Petitioners to Answer Interrogatories Pertinent to His Practice, filed September 22, 2003. On September 23, 2003, the court conducted a status conference with the parties to discuss these submissions. On September 30, 2003, respondent filed Respondent's Reply to Petitioners' Counsel's Response to Respondent's Motion to Order Petitioners' Counsel to Answer Interrogatories Pertinent to his Practice. See Respondent's Reply to Petitioners' Counsel' Response to Respondent's Motion for the Special Master to Order Petitioners to Answer Interrogatories Pertinent to their Counsel's Practice, filed September 30, 2003. Consistent with the court's discussion with the parties at the September 23, 2003 conference call, the court issued an Order ruling upon respondent's motion, providing a schedule for further filings, and, once again, strongly encouraging settlement. See Order, filed October 9, 2003.

On November 3, 2003, respondent's counsel filed Respondent's Opposition to Petitioners' Application for Attorneys' Fees and Costs, and petitioners' counsel filed his Response on November 13, 2003. See Respondent's Opposition to Petitioners' Application for Attorneys' Fees and Costs ("R. Fee Opp"), filed November 3, 2003; Petitioners' Counsel's Response to Respondent's Opposition for Attorney Fees and Costs ("P. Resp. to R. Fee Opp."), filed November 13, 2003. The issue of costs was addressed subsequently in Respondent's Opposition to Petitioners' Application for Costs, filed on December 8, 2003, and Petitioners' Counsel's Response to Respondent's Opposition for Application for Costs, filed on December 17, 2003. See Respondent's Opposition to Petitioners' Application for Costs ("R. Cost Opp."), filed December 8, 2003; Petitioners' Counsel's Response to Respondent's Opposition For Application for Costs ("P. Resp. to R. Cost Opp."), filed December 17, 2003.

On March 2, 2004 and March 4, 2004, the parties filed their respective responses to the court's February 17, 2004 Order, requesting further information pertaining to petitioners' requested fees and costs related to establishing a guardianship. See Respondent's Answers to the Special Master's Questions Posed in His February 17, 2004 Order ("R. Answer"), filed March 2, 2004; Petitioner's Response to the Information Requested in February 17, 2004 Order ("P. Answer"), filed March 4, 2004. After many unavailing attempts to informally resolve this dispute, this fees issue is now ripe for decision.

II. Discussion

A. *Hourly Rate*

Petitioners' Position

Petitioners request $821,500.00 in attorney's fees for the services of their counsel, Mr. Kops.[5] In essence, petitioners' counsel believes that his hourly rate of $500 is reasonable based

[5] This amount was determined by multiplying petitioners' counsel's total number of hours requested and petitioners' counsel's requested hourly rate of $500. See P. Fee Petn. at 2. The

on several factors. These include: the hourly rate that he has been previously paid; past orders entered by various courts;[6] the fees charged by representatives of vaccine manufacturers with whom petitioners' counsel litigates; and the fact that respondent has presented no evidence that an hourly rate of $500 is not applicable. P. Further Pet. I at 2. To support these assertions, Mr. Kops submits the affidavit of David Sherman, Esquire; court orders of the Circuit Court in Milwaukee County, Wisconsin, awarding counsel fees in 1987, along with an economist's analysis based on inflation of this award; and fees charged by the representatives of vaccine manufacturers with whom counsel litigates on a regular basis. P. Fee Petn. at Exhibits ("Ex.") B, C. In addition, Mr. Kops argues that his requested hourly rate is reasonable in light of his thirty-three years of experience in the field of plaintiff's product liability and medical malpractice, with a specialty in vaccine litigation; the affidavit of Arnold Levin, Esq., a Philadelphia attorney; the fees listed in the *National Law Journal* for senior partners throughout the United States; and the fees charged by the law firms of Wilmer, Cutler & Pickering and Berger & Montague. See P. Further Petn. III at 1-6; P. Ex. D (Affidavit of Arnold Levin, Esq.); P. Further Petn. II (*National Law Journal* information). Finally, Mr. Kops contends that his requested fee is reasonable, because should the Laffey Matrix calculation be performed in this case, it would "produce a fee in excess of $575 per hour as a reasonable rate applicable to Petitioners' counsel." P. Resp. to R. Fee Opp. at 4.

Respondent's Position

Respondent opposes Mr. Kops' hourly rate as unsupported by any credible and relevant evidence addressing the pertinent prevailing market rate.[7] R. Fee Opp. at 21. Respondent argues that the rate requested by petitioners is excessive and outside the range of the prevailing market rate. Id. at 21. To illustrate this point, respondent relies on the affidavits of four attorneys practicing in Philadelphia, Pennsylvania. Id. at 21-24, Exs. A-D.

Respondent also contends that any suggestion by petitioners' counsel that the lodestar should be adjusted due to his special experience or skill does not provide justification for adjusting the lodestar. R. Fee Opp. at 24-25. Respondent further notes that while the damages portion of the case may have been lengthy and hard fought, because entitlement to compensation was conceded early in the case, petitioners' counsel was "not required to utilize his litigation

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figure includes the additional 126.5 hours submitted by petitioners' counsel in "Petitioner's Counsel's Request for Additional Fees between December 2002 and November 12, 2003." This figure does not include paralegal fees, Stanley Kops' costs, guardianship ad litem fees, guardianship attorney fees, guardianship attorney costs, or clients' unreimbursed medical expenses.

[6] None of these orders were issued by the Office of Special Masters or Court of Federal Claims.

[7] Respondent does not object to an award of $75 per hour for paralegal services. See R. Fee Opp. at 12, n.3.

'expertise' to meet the otherwise heavy burden of proving entitlement to compensation." Id. at 25.

Relevant Case Law

Pursuant to 42 U.S.C.A. § 300a-15(e), special masters may award "reasonable" attorney's fees as part of compensation. To determine reasonable attorney's fees, this court has traditionally employed the lodestar method which involves "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." Blanchard v. Bergeron, 489 U.S. 87, 94 (1989); Blum v. Stenson, 465 U.S. 886, 888 (1984); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The resulting lodestar figure is an initial estimate of reasonable attorney's fees which may then be adjusted if the fee is deemed unreasonable based upon the nature of the services rendered in the case. Blanchard, 489 U.S. at 94; Pierce v. Underwood, 487 U.S. 552, 581 (1988) (Brennan, J. et al., concurring); Blum, 465 U.S. at 897, 899; Hensley, 461 U.S. at 434.[8]

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[8] The appropriate role, if any, of the special masters' experience in determining the hourly rate was called into question recently in Rupert v. Secretary of HHS, 52 Fed. Cl. 684 (2002) ("Rupert I") and Rupert v. Secretary of HHS, 55 Fed. Cl. 293 (2003) ("Rupert II"). While not binding on the special masters, (see Hanlon v. Secretary of HHS, 191 F.3d 1344, 1999 WL 692347, at * 4 (Fed. Cir. 1999)) decisions of the Court of Federal Claims judges are obviously very persuasive and not to be taken lightly. However, with all due respect, the undersigned disagrees with the discussion in Rupert I and Rupert II regarding the appropriate usage of the special masters' experience in determining hourly rates. The special masters' use of experience was Congress' expectation and the reviewing courts, save Rupert, have sanctioned its usage. The legislative history of the Vaccine Act is replete with language endorsing the special masters' broad and general exercising of discretion. This discretionary authority includes, but is not limited to, determining what information is necessary, what types of proceedings are necessary, what witnesses must testify, and whether and to what extent cross-examination will be permitted. H.R. Rep. No. 99-908, at 17, reprinted in 1986 U.S.C.C.A.N. 6344, 6358. This authority was granted to eliminate complex proceedings and replace them with an informal, flexible and expeditious process. The clear expectation was to enlist a proactive, vigorous special master to control proceedings, ensure a complete record, and resolve issues with despatch, consistency and certainty. The reviewing courts have examined this language and sanctioned the special masters' broad authority.

The Court of Appeals for the Federal Circuit, whose decisions are binding on the special masters, has on several occasions affirmed and positively commented on the special masters' use of discretion. See Wasson v. Secretary of HHS, 24 Cl. Ct. 482 (1991), aff'd, 988 F.2d 131 (Fed. Cir. 1993) (holding that a special master can rely on general experience when awarding fees and costs); Saxton v. Secretary of HHS, 3 F.3d 1517, 1519 (Fed. Cir. 1993) (holding that special masters are entitled to use their prior experience with attorneys in the Vaccine Program in reviewing fee petitions). While the cases did not deal directly with application of the special masters' experience to hourly rates, the Circuits' language clearly sanctions such usage. In accordance are the decisions

of several Court of Federal Claims judges. See Edgar v. Secretary of HHS, 1994 WL 256609 (Fed. Cl. Spec. Mstr. May 27, 1994), aff'd, 32 Fed. Cl. 506, 509 (1994) (upholding the Chief Special Master's discretionary adjustment of hourly rate and acknowledging that "[t]here is no exact formula or method for the special master to use to decide what a reasonable hourly rate is or how many hours should be allowed." Edgar, 32 Fed. Cl. at 509); Guy v. Secretary of HHS, 38 Fed. Cl. 403, 405-06 (finding that the special master properly based the determination to reduce the hourly rate on Vaccine Program precedent); See also Hines v. Secretary of HHS, 22 Cl. Ct. 750, 753 (1991) (Tidwell, J.) ("The reviewing court must grant the special master *wide latitude* in determining the reasonableness *of both attorneys' fees and costs*.") (italics added), aff'd, 940 F.2d 1518 (Fed. Cir. 1991).

From the beginning of the Program, the special masters have applied their experience as a factor in determining hourly rates. Experience was the basis for setting hourly rate caps. See Meredith v. Secretary of HHS, No. 88-75V, 1990 WL 608697, at * 2 (Cl. Ct. Spec. Mstr. June 13, 1990); Maloney v. Secretary of HHS, No. 90-1034, 1992 WL 167257, at * 7 (Cl. Ct. Spec. Mstr. June 25, 1992, Awarding Order June 30, 1992); Vickery v. Secretary of HHS, No. 90-977, 1992 WL 281073, at *6 (Cl. Ct. Spec. Mstr. Sept. 24, 1992); Schuerer v. Secretary of HHS, No. 90-1639V (Cl. Ct. Spec. Mstr. May 21, 1992); Martin v. Secretary of HHS, No. 90-3820V, 1992 WL 34910, at * 2-3 (Cl. Ct. Spec. Mstr. Feb. 2, 1992); Anaya v. Secretary of HHS, No. 91-285V, 1993 WL 241433, at * 1 (Fed. Cl. Spec. Mstr. June 17, 1993); Childers v. Secretary of HHS, No. 96-194V, 1999 WL 159844, at * 1-2 (Fed. Cl. Spec. Mstr. June 11, 1999); Mandel v. Secretary of HHS, No. 92-260V, 1998 WL 211914, at * 1-2 (Fed. Cl. Spec. Mstr. Apr. 2, 1998); Pinegar v. Secretary of HHS, No. 90-3375V, 1997 WL 438761, at * 2 (Fed. Cl. Spec. Mstr. July 22, 1997); Betlach v. Secretary of HHS, No. 95-03V, 1996 WL 749707, at * 2 (Fed. Cl. Spec. Mstr. Dec. 17, 1996).

