

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
OFFICE OF SPECIAL MASTERS**

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PETER BROEKELSCHEN, M.D., \*

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Petitioner, \*

No. 07-137V

Special Master Christian J. Moran

v. \*

Filed: February 21, 2012

SECRETARY OF HEALTH \*

AND HUMAN SERVICES, \*

Respondent. \*

Attorneys' fees and costs, reasonable  
basis for motion for review on fees,  
fees for fees, Fox v. Vice

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Lisa A. Roquemore, Law Offices of Lisa A. Roquemore, Irvine CA, for petitioner,  
Voris E. Johnson, Jr., United States Dep't of Justice, Washington, DC, for  
respondent.

**PUBLISHED DECISION ON  
SUPPLEMENTAL ATTORNEYS' FEES AND COSTS**\*

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\* Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

This case originated as a claim for compensation under the National Vaccine Injury Compensation Program (“the Vaccine Program”), 42 U.S.C. §§ 300aa—10 et seq. (2006). However, the present decision is not about Peter Broekelschen’s claim that the flu vaccine caused him to suffer transverse myelitis. Instead, this decision resolves Dr. Broekelschen’s request that he be awarded attorneys’ fees and costs for unsuccessfully appealing a prior decision awarding attorneys’ fees and costs.

Dr. Broekelschen’s lack of success on the motion for review means that he is not entitled to attorneys’ fees as a matter of right. The lack of success, however, is not disqualifying by itself. Petitioners who do not obtain relief may be awarded attorneys’ fees “if the special master or court determines . . . there was a reasonable basis for the claim.” 42 U.S.C. § 300aa—15(e).

Thus, the critical question is whether Dr. Broekelschen’s latest motion for review was supported by a “reasonable basis.” If the motion for review had a reasonable basis, then Dr. Broekelschen is eligible for an award of his reasonable attorneys’ fees. On the other hand, if the motion for review lacked a reasonable basis, then Dr. Broekelschen could not recover any attorneys’ fees for the motion for review.

The Secretary opposes Dr. Broekelschen’s request entirely. The Secretary maintains that Dr. Broekelschen’s motion for review was not filed with a reasonable basis and was “frivolous,” disqualifying Dr. Broekelschen from receiving additional attorneys’ fees.

As set forth below, Dr. Broekelschen’s motion for review was supported by a reasonable basis. Dr. Broekelschen presented a tenable (but not persuasive) argument that the special master committed an error of law. Additionally, the Court, when denying Dr. Broekelschen’s motion for review, did not suggest that the motion for review was lacking all merit.

Consequently, Dr. Broekelschen is eligible for an award of attorneys’ fees. In respect to the amount of the award, Dr. Broekelschen is awarded **\$24,183.50**.

## **I. Background**

This case has two parts – entitlement and attorneys’ fees. Dr. Broekelschen claimed that he was entitled to compensation from the Vaccine Program because,

according to Dr. Broekelschen, the flu vaccine caused him to suffer transverse myelitis. A hearing was necessary to resolve this claim. After this hearing, the undersigned found that Dr. Broekelschen did not meet his burden of proof. Entitlement Decision, 2009 WL 440624 (Fed. Cl. Spec. Mstr. Feb. 4, 2009). Dr. Broekelschen sought review of the entitlement decision by filing a motion for review with the Court of Federal Claims, an appeal to the Federal Circuit, and a petition for en banc review by the Federal Circuit. The Court of Federal Claims denied the motion for review, 89 Fed. Cl. 336 (2009); a panel of the Federal Circuit affirmed the decision of the Court of Federal Claims, 618 F.3d 1339 (Fed. Cir. 2010), and the Federal Circuit denied the petition for en banc review. This last action concluded the entitlement phase of Dr. Broekelschen's case.

In addition, Dr. Broekelschen sought an award for his attorneys' fees and costs. Dr. Broekelschen was awarded, on an interim basis, attorneys' fees and costs for work performed essentially through the entitlement hearing pursuant to Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008). Interim Fees Decision, 2008 WL 5456319 (Fed. Cl. Spec. Mstr. Dec. 17, 2008) (awarding \$134,371.01 in attorneys' fees and costs). After the appellate review of the entitlement proceedings concluded, Dr. Broekelschen sought an additional award of attorneys' fees and costs, totaling approximately \$165,000.00. Dr. Broekelschen was awarded approximately \$116,000.00. The reduction (totaling approximately \$50,000) was primarily because Dr. Broekelschen's attorney spent an unreasonable number of hours on tasks related to the appellate litigation. Final Fees Decision, 2011 WL 2531199 (Fed. Cl. Spec. Mstr. June 3, 2011).