Respondent supported the caps and argued for their application. See, e.g., Corder v. Secretary of HHS, No. 97-125V, 1999 WL 1427753, at * 2 (Fed. Cl. Spec. Mstr. Dec. 22, 1999) (arguing that $175 has generally been considered the premier hourly rate, reserved for the most experienced attorneys providing the best representation in high cost geographic areas); Haugh v. Secretary of HHS, No. 90-3128V, 1999 WL 525539, at * 2 (Fed. Cl. Spec. Mstr. June 30, 1999) (contending that $175 is the premier rate, respondent argues that $175 is an excessive rate to be charged by an attorney practicing in Twin Falls, Idaho); McKenney v. Secretary of HHS, No. 90-3951, 1998 WL 409377, at * 1 (Cl. Ct. Spec. Mstr. June 8, 1998) (agreeing with Maloney and similar cases, respondent notes that special masters have expressed the view that counsel under the Program ordinarily should not be awarded hourly rates in excess of $175); Woodcock v. Secretary of HHS, No. 90-1030, 1992 WL 329300, at * 1 (Cl. Ct. Spec. Mstr. October 23, 1992) (citing Maloney, respondent argues that $150 per hour is appropriate in this case).

Special masters have also utilized their experience routinely in literally hundreds, if not thousands, of cases in determining hourly rates. See Helms v. Secretary of HHS, No. 96-518V, 2002 WL 31441212, at * 17-18 (Fed. Cl. Aug. 8, 2002); Erickson v. Secretary of HHS, No. 96-

361V, 1999 WL 1268149, at * 7 (Fed. Cl. Dec. 10, 1999); Barnes v. Secretary of HHS, No. 90-1101, 1999 WL 797468, at * 3 (Fed. Cl. Spec. Mstr. Sept. 17, 1999); Haugh v. Secretary of HHS, No. 90-3128V, 1999 WL 525539, at * 2 (Fed. Cl. Spec. Mstr. June 30, 1999); Edgar v. Secretary of HHS, 1994 WL 256609, at * 3 (Fed. Cl. Spec. Mstr. May 27, 1994). This usage comports with legislative history mandating that the special masters rely on their expertise, experience and discretion to resolve claims fairly and swiftly. See generally H.R. Rep. No. 99-908, reprinted in 1986 U.S.C.C.A.N. 6344; H.R. Rep. No. 101-247, reprinted in 1989 U.S.C.C.A.N. 1906; H.R. Conf. Rep. No. 101-386, reprinted in 1989 U.S.C.C.A.N. 3018.

This congressional intent has been recognized repeatedly by the Federal Circuit. See Whitecotton v. Secretary of HHS, 81 F.3d 1099, 1108 (Fed. Cir. 1996) ("Congress desired the special masters to have very wide discretion with respect to the evidence they would consider and the weight to be assigned that evidence."); See also Hanlon v. Secretary of HHS, 191 F.3d 1344, 1999 WL 692347, at * 4 (Fed. Cir. 1999) (citing approvingly Whitecotton v. Secretary of HHS, 81 F.3d 1099, 1108 (Fed. Cir. 1996)); Burns v. Secretary of HHS, 3 F.3d 415, 417 (1993) ("A special master . . . has wide discretion in conducting the proceedings in a case.") (citations omitted); Munn v. Secretary of HHS, 970 F.2d 863, 871 (Fed. Cir.1992) (discussing the scope of review of the Federal Circuit,"[i]t is, after all, the special masters to whom Congress has accorded the status of expert, entitling them to the special statutory deference in fact-finding normally reserved for specialized agencies.").

These sentiments have been followed by the Court of Federal Claims judges as well. See, e.g., Sword v. Secretary of HHS, 44 Fed. Cl. 183, 188 (Fed. Cl. 1999) ("[E]ven more than ordinary fact-finders, this Court has recognized *the unique ability of Special Masters to adjudge cases in the light of their own acquired specialized knowledge and expertise*." (citing Ultimo v. Secretary of HHS, 28 Fed. Cl. 148, 152-53 (1993)) (italics added)); McCarren v. Secretary of HHS, 40 Fed. Cl. 142 (1997) (finding that where the Vaccine Act is silent or ambiguous with respect to a specific issue, the special master's interpretation should be given deference).

While respondent took a different position in Rupert, respondent in the past has supported the special masters' use of experience in determining hourly rates. Thus, the Saxton court stated:

> *According to the government*, determining what is 'reasonable' requires the special master to use his prior experiences to compare attorneys across cases. Such prior experiences are particularly relevant in the context of the vaccine program because a small group of attorneys reportedly appears before the small group of special masters.

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, 461 U.S. at 434. Likewise, the court must ensure that the hourly rate requested is reasonable. The Supreme Court has repeatedly opined that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the *relevant community*." Blum, 465 U.S. at 895 (italics added). More specifically, "the burden is on the fee applicant to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Blum, 465 U.S. at 896, n.11. This is not an easy task. The Supreme Court has acknowledged that determining the appropriate market rate for attorneys is

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Saxton, 3 F.3d at 1520 (italics added).

Also, in Loe v. Secretary of HHS, Judge Tidwell stated:

> Congress intended that the Act establish a flexible compensation program. See H.R. Report No. 247, 101st Cong., 1st Sess., at 510 (1989), U.S. Code Cong. & Admin. News 1989, 1906, 2236. Congress gave this flexibility to the special masters so they could meet the particular needs of many petitioners presenting unique factual situations.
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> However, petitioner cites no authority indicating that a special master may not rely on expertise gained in resolving numerous previous cases. *The court agrees with respondent that such a suggestion is ludicrous*. Additionally, the statute does not mandate testimony for any part of the special master's proceeding on a petition. Instead, the statute provides that the special master *may* require such evidence, information, or testimony "as may be reasonable and necessary." 42 U.S.C. § 300aa-12(d)(3)(B)(i)-(iii).

Loe v. Secretary of HHS, 22 Cl. Ct. 430, 433, 434 (1991) (italics added).

In fact, in the instant case, respondent argues that the $250 hourly rate awarded in Rupert II to Mr. Conway, a "very experienced" Program attorney in Boston, practicing in a "very high cost" area of living, should be "instructive for the special master" in establishing an upper limit on Mr. Kops' services. R. Notice at 4. Thus, respondent essentially urges the special master to use his experience in determining the hourly rate to be awarded in this case. Rupert appears to stand alone in questioning this usage.

"inherently difficult" since the types of services, experience, skill, and reputation may vary not only throughout the marketplace, but within the petitioning attorney's firm as well. Blum, 465 U.S. at 896, n.11. In any event, the prevailing market rate or reasonable hourly rate is a product of a number of considerations, including the quality of representation, the attorney's legal skills and experience, the novelty and difficulty of issues presented, the undesirability of the case, and the results obtained. Pierce, 487 U.S. at 573; Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 726-727 (1987); Blum, 465 U.S. at 899. In essence, the market rate "is determined by a reference to the *particular* attorney involved rather than to a minimally qualified hypothetical lawyer." Pierce, 487 U.S. at 581 (Brennan, J. et al., concurring) (citations omitted) (italics added).

Analysis of Hourly Rate

Mr. Kops clearly failed to meet his burden of substantiating the requested hourly rate of $500.[9] The evidence petitioners filed in this case is insufficient to ascertain the prevailing market rate for attorneys of like skills, experience, and reputation practicing in a related field in Philadelphia. In support of the prevailing market rate, petitioners' filings consist of: counsel's own supportive statements of worth; a 1987 Milwaukee County, Wisconsin circuit court order from 1987 documenting a $200 per hour award, and an economist's analysis based on inflation of the 1987 award; the affidavit of David Sherman, Esq.; the affidavit of Arnold Levin, Esq.; the fees listed in the *National Law Journal* for senior partners throughout the United States; the fees charged by the law firm of Wilmer, Cutler & Pickering and the law firm of Berger & Montague; and fees based on a Laffey Matrix calculation.[10] As discussed below, the court finds these

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[9] Petitioners' counsel notes that the Vaccine Act does not give respondent the right to cross-examine petitioners' counsel's fees, and should the government believe compensable hours demanded are unreasonable, respondent must provide evidence to prove such. P. Resp. to R. Fee Opp. at 13. However, as it is petitioners' burden to prove the appropriate hourly rate by providing documentation of fees and expenses, respondent is not required to provide evidence to prove the unreasonableness of the requested rate when petitioners have failed to meet this burden. See Bell v. Secretary of HHS, 18 Cl. Ct. 751, 760 (1989); Rupert v. Secretary of HHS, 52 Fed. Cl. 684, 693 (2002); Edgar v. Secretary of HHS, No. 90-711V, 1994 WL 256609, at *2 (Fed. Cl. Spec. Mstr. May 27, 1994), aff'd by 32 Fed. Cl. 506 (1994) (citing Blum v. Stenson, 465 U.S. 886, 895-96, n.11 (1994)).

[10] The Laffey Matrix, prepared by the Civil Division of the United States Attorney's Office for the District of Columbia, is based on the hourly rates allowed by the District Court in Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354 (D.D.C. 1983). The Matrix provides hourly rates for attorneys of varying experience levels, as well as for paralegals and law clerks, and is intended to be used in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees. See, e.g., 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412(b) (Equal Access to Justice Act). The District of Columbia Court of Appeals implicitly endorsed use of an updated

materials unhelpful in determining the prevailing market rate for counsel's relevant community for the following reasons.

In support of his claimed rate of $500 per hour, Mr. Kops states that he is a member in good standing of the State Bar of Pennsylvania, the Bar of the Federal Courts of Pennsylvania, the Bar of the United States Court of Federal Claims, and Bars of the Second, Third, Fourth, Fifth, Sixth and Ninth Circuit Courts of Appeals. P. Fee Petn. at 1. He is also admitted *pro hac vice* to handle vaccine cases in New York, New Jersey, California, Louisiana, Florida, South Carolina, Idaho, Iowa, Wisconsin, Maryland and Ohio. Id. For the past thirty-one years he has specialized in the field of vaccine litigation, and on occasion has been involved in class action lawsuits. Id. Mr. Kops has been a speaker at several medical and legal forums and has authored two peer-reviewed articles about polio vaccines that have appeared in medical journals. Id. at 1-2. As counsel's own statements of worth are inherently highly subjective, standing alone, such statements clearly do not provide an objective indication of the appropriate hourly rate for Mr. Kops. Thus, the court must turn to the additional evidence proffered by Mr. Kops in support of his hourly fee.

Offering further support for his claimed hourly rate, Mr. Kops submits a 1987 Milwaukee

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Laffey Matrix in the case Save Our Cumberland Mountains v. Hodel, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc). The Court of Appeals subsequently stated that parties may rely on the updated Matrix prepared by the United States Attorney's Office as evidence of prevailing market rates for litigation counsel in the Washington, D.C. area. See Covington v. District of Columbia, 57 F.3d 1101, 1105, & n.14, 1109 (D.C. Cir. 1995), cert. denied, 516 U.S. 1115 (1996). Lower federal courts in the District of Columbia also have used the updated Matrix in determining whether fee awards under fee-shifting statues are reasonable. See, e.g., Blackman v. District of Columbia, 59 F. Supp. 2d 37, 43 (D.D.C. 1999); Jefferson v. Milvets System Technology, Inc., 986 F. Supp. 6, 11 (D.D.C. 1997); Ralph Hoar & Associates v. Nat'l Highway Transportation Safety Admin., 985 F. Supp. 1, 9-10 n.3 (D.D.C. 1997); Martini v. Fed. Nat'l Mtg Ass'n, 977 F. Supp. 482, 485 n.2 (D.D.C. 1997); Park v. Howard University, 881 F. Supp. 653, 654 (D.D.C. 1995). See United States Attorney's Office for the District of Columbia, Laffey Matrix -- 1992-2003, at http://www.usdoj.gov/usao/dc/laffey/laff9203.html (last visited January 14, 2004). Petitioners' counsel argues that this matrix is used by respondent's counsel to determine reasonable fees in litigation against the United States in jurisdictions nationwide. Accordingly, petitioners' counsel contends that respondent "had to have known that the Laffey Matrix calculation, if performed for the instant case, would have produced a fee in excess of $575 per hour as the reasonable hourly rate applicable to Petitioners' counsel." P. Resp. to R. Fee Opp. at 4, P. Ex. 1. This court knows of no instance in which the Laffey Matrix has been utilized in a Vaccine Program case. Furthermore, as the Laffey Matrix specifically provides an initial estimate of reasonable attorneys' fees in the Washington, D.C.– Baltimore area, the court does not believe that the Matrix is probative in demonstrating the prevailing market rate for attorneys practicing in the Philadelphia area.

County, Wisconsin court order awarding him hourly fees of $200 in a polio vaccine case, along with an economist's current estimate of the award, accounting for inflation.[11] P. Fee Petn. at Exs. B, E. Mr. Kops also cites a 1992 case from the U.S. District Court of the Southern District of New York, which he reports was "the second occasion when I was awarded attorneys fees based upon hourly work with a lodestar." P. Fee Petn. at 2. Counsel's awards in two cases since 1987 do not provide the court with evidence of the prevailing market rate for comparable attorneys in Philadelphia, nor do two fee awards aid the court in determining Mr. Kops' customary hourly rate. Furthermore, under the Program, petitioners' counsel is not entitled to fees which would duplicate those normally received in non-Program cases. See Edgar v. Secretary of HHS, 32 Fed. Cl. 506, 509 (1994) ("The goal of the Program is to attract competent counsel....While the fees must be ample to achieve such a goal, the fees that are awarded under government programs are not meant to duplicate the fees the attorney would normally receive for non-program cases.").

Similarly, the *National Law Journal*'s list of fees for senior partners throughout the United States does not offer evidence of the prevailing market rate for Mr. Kops' relevant community. This list provides a broad range of law firms that are not necessarily comparable to Mr. Kops in skill, experience and reputation.[12] The survey does not provide specific examples of attorneys or

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[11] The economist estimated that based on an hourly fee of $200 in 1987, the hourly value for the year 2002 would be approximately $478 to $550 per hour. This estimate was based on "the increase in the value of $200 per hour in 1987, growing 15 years to the year 2002 at rates of increase consistent with historical life cycle annual increases relative to the incomes of lawyers in the United States. The annual rates of increase over life cycle range between 6% and 7% a year from 1950 through the year 2002." P. Fee Petn. at Ex. E.

[12] In the past, the undersigned has criticized the use of broad nationwide surveys as unhelpful in determining a Program attorney's reasonable hourly rate. In Frangakis v. Secretary of HHS, No. 90-1879V, 1992 WL 397565, * 2 (Fed. Cl. Spec. Mstr. Dec. 22, 1992), the undersigned observed:

> The court finds [the hourly rate data in the Lawyer's Almanac and The National Law Journal] unhelpful as well. The court concurs with respondent that the firms listed in each of these sources ... are substantially larger than the [petitioners' counsels' law firm'] and that the range of fees is so broad that the data shed little light on what is reasonable for petitioners' attorneys. Id.

Similarly in Edgar v. Secretary of HHS, No. 90-711, 1994 WL 256609, * 2 (Fed. Cl. Spec. Mstr. May 27, 1994), aff'd, 32 Fed. Cl. 506 (1994), the undersigned noted:

> No information was provided to allow the court to independently determine whether a comparison of petitioners' counsel to the surveyed firms was warranted. Petitioners' argument amounts to "they are charging these rates, therefore it is reasonable that we charge the same." However, what is missing in these broad

firms that provide the same or similar services as Mr. Kops, and thus does not aid the court in estimating the prevailing market rate. Likewise, the submission of fees charged by attorneys at the law firm of Wilmer, Cutler & Pickering, a 550 lawyer, multi-office, international firm, also fails to provide relevant evidence of Mr. Kops' appropriate hourly fee. The Wilmer, Cutler & Pickering firm provides a variety of legal services, not solely in the area of personal injury, medical malpractice or vaccine litigation. In fact, Mr. Kops illustrates this in his filings. While Mr. Kops compares himself to two Wilmer lawyers who commonly defend vaccine injury cases in third party litigation, Mr. Kops provides proof of these lawyers' hourly rate by submitting their awarded rates in corporate bankruptcy litigation. P. Further Petn. III at 2, Ex. A. In addition, Mr. Kops provides the hourly rates awarded to lawyers from the 55-attorney firm of Berger & Montague with whom Mr. Kops was co-counsel in a class action suit. P. Further Petn. III at 2-3, Ex. B. Mr. Kops explains that he provided Berger & Montague's fee information to demonstrate that other counsel in Philadelphia, who handle cases identical to those petitioners' counsel has handled in the past, are receiving attorneys fees in excess of $650 per hour. P. Resp. to R. Fee Opp. at 7. Mr. Kops also provides fee information awarded to counsel in New Jersey, with whom he has numerous cases now pending. P. Further Petn. II at 3, Ex. C. However, the cases in which both of these rates were awarded were class action securities and class action derivative lawsuits, in which Mr. Kops did not participate. Accordingly, the awards are not probative in determining reasonable rates for petitioners' counsel in the Vaccine Program.

Mr. Kops also offers the affidavit of David Sherman, Esquire, in support of his claimed hourly rate. P. Fee Petn. at 2, Ex. C. Mr. Sherman attests that he paid Mr. Kops $500 per hour for "legal review regarding post-trial motions and potential appellate work/evaluation." Fee Petn. at Ex. C. Although Mr. Sherman states that he believes such fee is reasonable based on Mr. Kops' "experience, knowledge and skill," Mr. Sherman's affidavit is not relevant to establishing the prevailing market rate for services rendered in this Vaccine Program case. The only work performed for Mr. Sherman by petitioners' counsel consisted of consulting. Consulting is not the same as litigating. Thus, the value of Mr. Kops' services in the instant case is not appropriately addressed by Mr. Sherman's affidavit.

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ranges provided is specific information concerning the years and experience and types of services rendered. Thus, a corporate tax lawyer with 25 years is not a lawyer of "comparable skill, experience, and reputation" when compared to a personal injury attorney handling vaccine litigation. Different services are provided to different clients by attorneys with vastly different knowledge and skill requirements.

Edgar, 1994 WL 256609, at * 2; See also Martson v. Secretary of HHS, No. 91-0355V, 1998 WL 719493, at * 3 (Fed. Cl. Spec. Mstr. Sept. 29, 1998) (Special Master Millman) (citing Edgar, 1994 WL 256609 at * 2).

Further, petitioners' counsel submits the affidavit of attorney Arnold Levin in support of an hourly rate of $500. P. Further Petn. III at 3-4, Ex. D. Mr. Levin attests that he and Mr. Kops were colleagues from 1967 through August 17, 1981. P. Further Petn. III at Ex. D (Affidavit of Arnold Levin, Esquire). Mr. Levin states that "Based upon my personal knowledge of SPK having worked with him both on massive tort actions...I can attest to his abilities and his recognition as one of the top authorities in vaccine litigation, which litigation started when he was a member, with the affiant, in the law firm of Freeman, Borowsky & Lorry." Id. While the court respects Mr. Levin's opinion, this court generally has viewed with skepticism "generalized and conclusory 'information and belief' affidavits from friendly attorneys." Guy v. Secretary of HHS, 38 Fed. Cl. 403, 405 (1997) (citing Bell v. Secretary of HHS, 18 Cl. Ct. 751, 761 (1989), quoting, National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1325 (D.C. Cir. 1982)).[13] More importantly, Mr. Levin's affidavit fails to provide proof of the prevailing market rate for the relevant community. Mr. Levin's affidavit states that Mr. Kops should be awarded an hourly rate of $500 based on his belief that the fair value of Mr. Kops' hourly rate is $575 and based on "what the charges an attorney of [Mr. Kops'] stature and reputation *can* receive in the Philadelphia area." P. Further Petn. III at Ex. D (Affidavit of Arnold Levin, Esquire) (italics added). This affidavit standing alone does not provide sufficient detail as to persuade the court that $500 per hour is the prevailing market rate for comparable attorneys. See Rupert, 52 Fed. Cl. at 693 (citing Greene v. Secretary of HHS, 19 Cl. Ct. 57, 66 (1989); Bell v. Secretary of HHS, 18 Cl. Ct. 751, 761 (1989)).

In opposing petitioners' counsel's requested hourly rate, respondent argues that petitioners have failed to produce any credible and relevant evidence addressing the pertinent prevailing

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[13] In Rupert v. Secretary of HHS, 52 Fed. Cl. 684, 693 (2002), the court reiterated the standard articulated by the D.C. Circuit in Concerned Veterans, 675 F.2d at 1325-26:

> [G]eneralized and conclusory "information and belief" affidavits from friendly attorneys presenting a wide range of hourly rates will not suffice. To be useful an affidavit stating an attorney's opinion should be as specific as possible.... The best evidence would be the hourly rate customarily charged by the affiant himself or by his law firm. Alternatively, the affidavit might state that the stated is based on the affiant's personal knowledge about specific rates charged by other lawyers or rates for similar litigation.
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> ... The District Court's task is to determine the approximate market rate. Its inquiry is aided little by an affidavit which just offers one attorney's conclusory and general opinion on what that rate is. Nor is it helpful if the affiant simply states that he is familiar with the attorney and the litigation and that he thinks the fee request is reasonable. What is needed are some pieces of evidence that will enable the District Court to make a reasonable determination of the appropriate hourly rate.