Dr. Broekelschen filed a motion for review of the reduction in his attorneys' fees, which presented two primary arguments. First, he argued that the undersigned special master did not comply with a recent Supreme Court case, Perdue v. Kenny A., 130 S. Ct. 1662 (2010), when the special master did not specifically identify what tasks took an unreasonable amount of time. Pet'r Mot. for Review, filed June 16, 2011, at 8-11. Second, he argued that the undersigned should not have compared the attorneys' fees in his case to the attorneys' fees in other cases. In addition to arguing that the Court should award the entire amount previously requested in attorneys' fees, Dr. Broekelschen maintained that the Court should award him supplemental attorneys' fees for filing the motion for review. Dr. Broekelschen requested \$16,221 in additional attorneys' fees, although Dr. Broekelschen did not submit any timesheets detailing the basis for that amount. Id. at 18-19. The Secretary's response to the motion for review argued that the Court should not award attorneys' fees for the motion for review. Resp't Resp., filed July 18, 2011, at 15-17.

The Court denied Dr. Broekelschen's motion for review and ordered that the Clerk's Office enter judgment in the amount awarded in the Final Fees Decision. The Court found "that the special master did not act arbitrarily, capriciously, or contrary to law, and did not abuse his discretion when he determined petitioner's final award of fees and costs." Opinion and Order, 2011 WL 5600217, at \*15 (Oct. 31, 2011). The Court did not address Dr. Broekelschen's request for \$16,221 in supplemental attorneys' fees for filing the motion for review.

Dr. Broekelschen renewed and perfected his application for supplemental attorneys' fees by submitting another request, this one supported by timesheets. In this request, he requested \$25,426.00 in attorneys' fees and nothing in costs. Dr. Broekelschen directed this filing to the Court. Pet'r Request for Supp'l Fees, filed Nov. 9, 2011.

The next day, the Court remanded Dr. Broekelschen's request to the undersigned pursuant to Vaccine Rule 34(b). The Court did not comment on the merit or lack of merit to the motion for supplemental fees. Order, filed Nov. 10, 2011.

The Secretary opposed Dr. Broekelschen's request for supplemental fees. The Secretary's position is that Dr. Broekelschen's motion for review was frivolous.<sup>1</sup> The Secretary maintains that "Petitioner should not be awarded any attorneys' fees or costs for pursuing an appeal that was frivolous as argued."

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<sup>1</sup>The Secretary states the Court "held [that] petitioner's appeal was entirely without merit, and respondent contends it was therefore frivolous as argued." Resp't Opp'n, filed Nov. 22, 2011, at 1. This characterization is not correct.

It is true that the Court rejected all of Dr. Broekelschen's arguments. However, the Court did not comment – one way or the other – as to whether any of petitioner's unpersuasive arguments had some merit. Although divining the Court's assessment of the reasonableness of the motion for review is difficult, the Court did not use language hinting that the Court questioned the motion's reasonableness. The views of the reviewing Court are often influential in evaluating whether a motion for review had a reasonable basis. See Hocraffer v. Sec'y of Health & Human Servs., No. 99-533V, 2011 WL 3705153, at \*7 n.12 (Fed. Cl. Spec. Mstr. July 25, 2011) (stating "without some comment from the reviewing court as to the reasonableness of an appeal, the undersigned is disinclined to deny compensation for the time and cost of what are arguably, but not clearly, questionable appeals").

Resp't Opp'n, filed Nov. 22, 2011, at 5. Alternatively, she argued that if there were a reasonable basis for the motion for review, then the amount requested should be reduced.

Dr. Broekelschen defends the reasonableness of the motion for review, arguing that the arguments contained therein “were made on a good-faith basis and based upon current law.” Pet’r Reply, filed Nov. 23, 2011, at 2. When Dr. Broekelschen filed a reply, he increased the amount requested to \$26,917.50. With the filing of that brief, Dr. Broekelschen’s motion for supplemental fees is ready for adjudication.

## **II. Analysis**

### **A. Whether Dr. Broekelschen Is Entitled to Any Attorneys’ Fees**

The first question is whether Dr. Broekelschen is entitled to any award of his attorneys’ fees and costs for filing his motion for review. If Dr. Broekelschen had been awarded compensation, then he would be entitled to his reasonable attorneys’ fees and costs as a matter of right. However, he was not awarded compensation. In this circumstance, “the special master or court may award . . . reasonable attorneys’ fees and other costs . . . if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim.” 42 U.S.C. § 300aa—15(e).<sup>2</sup>

#### **1. Reasonable Basis**

The definition of reasonable basis has not been set forth authoritatively. The Vaccine Act does not define “reasonable basis.” The rules governing proceedings before the special masters in the Vaccine Program do not discuss “reasonable basis.”