Rupert, 52 Fed. Cl. at 693 (citing Concerned Veterans, 675 F.2d at 1325-26).

market rate. R. Fee Opp. at 21. Further respondent contends that the rate requested by petitioners is excessive and outside the range of the prevailing market rate. Id. To illustrate this, respondent relies on the affidavits of four attorneys practicing in the Philadelphia area. Id. at 21-24, Exs. A-D. While offered in the attempt to show that Mr. Kops' requested rate is excessive, this evidence does not aid the court in determining the prevailing market rate for similarly situated attorneys in Mr. Kops' area.[14] The hourly rates charged by the four attorney affiants provided by respondent range from $90 to $425 per hour. Id. at 21-24, Exs. A-D. Further, the affiant's areas of practice widely vary in type. Id. Such a broad range of hourly rates and practices do not sufficiently establish the prevailing market rate for attorneys comparable to Mr. Kops. Greene v. Secretary of HHS, 19 Cl. Ct. 57, 66 (1989); Bell v. Secretary of HHS, 18 Cl. Ct. 751, 761 (1989)). In the end, respondent's affidavits are deficient for the same reasons that the court found petitioners' affidavits wanting.

Due to petitioners' counsel's lack of proper substantiation, this court is placed in the position of relying on its own experience and must overcome the deficiencies in petitioners' submissions by using the special master's discretion. See Rupert v. Secretary of HHS, 52 Fed. Cl. 684, 688-89 (2002) (citing Saxton v. Secretary of HHS, 3 F.3d 1517, 1521 (Fed. Cir. 1993)); Edgar, 1994 WL 256609 at * 3; see also Wasson v. Secretary of HHS, 988 F.2d 131 (Fed. Cir. 1993). As in previous cases in which there exists no relevant objective information from which to determine a reasonable hourly rate, the court must look to other sources of evidence. Specifically, this court has found a comparison of the involved attorney's performance and claimed hourly rate with other attorneys in this Program of similar quality and experience who practice in similar geographic areas to be highly probative. See Edgar, 1994 WL 256609 at * 3; Maloney v. Secretary of HHS, No. 90-1034V, 1992 WL 167257, at * 5, 6 (Cl. Ct. Spec. Mstr. June 25, 1992, Awarding Order June 30, 1992).

In comparison to other highly experienced Program attorneys, Mr. Kops' requested hourly rate of $500 is well above any previously awarded in the Program. The undersigned explained in Erickson that "considering an attorney's actual performance, comparing those efforts to others practicing before the court, and weighing the respective claimed and awarded hourly rates gives the court far more reliable information in determining an attorney's hourly rate." Erickson v. Secretary of HHS, No. 96-361V, 1999 WL 1268149, at *5 (Fed. Cl. Sp. Mstr. Dec. 10, 1999). Recently, the Office of Special Masters and the Court of Federal Claims have awarded experienced litigators in high cost metropolitan areas as much as $250 per hour. See Rupert II, 55 Fed. Cl. at 293 (awarding hourly rates $250 for Kevin Conway and $210 for Ronald Homer, both Program attorneys practicing in Boston, Massachusetts); Beatty v. Secretary of HHS, No. 98-911, 2003 WL 21439671 (Fed. Cl. Spec. Mstr. Mar. 17, 2003) (awarding $205 per hour for Clifford Shoemaker, a Program attorney practicing in the Washington, D.C. metropolitan area); Macrelli v. Secretary of HHS, No. 98-103V, 2002 WL 229811 (Fed. Cl. Spec. Mstr. Jan. 30, 2002) (awarding

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[14] The court notes, however, that it is not the burden of respondent, but of petitioner, to demonstrate the prevailing market rate when petitioner has failed to provide such evidence. Rupert, 52 Fed. Cl. at 693 (citing Blum, 465 U.S. at 895-96 n.11).

$190 per hour for Peter Meyers, a Program attorney practicing in Washington, D.C.).

Mr. Kops has over thirty-three years of experience in the practice of law. His expertise is extensive and impressive in the areas of plaintiff's product liability, medical malpractice and vaccine litigation. The Philadelphia metropolitan area, where counsel practices, is a relatively high-cost urban area. Mr. Kops' performance on behalf of his client before this court was consistent with his many years of experience and extensive expertise. He zealously and ably represented his client in the face of an equally zealous defense. Mr. Kops' efforts in this long and hard fought case resulted in an extremely beneficial award for his client. Determination of "reasonable compensation" is not an exact science. There is a wide range of "reasonableness" in each case. Mr. Kops' efforts resulted in one of the largest awards paid in this Program. That said, however, while Program fees must be sufficient to attract competent counsel, they are "not meant to duplicate the fees the attorney would normally receive for non-program cases." Edgar v. Secretary of HHS, 32 Fed. Cl. 506, 509 (1994) (citing Blum v. Stenson, 465 U.S. 886, 888 (1984)).

After reviewing Mr. Kops' many years of vaccine litigation experience, reputation, site of practice, skill and participation in this case, and comparing this with other vaccine attorneys practicing in similar venues, the court finds an hourly rate of $250 to be appropriate. Specifically, in many respects, the court finds Mr. Kops to be comparable to Kevin Conway, who was awarded $250 as a market-based rate by Judge Miller in Rupert II. Both are extremely experienced attorneys, who are excellent at their craft and hail from high cost areas. Judge Miller's determination of $250 per hour was based upon a lodestar analysis. Accordingly, the similarities between Mr. Kops and Mr. Conway, and the absence of evidence to the contrary, lead the court to conclude that the same $250 hourly rate awarded to Mr. Conway is a reasonable award for Mr. Kops.

B. Hours Expended

Petitioners' Position

Mr. Kops requests 1,643 attorney hours.[15] Mr. Kops believes that the total number of hours expended and his contemporaneous records are reasonable. P. Resp. to R. Fee Opp. at 11. Petitioners' counsel avers that, because he rarely charges by the hour, his office is not equipped for an automatic billing system, which is the reason daily time records were not kept in this case. P. Further Petn. I at 3. Counsel argues that all travel hours were necessary and appropriate to secure documents and read files where such items were prohibited from leaving repository offices and to achieve resolution in the case. P. Resp. to R. Fee Opp. at 12. Petitioners' counsel also explains that had this not been his first case involving the Act, he would have had more

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[15] This number includes the 126.5 additional hours submitted by petitioners' counsel in "Petitioner's Counsel's Request for Additional Fees between December 2002 and November 12, 2003."

experience and expertise with the process of litigation under the Act and would have known the manner by which to proceed, and thus spent fewer hours in preparation. Id. at 17-18. Mr. Kops rebuts respondent's allegation that petitioners' counsel expended excessive hours "holding hands" with his clients, as part of the duties and responsibilities of a personal injury attorney. Petitioners' Counsel's Brief in Support of Hourly Fees ("P. Brief"), filed July 8, 2003, at 6-7; P. Resp. to R. Fee Opp. at 14. Petitioners' counsel also refutes respondent's complaint that some of his work should have been handled by lower-paid associates, as impossible since counsel is a sole practitioner. P. Resp. to R. Fee Opp. at 17.

Respondent's Position

As to hours expended, respondent avers that the reasonableness of Mr. Kops' requested hours expended cannot be determined, as the record does not provide specific documentation of billed attorney or paralegal hours.[16] R. Fee Opp. at 3. Consequently, due to this lack of documentation as to the number of hours expended, respondent maintains that application of the lodestar to determine a reasonable fee award is impossible. Id. at 5. Respondent notes that petitioners' counsel failed to maintain contemporaneous time records in this case, despite being instructed to do so by several court orders. Id. at 3-5.

Relevant Case Law

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." Hensely v. Eckerhart, 461 U.S. 424, 434 (1983). In making reductions, the special master is not necessarily required to base his or her decisions 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, 988 F.2d 131 (Fed. Cir. 1993). Moreover, special masters may rely on their experience with the Vaccine Act and its attorneys to determine the reasonable number of hours expended. Wasson, 24 Cl. Ct. at 486, aff'd, 988 F.2d 131 (Fed. Cir. 1993). Just as "[t]rial court courts routinely use their prior experience to reduce hourly rates and the number of hours claimed in attorney fee requests . . . . [v]accine program special masters are also entitled to use their prior experience in reviewing fee applications." Saxton v. Secretary of HHS, 3 F.3d 1517, 1521 (Fed. Cir. 1993) (citing Farrar v. Secretary of HHS, 1992 WL 336502. at * 2-3 (Cl. Ct. Spec. Mstr. Nov. 2, 1992) (requested fees of $24,168.75 reduced to $4,112.50); Thompson v. Secretary of HHS, No. 90-530V, 1991 WL 165686, at * 2-3 (Cl. Ct. Spec. Mstr. Aug. 13, 1991) (requested fees of $18,039.75 reduced to

[16] Respondent notes that "Here petitioners' counsel has billed in excessively large increments, to include *hundreds* of hours. For instance, he estimates that he has expended 450 hours in discussions with his clients." R. Fee. Opp. at 7 (referring to Petitioners' Brief on Hourly Rates at 6).

$9,000); Wasson, 24 Cl. Ct. at 483 (1991), on remand, No. 90-208V, 1992 WL 26662 (Cl. Ct. Spec. Mstr. Jan. 2, 1992), aff'd, 988 F.2d 131 (Fed. Cir. 1993) (hourly rates reduced, and requested fees of $151,575 reduced to $16,500; special master disregarded the claim for 698.5 hours and estimated what, in her experience, would be a reasonable number of hours for a case of that difficulty). "It is well within the special master's discretion to reduce the hours to a number that, in his experience and judgment, was reasonable for the work done." Saxton, 3 F.3d at 1521.[17]

Analysis of Hours Expended

Petitioners' counsel requests 1,643 attorney hours[18] and 236 paralegal hours. Respondent objects to both requests, since Mr. Kops does not provide any documentation of his own time or that of his paralegals, despite being ordered to do so. R. Fee. Opp. at 3. Mr. Kops essentially contends that he maintained no exact records because he does not charge on an hourly basis in his usual practice.[19] P. Further Petn. I at 3. The court finds this argument without merit. As early as the initial Order in this case, petitioners' counsel was forewarned that precise record-keeping was necessary. See Order, filed March 16, 1999 (Special Master Wright). Regarding fees, the Order instructed that the application "must include a photocopy of such contemporaneous time and activity records *of each person* for whom time is being charged (summarized by person)" and "[*t*]*ime entries that contain broad descriptive categories that do not allow an intelligent*

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[17] The Federal Circuit noted that "The Court of Federal Claims erred in prohibiting the special master from considering his past experiences with attorneys in the vaccine program -- this past experience is a relevant factor and should be taken into account." Saxton, 3 F.3d at 1521, citing Hensley, 461 U.S. at 430, n.3 (awards in similar cases and counsel's experience and ability are two of twelve factors relevant to a fee determination); Slimfold Mfg. Co. v. Kinkead Indus., Inc., 932 F.2d 1453, 1459 (Fed. Cir. 1991) (district court may rely on its prior experience and knowledge in determining reasonable hours and fees).

[18] Broken down by stage of proceeding, Mr. Kops requests approximately 100 hours for time spent before filing the petition, 40 hours for the entitlement phase of this case, 1376.5 hours for the damages portion, and 126.5 hours for the attorney's fees stage. See P. Further Petn. I at 3-8; P. Resp. to R. Fee Opp. at "Petitioner's Counsel's Request for Additional Fees between December 2002 and November 12, 2003."

[19] In addition, petitioners' counsel respectfully submits that "the courts do not require petitioners' counsel to start a whole new system of logging in minutes, and building a computer system so that respondent can see how the petitioners' counsel spent hundreds of hours preparing for each of the defenses raised by respondent." P. Brief at 7. The court notes that pursuant to Program requirements, documentation of time expended is required. However, as respondent argues, and the court agrees, documentation of hours does not require an automated system. Rather, documentation merely requires a pen and paper with which to record contemporaneous activities. In addition, numerous inexpensive computer programs exist to track attorney billings.

determination of the reasonableness of the hours claimed will not suffice." Order, filed March 16, 1999, at 2 (italics in original) (Special Master Wright). Further, the Guidelines for Practice Under the National Vaccine Injury Compensation Program ("Guidelines") provide that regarding requests for attorney's fees in the program, "[e]ach fee petition shall include ... [c]ontemporaneous time records that indicated the date and specific character of the service performed, the number of hours (or fraction thereof) expended for each service, and the name of the person providing the service." Guidelines at 31. For reasons that escape the court, petitioners' counsel failed to comply with these instructions. Moreover, despite being afforded ample opportunity to substantiate the record, counsel failed to do so. See Order, filed February 14, 2003; Order, filed March 17, 2003.

A review of the record reveals that instead of adequately documenting each hour expended, Mr. Kops provides "global," descriptive assessments of time expended that are simply unhelpful and border on speculation, absent actual documentation of the work completed. For example, counsel requests 462 hours in "[d]iscussion via telephone with clients and meetings with clients." P. Fee Petn. at 4 ("The Fee Petition"); P. Further Petn. I at 4, Ex. A. While the court appreciates counsel's zealous representation of his clients, providing such a general description of activity for 460 hours of work certainly does not provide sufficient documentation of each hour expended. [20]

In addition, Mr. Kops requests "approximately 100 hours" for pre-petition work. P. Further Petn. I at 3. Counsel reports that this time consisted of reviewing the Act, legislative history and cases interpreting the act; discussions with counsel who normally participated in Program proceedings; reviewing actual files of the Office of Special Masters involving polio cases; reviewing respondent's replies to various petitions; and collecting and reviewing necessary material to meet the obligations of petitioners' initial pleading. [21] Id. Mr. Kops also seeks

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[20] Petitioners' counsel rebuts respondent's argument that it is inordinate to spend so much time talking with clients, by stating that "a petitioner's counsel builds a rapport with their client, and in certain respects, becomes a father, brother, and/or a priest/rabbi, all of which are necessary to become the advocate who must represent the injured victim, so that they trust his recommendations when it comes to each aspect of the litigation." P. Brief at 6. The court concurs with respondent in finding this amount of time communicating with ones client to be excessive. The court agrees that petitioners' counsel has a legal and ethical obligation to keep clients informed of progress in the case. However, as the undersigned has previously indicated, "spending over 30% of [one's] time on a case communicating with [one's] client is excessive by any measure." Corder v. Secretary of HHS, No. 97-125V, 1999 WL 1427753, at * 8 (Fed. Cl. Spec. Mstr. Dec. 22, 1999).

[21] The court notes that 100 hours of work pre-dating the filing of the petition appears excessive. Further, while petitioners' counsel argues his extensive expertise in vaccine litigation as a vital factor in supporting his requested hourly rate, claiming that 100 hours were required to educate himself about the Vaccine Act in fact demonstrates inexperience working within the Vaccine Program.

reimbursement for "approximately 465 hours over the period of March 2000 through April 2002" for investigating and preparing life care plans and insurance; substantiating damages; researching previous cases, including interviewing the attorneys and requesting the records involved in these cases; and preparing for trial with experts. P. Further Petn. I at 5-7. Given the broad descriptive categories of hours expended, the court finds it impossible to intelligently determine the reasonableness of the claimed hours. See Edgar, 1994 WL 256609 at * 5.

Accordingly, to assist the court in determining how much time is reasonable, the court reviewed the numbers of hours requested and awarded in cases similar to this one in complexity and length of proceedings. Each case was resolved by the undersigned. This survey revealed that the number of hours requested by Mr. Kops far exceeds the hours claimed in those cases and, to the undersigned's knowledge, any previously requested under the Program. For example, in Edgar v. Secretary of HHS, No. 90-711V, 1994 WL 256609 (Fed. Cl. Spec. Mstr. May 27, 1994), aff'd, 32 Fed. Cl. 506 (1994), a three year-long, complicated and conceded DPT/OPV seizure/coma case, which was appealed to the Court of Federal Claims and the Federal Circuit, petitioner's attorney requested 518.9 attorney hours but was awarded 300 attorney hours. In Sanford v. Secretary of HHS, No. 99-287V (Fed. Cl. Spec. Mstr. Mar. 21, 2003),[22] a two year-long polio conceded case, which involved some difficult pain and suffering and lost wages issues, as well as a complex damages hearing, fees were awarded for 706 attorney *and* paralegal hours although petitioner's counsel requested 775 hours. In Moorman v. Secretary of HHS, No. 95-323V (Fed. Cl. Spec. Mstr. Jan. 11, 1999), a three year-long, extremely complex, conceded polio case with an extensive damages hearing that resulted in the largest award to date, fees were settled pursuant to a request for 372.80 hours.[23]

While Mr. Kops' request for over 1500 in attorney hours clearly surpasses the hours

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[22] The undersigned selected for comparison complex polio cases, much like the instant case. Severe polio cases often present the most complex and expensive damages cases because while the body is devastated, the mind is not. Thus, in addition to medical care, provisions for "independent living," including college and extensive computer control systems, are made.

[23] The court reviewed the decisions and dockets in three additional cases. Although the total number of hours awarded in these cases was not available, as the files are archived at the court, these were all lengthy and complex polio cases. In Pierson v. Secretary of HHS, No. 93-498V (Fed. Cl. Spec. Mstr. July 17, 1997), a four year-long case, petitioner agreed to revise his request downward and the court awarded total of $66,247.89 for fees and costs. In Dominguez v. Secretary of HHS, No. 94-482V (Fed. Cl. Spec. Mstr. Feb. 15, 2000), a four year-long conceded polio case, the parties stipulated to petitioner incurring $50,925.00 in fees and $20,365.00 in costs, and the undersigned found an award of $71,281.00 to be appropriate. Finally, in Hermann v. Secretary of HHS, No. 90-1201V (Fed. Cl. Spec. Mstr. Feb. 14, 1997), a five year-long case, petitioners were awarded the maximum $30,000 cap for pre-Act cases, of which $14,476.68 went to petitioners' counsel (with $8,503.45 for Re-entry and $7,019.87 for pain and suffering). **The undersigned emphasizes that the instant case is no more complex than any of the cases reviewed.**

claimed in these cases, the court does acknowledge that the resolution of this case took four years, presented severe damages, was hard fought and resulted in an extremely beneficial award. However, the same can be said for each of the above-reviewed cases. Thus, after considering all factors, including the above review of similar cases, the undersigned concludes that 750 attorney hours is reasonable. This award is comparable to the number of hours awarded in Sanford and reasonably reflects the amount of process involved in this case. The court notes that this figure is no doubt generous considering that the court is well within its right to appreciably reduce or even deny Mr. Kops' hours given his failure to adequately document each hour expended.[24]

For the same reasons as explained above, the court will reduce the 236 hours of paralegal time requested to100 hours. As discussed above, Mr. Kops was forewarned of the need to keep "contemporaneous time and activity records *of each person* for whom time is being charged." Order, filed March 16, 1999, at 2 (italics in original) (Special Master Wright). Mr. Kops failed to provide any documentation as to paralegal hours expended. However, given the undersigned's experience and the amount of process involved in this case, the court finds that an award of 100 hours in paralegal time is appropriate.[25]

B. *Costs Incurred*

Petitioners' Position

Petitioners seek a total of $33,088.55 in costs in this matter.[26] P. Cert. Support Petn at 1, 5. Petitioners' counsel's costs incurred include, among other things, travel and lodging, the life care planner's and economist's fees, Federal Express charges, fax charges, Court of Federal Claims bar admission fees, and other miscellaneous costs. Id. at 3-5. Petitioners' counsel also requests reimbursement for his clients' unreimbursed medical expenses and guardianship legal services. P. Fee Petn. at Exs. A, D, E.

Respondent's Position

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[24] The court also notes that in damages cases, such as this one, extensive efforts of a professional life care planner substantiate the damages case. Petitioners used an experienced life care planner, Mona Yudkoff. She was responsible for putting together and supporting Ciara Ceballos' life-time needs. Her time and efforts are fully compensated. See pp. 26-27, infra. Thus, Mr. Kops' requested hours must be viewed in the context of the extensive efforts of Ms. Yudkoff.

[25] Including the 750 hours awarded to Mr. Kops, the total number of hours awarded is 850.

[26] This figure does not include costs requested for petitioners' unreimbursed medical expenses ($2,968.93) or guardianship ad litem ($2,467.50) and guardianship attorney ($6,185.03) fees and costs. See P. Fee. Petn. at Exs. A, D.

Respondent objects to various items contained in petitioners' application for costs. Specifically, respondent finds that neither of the two bills for guardianship legal services are reimbursable as a matter of law. R. Cost Opp. at 1-2. Respondent also objects to petitioners' request for unreimbursed medical expenses under the presumption that this expense was paid as part of the lump sum payment to petitioners upon the June 7, 2002 judgment on the damages decision in this case. Id. at 2. Respondent contends that life care planner, Mona Yudkoff's, March 20, 2002 invoice lacks sufficient documentation of Ms. Yudkoff's time expended and expenses incurred in this case and thus fails to provide enough information to assess its reasonableness. Id. at 2-3. Similarly, respondent contests the July 8, 2002 invoice of economist, Andrew Verzillli. Id. at 4. Respondent finds that the invoice fails to provide an adequate description of Dr. Verzilli's services, and thus the reasonableness of the bill cannot be determined and reimbursement should be denied. Id.