Without definitive instructions, special masters and one judge have looked to the totality of the circumstances in determining whether a reasonable basis existed. E.g. McKellar v. Sec’y of Health & Human Servs., No. 09-841V, 2011 WL 5925323, at \*7 (Fed. Cl. Nov. 4, 2011); Franklin v. Sec’y of Health & Human

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<sup>2</sup> The Secretary has not questioned Dr. Broekelschen’s good faith in filing the motion for review.

Servs., No. 99-0855V, 2009 WL 2524492, at \*5 (Fed. Cl. Spec. Mstr. July 28, 2009); Hamrick v. Sec'y of Health & Human Servs., No. 99-683V, 2007 WL 4793152, at \*4 (Fed. Cl. Spec. Mstr. Jan. 9, 2008). One important factor that special masters have considered is whether the party's claim is feasible. An early case linking reasonable basis to feasibility is Di Roma v. Sec'y of Health & Human Servs., No. 90-3277V, 1993 WL 496981 (Fed. Cl. Spec. Mstr. Nov. 18, 1993), and since then special masters have cited Di Roma or cases that relied on Di Roma. E.g. Browning v. Sec'y of Health & Human Servs., No. 07-453V, 2010 WL 4359237, at \*8 (Fed. Cl. Spec. Mstr. Nov. 1, 2010) (quoting Turner); Turner v. Sec'y of Health & Human Servs., No. 99-544V, 2007 WL 4410030, at \*6 (Fed. Cl. Spec. Mstr. Nov. 30, 2007) (quoting Di Roma).

Reasonable basis is also needed at each stage of the case. This requirement is demonstrated by Perreira in which the Federal Circuit concluded the special master did not abuse his discretion in finding that the petitioner lacked a reasonable basis to proceed to a hearing. Perreira v. Sec'y of Health & Human Servs., 33 F.3d 1375, 1377 (Fed. Cir. 1994). The Federal Circuit held that “when the reasonable basis that may have been sufficient to bring the claim ceases to exist, it cannot be said that the claim is maintained in good faith.”

Here, the specific phase of Dr. Broekelschen's case for which Dr. Broekelschen seeks an award of attorneys' fees is the activities incident to June 16, 2011 filing of a motion for review of the June 3, 2011 Final Fees Decision.<sup>3</sup> The previous findings that Dr. Broekelschen had a reasonable basis for earlier actions do not automatically carry over to his motion for review. See Phillips v. Sec'y of Health & Human Servs., 988 F.2d 111, 113 (Fed. Cir. 1993) (Plager, J., concurring) (stating “the appropriateness of an award of fees related to the initial proceedings before the special master is an issue quite separate from the appropriateness of fees attributable to an appeal to this court.”); McKellar v. Sec'y of Health & Human Servs., No. 09-841V, 2012 WL 362030, at \*7 (Fed. Cl. Spec.

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<sup>3</sup> The Interim Fees Decision and the Final Fees Decision awarded Dr. Broekelschen attorneys' fees for all activities in the entitlement phase of the case --- proceedings before the special master, a motion for review, a Federal Circuit appeal, and a Federal Circuit request for en banc review. The two earlier fees decisions also awarded compensation for litigation regarding the two fee applications before the special master.

Mstr. Jan. 13, 2012) (stating “reasonable basis must exist at every phase of the litigation” and discussing Perreira).<sup>4</sup>

## 2. Standards for Quantifying Attorneys’ Fees and Standards of Review of Those Decisions

The June 3, 2011 Final Fees Decision awarded Dr. Broekelschen attorneys’ fees by following the lodestar method in which a reasonable hourly rate is multiplied by a reasonable number of hours. 2011 WL 2531199, at \*3. The Federal Circuit approved this methodology in 1993. Saxton v. Sec’y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993). As part of the lodestar analysis, the Final Fees Decision used an hourly rate to which Dr. Broekelschen did not object. The Final Fees Decision, however, reduced the number of hours spent by Dr. Broekelschen’s attorney. In doing so, the Final Fees Decision did not examine each entry on a line-by-line basis. Instead, the Final Fees Decision reduced the number of hours to a reasonable number and relied upon Saxton for this approach. 2011 WL 2531199, at \*5.