Further, respondent objects to various entries contained in petitioners' January 31, 2003 submission due to lack of sufficient "identification, documentation, or explanation." R. Cost Opp. at 4. This includes charges for photocopying, facsimile, federal express, credit card charges and miscellaneous bills. Id. at 4-6.

Analysis of Costs

Regarding requests for costs, the special masters' Guidelines provide that "such expenses . . . should be explained sufficiently to demonstrate their relation to the prosecution of the petition." Guidelines at 32. Further, Barnes v. Secretary of HHS, No. 90-1101V, 1999 WL 797468 (Fed. Cl. Spec. Mstr. Sep. 17, 1999) notes that "[p]etitioners' counsel is reminded that reimbursement for costs under the vaccine program is fairly straightforward: save receipts/documentation associated with a particular case, organize them, and submit them along with a petition for fees and costs. The court reimburses petitioners for all of their documented expenses so long as they are reasonable." Id. at * 7. Barnes also provides the following guidance:

> It is petitioners' burden to substantiate costs expended with supporting documentation such as receipts, invoices, canceled checks, etc. See Long v. Secretary, HHS, No. 91-326V, 1995 WL 774600, at * 8 (Fed. Cl. Spec. Mstr. Dec. 21, 1995). However, jurisprudence dictates that petitioner is required only to provide "reasonably specific documentation." Comm. Heating & Plumbing Co., Inc. v. Garrett, III, 2 F.3d 1143, 1146 (Fed. Cir. 1993). "[S]ufficient documentation requires... 'a breakdown of expenses such as the amounts spent copying documents, telephone bills, mail costs and other expenditures related to the case.'" Id. at 1146, citing Naporano Iron & Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987).

Barnes, 1999 WL 797468, at *7, n.19.

Further, as the Court of Federal Claims stated in Green v. Secretary of HHS, 19 Cl. Ct. 57,

67 (1989):

> Courts have disallowed or drastically reduced a fee award for failure to maintain contemporaneous time records. See Grendel's Den, Inc. v. Larkin, 749. F.2d 945 952 (1st Cir. 1984). Other courts have outright rejected "after-the-fact estimates of time expended." See Nat. Ass'n of Concerned Vets. v. Sec. of Defense, 675 F. 2d 1319, 1327 (D.C. Cir. 1982). The court in Nat. Ass'n of Concerned Vets wrote in pertinent part:
>
> > Attorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney. As stated by the Court of Appeals for the Second Circuit, "any attorney who hopes to obtain an allowance from the court should keep accurate and current records of work done and time spent." In re Hudson & Manhattan RR. Co., 339 F.2d 114, 115 (2d Cir. 1964); accord, In re Wal-Feld Co., 345 F.2d 676, 677 (2d Cir. 1965).
>
> Nat. Ass'n of Concerned Vets, 675 F. 2d at 1327.

While petitioners did not submit receipts for all expenses, the court is satisfied that most of the costs incurred were related to proceedings in this case and were reasonable.[27] However, the court finds that it will not allow reimbursement for the following costs requested by petitioners, as the costs are either unreasonable, unexplained or not compensable under the Program.

Ceballos' Unreimbursed Medical Expenses

Mr. Kops requests $2,968.93 for the cost of the Ceballos' unreimbursed medical expenses. P. Fee Petn. at Ex. A. Respondent argues that this expense should have been paid as part of the $35,000 Section 15 compensation awarded pursuant to the judgment entered in this matter on June 7, 2002. R. Cost Opp. at 2. Mr. Kops avers that "[a]s to the bills of Ceballos costs for the litigation," he was told by respondent that those bills would be considered at the time of reimbursement of costs to petitioners' counsel. P. Resp. to R. Cost Opp. at 6. He contends that these costs were not part of the $35,000 lump sum and the documentation was provided when costs were submitted nearly two years ago. Id. at 6. The court did not receive any documentation of this expense, demonstrating that it is separate from the unreimbursed medical expenses already paid to the Ceballos' pursuant to the June 7, 2002 judgment. Accordingly, without any documentation to substantiate this request, the court will not award petitioners' the $2,968.93 for

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[27] The court notes that the initial Order in this case directed counsel to document all expenses "by submitting a photocopy of the actual bills, receipts, invoices, or other records of payment or indebtedness." Order, filed March 16, 1999, at 2 (Special Master Wright). On March 11, 2003, petitioners' counsel submitted (but did not file) bills for many, but not all, expenses. See P. Cost. Doc.

these unverified costs. See Barnes, 1999 WL 797468, at * 7, n.19; Green, 19 Cl. Ct. at 67; see also Wilcox v. Secretary of HHS, No. 90-991V, 1997 WL 101572 (Fed. Cl. Spec. Mstr. Feb. 14, 1997) ("Caselaw clearly and uniformly shows that the failure to document the claimed costs results in denial of the claim.") (citing Fritz v. White, 711 F.Supp. 1350, 1357 (E.D. Pa. 1989); Vitug v. Multistate Tax Comm., 883 F. Supp. 215, 222 (N.D. Ill. 1995); Fietzer v. Ford Motor Co., 454 F. Supp. 966, 968 (E.D. Wis. 1978)).

Facsimiles

Petitioners' counsel also requests $435.00 in facsimile charges. P. Cert. Support Petn. at 4. The court has generally consider facsimile charges to be subsumed in the hourly rate as part of office "overhead" and thus not compensable. See Wilcox v. Secretary of HHS, No. 90-46V, 1997 WL 74664, at * 2 (Fed. Cl. Spec. Mstr. Feb. 3, 1997); Guy v. Secretary of HHS, 38 Fed. Cl. 403, 407 (1997). However, the undersigned and other special masters have expressed their willingness to consider facsimiles as a compensable cost so long as the attorney requesting compensation supplies reasonable evidence as to the actual, out-of-pocket cost involved in using the facsimile. See Wilcox, 1997 WL 74664 at * 2; Coats v. Secretary of HHS, No. 91-504V, 1999 WL 94924, at * 3 (Fed. Cl. Spec. Mstr. Jan. 29, 1999); Barnes v. Secretary of HHS, No. 90-1101V, 1999 WL 797468, at * 6 (Fed. Cl. Spec. Mstr. Sept. 17, 1999). In this case, counsel has provided no evidence as to how many facsimiles were sent or how the charges were computed. This lack of documentation or explanation makes it impossible for the undersigned to assess the actual, out-of-pocket cost to petitioners' counsel and thus reimbursement must be denied.

Court Fees

Petitioners' counsel asks that he receive reimbursement for his Court of Federal Claims bar admission fees, including a $25.00 charge by the Pennsylvania Supreme Court for a letter of good standing to accompany his application. P. Cert. Support Petn. at 5. Respondent's counsel argues that awarding such cost is not proper under the Program. R. Cost Opp. at 7. The court finds agreement with respondent on this issue. The admission fee for the Claims Court bar is unrecoverable. Huston v. Secretary of HHS, No. 88-77V, 1990 WL 293377, at * 2 (Spec. Mstr. Fed. Cl. Sept. 18, 1990); Gonzales v. Secretary of HHS, No. 91-905V, 1992 WL 92200, at * 4 (Spec. Mstr. Fed. Cl. April 10, 1992); Borger v. Secretary of HHS, No. 90-1066V, 1993 WL 540817, at * 1 (Spec. Mstr. Fed. Cl. Dec. 16, 1993); Winters v. Secretary of HHS, No. 91-4V, 1993 WL 114646 (Fed. Cl. Spec. Mstr. April 1, 1993), at * 1; Velting v. Secretary of HHS, No. 90-1432V, 1996 WL 937626, at * 4 (Spec. Mstr. Fed. Cl. Sept. 24, 1996); Rasmussen v. Secretary of HHS, No. 91-1566V, 1996 WL 752289, at * 2 (Spec. Mstr. Fed. Cl. Dec. 20, 1996).

Petitioners' counsel also requests reimbursement for a $330 Court of Federal Claims bill, and respondent objects to this bill for lack of documentation or explanation. R. Cost Opp. at 6. In response, petitioners' counsel states that this bill was for opinions he ordered from the court and documents related to these opinions. P. Resp. to R Cost Opp. at 6. Counsel believes "that the total charge was $330, though the invoice for the same cannot be located." Id. Without documentation of the $330 charge, the expense cannot be substantiated, and the court shall not reimburse counsel for this expense. See Barnes, 1999 WL 797468, at * 7, n.19; Green, 19 Cl. Ct.

at 67; Wilcox, 1997 WL 74664 at * 4.

Federal Express

Mr. Kops seeks reimbursement for $621.78 in Federal Express charges. P. Cert. Support Petn. at 5-6. Although noting that Mr. Kops provides corresponding documentation for all but approximately $115 of these charges, respondent objects to compensation of this item in certain circumstances because Mr. Kops provided no explanation as to why a more expensive method of delivery was required for correspondence between petitioners and their counsel and in sending documents to Curits Webb on October 30, 2000. R. Cost Opp. at 5-6. In response, Mr. Kops explains that because of the events of September 11, 2001, respondent claimed that their mail was not being received on time and told petitioners' counsel that he should use Federal Express. P. Resp. to R Cost Opp. at 4.

This court has found that use of an overnight delivery on a regular basis is generally not considered a reimbursable expense. See Guy v. Secretary of HHS, 38 Fed. Cl. 403, 407 (1997) (citing Neher v. Secretary of HHS, No. 90-431V, slip. op. at 3 (Fed. Cl. Spec. Mstr. July 22, 1993)). However, after September 11 the use of private delivery services was necessary to ensure timely delivery of documents. The court reviewed the charges (which include a number of charges prior to September 11) and, while not condoning the routine use of overnight mail, given the proceedings in this case and the extenuating circumstances, the court will allow the charges in full, totaling $621.78.

Photocopying

Mr. Kops claims $4,882.00 in costs for photocopying but provides no documentation or explanation of number of pages copied or cost per page. P. Cert. Support Petn. at 4. Respondent objects to these charges, as the number of pages copied and cost per page are not documented or explained and thus the reasonableness of the charge cannot be determined. R. Cost Opp. at 5. In rebuttal, Mr. Kops explains that The Copy Center charges between $.06 and $.15 per page, "depending on how many pages and whether the pages that were being copied were stapled or not." P. Resp. to R. Cost Opp. at 5.

Mr. Kops provides a list of bills incurred by his office, accompanied by receipts of these bills. See P. Cert. Support Petn.; P. Cost Doc. While no receipts are provided from The Copy Center, Mr. Kops does provide the dates and dollar amounts for copying done there. See P. Cert. Support of Petn. at 4. The total dollar amount listed for this copying is $814.72. Id. Although, as respondent contends, the reasonableness of this charge is unable to be determined, the court will except Mr. Kops' representation as a member of the court. See Corder, 1999 WL 1427753, at * 11. However, as Mr. Kops failed to provide any further substantiation of copying performed, the court will reduce his request for $4,822.00 in copying costs to $814.72, the amount for which there is documentation of copying paid and done.

Travel costs, etc.

Respondent contests certain credit card charges contained in petitioners' counsel's January

31, 2003 submission for reimbursement (P. Cert. Support Petn.) due to "lack of sufficient identification, documentation, or explanation." R. Cost Opp. at 4. Specifically, under the heading "American Express," respondent argues that due to lack of explanation or documentation, reimbursement should be denied for the following: two May 1998 train trips to Washington; the June 1999 trip to Atlanta; and the May 1999, September 1999, December 1999, April 2000, February 2001, April 2001, and January 2002 trips to Florida, as well a payment of $59.45 for "12/20/00 Atlantic City Hilton." R. Cost Opp. at 4. Under the heading "Citibank," respondent objects to the payment of $186.89 for "12/23/99 Academy of Pediatrics," the payment of $298.00 for "4/12/00 Marriott Hotel – Chicago," and the payment of $93.90 for "10/24/01 Citgo – Gas," as the payments remain undocumented and unexplained. R. Cost Opp. at 5.

Mr. Kops maintains that the two May 1998 train trips to Washington, D.C. were to meet with petitioners when they were going to testify before Congress. P. Resp. to R. Cost Opp. at 5. The court does not find an expense unrelated to the direct proceedings before the court to be reimbursable. Therefore, it shall not award payment for costs associated with petitioners testifying before Congress. As for the trips to Florida, Mr. Kops explains that those trips were "for the purpose of meeting with the parents of petitioner when various crises occurred, which fall[] under the attorney-client privilege." Id. Mr. Kops opines that "face-to-face meetings with his clients is essential in the representation of those clients, especially when they call and ask petitioners' counsel to meet them in Florida." Id. Mr. Kops also notes that petitioners cannot make the trip to Philadelphia or Washington because they have a daughter with paralysis in all of her limbs. Id. Mr. Kops further explains that the Atlantic City hotel bill was incurred because, in order to receive a cheap airfare, counsel utilized an airline that files from Atlantic City to Orlando. Id. at 4. Because the flight leaves early in the morning, counsel spent the night in Atlantic City. Id. The court finds Mr. Kops' nine trips to Florida in order to conduct "face-to-face meetings" with clients to be excessive. The court knows of no reason why these meetings could not be conducted via telephone. Based upon experience, the undersigned has seen two to three trips to be routine and reasonable. Accordingly, the court shall limit the award of travel costs to reimbursement for Mr. Kops' trips to Florida in March 2000 for depositions and in October 2001 for mediation, or approximately $1,300.00. Reimbursement for all additional trips is denied.

As to the Citibank charges, Mr. Kops states that he cannot recall why he spent $189.00 with the American Academy of Pediatrics, and thus withdraws this expense. P. Resp. to R. Cost Opp. at 4. Mr. Kops reports that the $298.00 4/12/00 Marriott Hotel Charge was incurred when, while in Chicago "for other matters," he met with individuals about preparing for the Ceballos trial. Id. The court will not reimburse petitioners' counsel for hotel charges incurred while traveling on matters unrelated to the case for which he is requesting costs. Although Mr. Kops stated no memory as to the details of the $93.90 Citgo bill, he indicated the possibility that a tire needed to be fixed or replaced while on a trip to Florida. Id. at 6. Mere possibilities do not rise to the level of proof required, much less documented proof. Accordingly, reimbursement of this item must be denied.

Respondent also objects to the following miscellaneous bills as unexplained or

undocumented: $45.00 paid 8/16/99 for "Pediatric Health Choice;" $25.00 paid 8/16/99 for "Central Florida Brace Inc.;" $50.50 paid 8/16/99, $33.50 paid 5/3/00, $5.33 paid 10/4/00, and $19.55 paid 1/8/01 for "Nemours Children's Clinic;" $10.00 paid 8/16/99 for "Dr. John Meisenheimer;" $45.00 paid 9/27/99 for "Sand Lake Dermatology Ctr.;" $8.00 paid 2/2400 for "Jose E. Quinines, M.D.;" $67.75 paid 2/24/00 for Windermere Pediatrics;" and $10.00 paid 4/5/00 and $65.00 paid 4/19/00 for "Empire Blue Cross/BS." R. Cost Opp. at 6. Mr. Kops provided bills documenting each of these items. See P. Cost. Doc. The court finds these bills reasonable and thus will fully compensate Mr. Kops for all of these expenses.

Life Care Planner & Economist

Mr. Kops requests $17,285.65 for the cost of life care planner, Mona Yudkoff and $2,000 for the services of economist, Andrew Verzilli. P. Fee Petn. at Ex. A. Respondent objects to reimbursement for Ms. Yudkoff's expenses. Respondent finds that while it is clear that Ms. Yudkoff charges an hourly rate of $110, the summary invoice provided deems it impossible to evaluate the reasonableness of time expended on this case. R. Cost Opp. at 2-3. Respondent believes that "much greater specificity of both the time expended and service provided is necessary to effect a reasonable understanding of her efforts in order for the special master to make a reasoned decision about reimbursing that expenditure." Id. at 3. Respondent also argues that reimbursement should be denied for Ms. Yudkoff's expenses for telephone, copy, travel and architect expenses due to lack of detailed documentation. Id. Respondent also contends that petitioners' counsel's request for reimbursement for the cost of $2,000.00 for economist, Andrew Verzilli, should be denied. Id. at 4. Respondent argues that, as Dr. Verzilli's invoice fails to provide Dr. Verzilli's hourly rate, daily time records or any description of the services provided on any given date or time, the special master cannot assess whether this bill is reasonable. Id.

The undersigned has addressed the reasonableness of life care planning expenses, stating that "the amount of process involved in resolving the damages in a Vaccine case has increased dramatically ... which in turn has increased the fees and costs claimed by life care planners." Martson v. Secretary of HHS, No. 91-0355, 1998 WL 719493, at * 6 (Fed. Cl. Spec. Mstr. Sept. 29, 1998) (quoting Wilcox v. Secretary of HHS, No. 90-991V, 1997 WL 101572, at * 3 (Fed. Cl. Spec. Mstr. Feb. 14 1997)). In Wilcox, the undersigned explained how the damages process has changed over the years and estimated that in approximately 1991, life care planning expenses ranged from $3,000.00 to $4,000.00. Id. at * 3. As the court has given increased responsibilities to life care planners, these costs have risen. Id. "[W]ith this increased role, the court and respondent cannot complain when faced with the billings from a quality professional who spent necessary time providing the information ordered by the court and expected by respondent." Id. However, this does not mean that life care planners can seek payment for service in a "blank check." Id. at * 3. While the court recognizes that these costs have risen, such costs must still be reasonable. Id.

Given the complexity and length of the damages proceedings in this case, as well as Ms. Yudkoff's important and demanding role in this damages case (see n.24, supra), the court finds that 141 hours of work from July 1999 to March 2002 is not unreasonable. For the most part, Ms.

Yudkoff's invoice provides sufficient documentation of hours expended and corresponding activities performed. Moreover, the court finds that an hourly charge of $110 is a reasonable rate. Thus, the court shall award Mr. Kops the full $17,285.65 requested for the cost of life care planner, Mona Yudkoff.

______While arguably respondent's position that Dr. Verzilli's bill fails to provide sufficient detail as to expenses incurred is correct, given the undersigned's experience and the amount of process involved in this case, the court finds the economist's charge reasonable and awards the full $2,000 requested for his services.

Guardianship

Mr. Kops requests reimbursement for guardianship expenses in the amount of $8,652.53. P. Fee Petn. at 3. This figure consists of costs incurred by guardian ad litem, Ruye Hawkins, in the amount of $2,467.50, and guardianship attorney, David C. Brennan, in the amount of $6,185.03. Id. Mr. Kops urges the Special Master to award fees for the appointment of a guardian ad litem and for the appointment of setting up the trust, arguing that "[u]nder the document which petitioners were given by the United States of America on behalf of respondent, we were required to have a guardian ad litem appointed." Id. Respondent contends that neither of these bills is reimbursable as a matter of law, citing Siegfried v. Secretary of HHS, 19 Cl. Ct. 323 (1990) and Mol v. Secretary of HHS, 50 Fed. Cl. 588 (2001). R. Cost Opp. at 1. Mr. Kops rebuts respondent's argument, claiming that the issue in Mol differs from the one presented in the instant case, because "[i]n Mol, petitioner's counsel asked for fees, while in this instance it is counsel engaged in Florida where there is a special trust fund that must be managed in a Florida bank and the release required numerous steps to be taken in the Florida Courts." P. Resp. R. Cost Opp. at 6. Mr. Kops contends that he incurred this expense only because respondent refused to pay a lump sum, thus creating the necessity for a guardianship trust. Id. at 6-7; P. Answer at 1. Mr. Kops avers that respondent should be responsible for payment of this expense, as petitioner hired the guardianship individuals in order to fulfill the requirements of the settlement agreement creating a trust. P. Resp. R. Cost Opp. at 7.

Respondent points out that the case was not resolved by settlement and contends that the parties did not discuss or make any agreements regarding guardianship. R. Answer at 1. Respondent argues that petitioners' requested certain changes to the trust after the entry of judgment, to which respondent did not agree. Id. at 2. Consistent with respondent's representation, time records from the counsel in Florida[28] reflect that petitioners did in fact establish the guardianship during the 90-day election period following judgment. Id. This period is subsequent to any respondent or court involvement.

The issue of whether guardianship expenses are reimbursable has been the subject of much debate. Those who have found guardianship expenses not to be reimbursable have done so on the premise that the statute makes clear that fees and expenses regarding the administration of the

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[28] See P. Fee Petn. at Ex. D.

estate or instituting a guardianship are not compensable because they were not "incurred in any proceeding on [a Vaccine] petition" filed in the Court of Federal Claims. § 300aa-15(e)(1)(B); Mol v. Secretary of HHS, 50 Fed. Cl. 588, 591 (2001) (citing Siegfried v. Secretary of HHS, 19 Cl. Ct. 323, 325 (1990), and Lemon v. Secretary of HHS, 19 Cl. Ct. 621, 623 (1990)); see also Zeman v. Secretary of HHS, No. 92-0240V, 1994 WL 325425 (Fed. Cl. Spec. Mstr. June 20, 1994); Cain v. Secretary of HHS, No. 91-817V, 1992 WL 379932 (Fed. Cl. Spec. Mstr. Dec. 3, 1992); Barnes v. Secretary of HHS, No. 90-1510V, 1992 WL 185708 (Cl. Ct. Spec. Mstr. July 16, 1992); Widdoss v. Secretary of HHS, No. 90-486V, 1992 WL 80809 (Cl. Ct. Spec. Mstr. Mar. 31, 1992).

In finding guardianship expenses to be reimbursable, this court has employed a "but for" test. As the undersigned explained in Thomas v. Secretary of HHS, No. 92-46V, 1997 WL 74664, at * 3 (Fed. Cl. Spec. Mstr. Feb. 3, 1997):

> [T]his court has for years compensated such costs utilizing a "but for" test. That is, the only reason these costs were incurred [was] to comply with respondent's demand to set up an estate to receive the money, by the court's demand that a conservatorship be set up to protect the funds from dissipation, or by the terms in a settlement stipulation which require as a condition of settlement that a conservatorship be set up.....This court sees no distinction between the time and costs incurred between generating information, such as an IME, that is later presented to the court and the court ordered conservatorship. While performed outside of this court's physical viewing, the information is presented to the court at its behest and for its approval.

Id; accord, Velting v. Secretary of HHS, No. 90-1432, 1996 WL 937626 (Fed. Cl. Spec. Mstr. Sept. 24, 1996); see also Childers v. Secretary of HHS, No. 96-194V, 1999 WL 514041, * 3 (Fed. Cl. Spec. Mstr. June 11, 1999).

Since the decision in Thomas, the Court of Federal Claims once again addressed the issue in Mol v. Secretary of HHS, 50 Fed. Cl. 588 (2001). Therein, Judge Futey found consistent with the Lemon and Siegfried courts that only work done "during the pendency of a petition before a special master" or the court is compensable and "state court proceedings were not part of the prosecution of the vaccine petition." Mol, 50 Fed. Cl. at 591.

It is understood that decisions by the Court of Federal Claims are not binding upon the special masters. See Hanlon v. Secretary of HHS, 40 Fed. Cl. 625, 630 (1998). However, these decisions are due great respect. In reading the decisions involving the guardianship issue, it appears to the undersigned that much background information is missing from the discussion. Such information could show that, at least in some instances, the guardianship expenses are incurred "during the pendency of a petition before a special master" and as part of the "prosecution of the vaccine petition." Mol, 50 Fed. Cl. at 591. An effort to explain follows.

The guardianship expenses arise as part of the damages portion of the case. The special master controls all of the proceedings on damages, see, e.g., Damages Order, filed June 25, 1999; however, not all of the "proceedings" occur before the special master. For example, independent medical examinations, vocational assessments, life care planner interviews with providers and third-party mediators are all critical components of the damages process. All occur pursuant to the special master's order but none occur physically before the special master. All are routinely reimbursed without objection, as costs incurred on a petition and as part of prosecuting the claim.

Another example is petitioner's economist's review of the award. As was done in this case, the economist performs this task without the special master's knowledge on a schedule set by the petitioner, not the special master. However, the economist's review of the award is critical to petitioner's acceptance and the cost is routinely reimbursed without objection by respondent (in the instant case, respondent objected to the lack of documentation of the economist's bill, but not the compensability of the economist's cost). Why then are guardianship costs different and not compensable?

Guardianships are established for various reasons and at various times in these proceedings. In many cases, a guardianship is set up without court or respondent involvement. This may occur prior to filing the petition or, as in this case, petitioners may wait until the conclusion of the proceedings to initiate the state court proceedings for a guardianship. In those instances where the guardianship is established without a special master's order, the undersigned agrees with the conclusion in Mol that such costs are not incurred "on a petition" and thus are not compensable under the Program.

However, in the majority of cases involving a guardianship, the guardianship is set up to fulfill a condition of receiving the vaccine award. If this condition is set by either court order or as an element of the agreed-upon settlement with respondent, which the special master must ultimately approve, the undersigned sees no distinction from the myriad of other costs incurred by third parties in executing critical pieces of the damages puzzle. The fact that the third party is another court does not change the critical fact that the special master requires that piece of the puzzle to complete the compensation picture.

In the case *sub judice*, the court posed the following question to the parties:

Q. Is the guardianship required for receipt of the annuity payments, lump sum or both?

[Respondent's] A. If a minor is the recipient of the funds, the answer generally is yes, subject to pertinent state law.

R. Answer at # 6.

However, respondent in fact has been advocating a more expansive view of requiring

guardians. In a status conference held on February 2, 2004 in Correa v. Secretary of HHS, No. 99-736V, respondent's counsel stated that his client agency, HHS, advocated that a guardianship should be required by the special master in all cases, regardless of whether state law requires such a guardianship.[29] Thus, in furtherance of internal policy, respondent is asking the court to impose this additional cost on petitioners.

In addition, the insurance companies that respondent selects often require guardianships as a condition for petitioner to receive the annuity payments. Again, the form of payment and the selected payor dictates the incurrence of this extra cost. To the undersigned, in these instances where the special master has ordered compensation paid by annuity, it is clear that the costs are incurred "on a petition" and in the prosecution of the petition.

In an effort to understand respondent's position on this issue as it relates to third party costs, the undersigned ordered respondent to answer the following:

> Previous court decisions have accepted respondent's argument that the establishment of a guardianship is not a 'proceeding on a petition' pursuant to section 15(e)(1)(B). The undersigned is interested to know whether, in other cases, petitioner's share of mediation costs paid to a private third party neutral are being assessed as costs? If yes, please explain how these costs are a 'proceeding on a petition' as respondent has interpreted that phrase before the Court of Federal Claims judges.

Order, filed February 17, 2004, at # 7.

The court notes its disagreement with respondent's answer. See R. Answer at 4. Respondent attempts to distinguish mediation costs paid to a **private third-party neutral** and guardianship costs in terms of whether each is considered a "proceeding on a petition." As respondent explains, "A 'proceeding on the petition' is one over which the special master or judge of the Court of Federal Claims properly exercises jurisdiction." Id. Respondent argues that mediation proceedings are reimbursable even when not performed by the special master himself, because the special master is "free to authorize these proceedings, dictate rules of procedure and timing, or terminate them and proceed to hearing to resolve the disputed issues." Id. Respondent contends that guardianship proceedings differ in that, under Section 12 of the Vaccine Act, special masters have no jurisdiction to conduct guardianship proceedings. Id. Instead, "[g]uardianship proceedings are conducted solely by state courts of competent jurisdiction subject to rules set by those courts. Such proceedings therefore are not 'proceedings on a [Vaccine Act] petition,' otherwise states courts would have no authority to conduct them." Id.

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[29] Correa involves a situation where state law does **not** require a guardianship when a parent is receiving the funds on behalf of their child. However, HHS refuses to make payment absent the guardianship. Thus, petitioner is forced to expend funds to set up a guardianship. Even still, respondent has indicated that he will contest the award of guardianship expenses.

The court finds respondent is arguing a distinction without a meaningful difference. As with third-party neutral proceedings, guardianship proceedings, while not performed physically before the special master, may occur by order of the special master. Thus, although the guardianship proceedings take place before another court, they arise from this court's direction and under its jurisdiction. In attempting to distinguish the third-party neutral proceedings, respondent grossly overstates the role of the special master with these third-party mediators. Similar to the role of an economist or a vocational expert, the special master orders the process and then sits back and awaits the result. As seen from innumerable delays in getting these reports, the special master has no effective control over the timing or process of getting this critical information. Likewise, it is specious to suggest that the special master controls or is involved in the third-party mediation any more than the special master is involved in an independent medical examination. As part of the "proceeding on a petition" the special master orders tests, medical examinations or mediation as part of the process of providing information to the court. Likewise, ordering a guardianship, either at respondent's behest in a stipulation or on the court's own motion, as respondent's client agency suggests, is part of the "proceeding on a petition" in providing compensation to a minor. This court is requiring its establishment. It is no more reasonable to order petitioner to incur the cost of an independent medical examination to provide information in formulating the award than to order petitioner to incur the expense of a guardianship to receive the award. The critical act is the special master's determination that the guardianship is necessary, not who performs the act of signing the paperwork. Whether a "service" is performed by another court, provider or other professional, if ordered by this court and accomplished as part of the process of providing reasonable compensation to petitioner, it follows ineluctably that the costs were incurred "on a petition" and in "prosecuting the petition" and thus are compensable.[30]

This said, in the instant case, the court did not order establishment of a guardianship. In its May 7, 2002 Damages Decision, this court ordered that "[a] lump sum of $6,500,000.00 shall be deposited in a government-funded, inter-vivos, irrevocable, reversionary medical trust in order to fully fund the items of compensation set forth in petitioners' life care plan filed on September 17, 2001." See Damages Decision, filed May 2, 2002, at 3. The court stated that the parties agreed Sun Trust Bank of Orlando, Florida would serve as trustee of the trust, and the court found Skip Cressman, Vice-President of Med-Bill, qualified to serve as medical administrator to assist

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[30] The undersigned emphasizes full agreement with respondent's policy of requiring independent oversight, such as trusts and guardianships, over a minor's funds. However, it is unconscionable to request, negotiate or demand this benefit for the recipient of the vaccine funds and then shift the costs to the parent. If these expenses are in fact unreimbursable, this special master will reconsider following HHS's request to order guardianships and will review the insurance company's policies to determine if in fact they require guardianships as respondent purports. Lastly, the undersigned will consider other methods of payments petitioners may suggest to avoid these costs. See § 300aa-15(f)(4)(A). It appears to the undersigned that respondent's position on this close issue is shortsighted and threatens their stated policy, a very good policy, of protecting the minor's vaccine award.

Sun Trust Bank in administering the reversionary trust. Id. No guardianship or conservatorship was mentioned or ordered in the decision. However, as reflected in bills submitted for the guardianship attorneys' fees, petitioners' counsel appears to have retain their services during the 90-day period following the June 7, 2002 judgment. See P. Fee Petn. at Ex. D. Thus, it appears that for reasons unknown to the court, petitioners' established this guardianship for their own purposes. The court therefore will not award petitioners the $8,652.53 requested in guardianship expenses for a guardianship not required by the court.

Accordingly, the court finds that $24,616.95 is the appropriate award for costs incurred in this case.

III. Conclusion

After a thorough review of petitioners' fee application and respondent's objections, petitioners are awarded $195,000.00 in fees ($250 per hour X 750 attorney hours = $187,500.00; $75 per hour X 100 paralegal hours = $7,500.00) and $24,616.95 in costs.

Accordingly, pursuant to Vaccine Rule 13, petitioners are hereby awarded a total of $219, 616.95 in attorney's fees and costs.[31] In the absence of a motion for review filed pursuant to RCFC, Appendix B, the Clerk is directed to enter judgment according to this decision.[32]

IT IS SO ORDERED.

Gary J. Golkiewicz
Chief Special Master

[31] This amount is intended to cover all legal expenses. 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.A. §300aa-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).

[32] Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a U.S. Court of Federal Claims judge.