The Federal Circuit has repeatedly stated that special masters have discretion when they determine the amount of attorneys’ fees. The Federal Circuit has reviewed those decisions under an abuse of discretion standard. Hall v. Sec’y of Health & Human Servs., 640 F.3d 1351, 1356 (Fed. Cir. 2011); see also Masias v. Sec’y of Health & Human Servs., 634 F.3d 1283, 1291 (Fed. Cir. 2011) (ruling that the special master did not abuse his discretion when finding a reasonable hourly rate), cert. denied, 132 S. Ct. 815 (2011);; Saxton, 3 F.3d at 1521 (stating “It was 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.”).

As stated by the Court of Federal Claims when denying Dr. Broekelschen’s motion for review, for Dr. Broekelschen to gain any relief, he must establish that

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<sup>4</sup> The parties have not identified any cases that determined reasonable basis in the context of an appeal requesting an increased amount of attorneys’ fees. Morse v. Sec’y of Health & Human Servs., No. 05-418V, 2010 WL 1177321 (Fed. Cl. Spec. Mstr. March 9, 2010), attempted to do so. However, on another motion for review, the Court held that the (undersigned) special master’s examination of reasonable basis was not appropriate because Ms. Morse (unlike Dr. Broekelschen) received compensation on her underlying claim. Morse v. Sec’y of Health & Human Servs., 93 Fed. Cl. 780, 791-92 (2010).

the special master abused his discretion. Opinion and Order, 2011 WL 5600217, at \*9. The Court defined the abuse of discretion standard as satisfied when the “decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors.” Id., quoting Gose v. United States, 451 F.3d 831, 836 (Fed. Cir. 2006) (internal quotation marks and citation omitted). Consequently, for the June 16, 2011 motion for review to have a reasonable basis, it must present some tenable argument that the special master abused his discretion.

### **3. June 16, 2011 Motion for Review**

Dr. Broekelschen’s motion presented four arguments: (1) the special master committed a legal error in how the special master determined the amount of attorneys’ fees, (2) the special master was arbitrary in reducing the number of hours, (3) the special master considered an impermissible factor, and (4) the special master was arbitrary in reducing the costs.<sup>5</sup> The Court rejected all these arguments and upheld the June 3, 2011 Final Fees Decision.

To determine if Dr. Broekelschen is eligible for attorneys’ fees for the motion for review, the question that must be answered is did any of those four arguments have a reasonable basis. The last three points may well have lacked a reasonable basis. A special master’s determination about the reasonableness of the amount of time for an activity or the reasonableness of an item of costs is entitled to substantial deference. Additionally, although Dr. Broekelschen argued that the special master may not take into account amounts of attorneys’ fees awarded in other cases, the Federal Circuit had previously endorsed that approach. Saxton, 3 F.3d at 1521. A lengthy analysis about the reasonableness of Dr. Broekelschen’s last three arguments is not needed because of his first argument.

The remaining argument is that the special master committed an error of law when reducing time spent on, for example, the Federal Circuit appeal to a discrete number without explaining exactly what activities were excessive. Dr. Broekelschen’s motion for review quoted the Supreme Court’s description of the

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<sup>5</sup> This summary rephrases and reorganizes the arguments presented in the motion for review to make the arguments fit the abuse of discretion categories more closely. As noted by the Court, Dr. Broekelschen’s briefs did not focus on the standard of review very well. Opinion and Order, 2011 WL 5600217, at \*9.

trial court's responsibility in determining the amount of attorneys' fee: "[B]ut the judge's discretion is not unlimited. It is essential that the judge provide a reasonably specific explanation for all aspects of a fee determination, including any award of an enhancement. Unless such explanation is given, adequate appellate review is not feasible." Pet'r Mot. for Review, filed June 16, 2011, at 9, quoting Perdue v. Kenny A., 559 U.S. \_\_\_\_, 130 S.Ct. 1662 (2010) (all emphasis added by Dr. Broekelschen). Dr. Broekelschen acknowledged that the Final Fees Decision cited to Saxton for the proposition that special masters are not required to analyze fee applications on a line-by-line basis, but argued that based on Perdue, "this interpretation of the law is incorrect." Id.; accord id. at 11 (stating that the special master's interpretation of Saxton "is certainly contrary to the United States Supreme Court decision in Perdue).<sup>6</sup>

Although Dr. Broekelschen does not use the term "overruled," he was essentially arguing that Perdue overruled Saxton. According to Dr. Broekelschen, after Perdue, special masters could not follow Saxton's methodology by estimating a reasonable number of hours. Under Dr. Broekelschen's understanding of Perdue, the special master would need to "provide a reasonably specific explanation" for each item that the special master declined to credit. Because the Final Fees Decision did not contain this level of detail, it reflected a legally erroneous method.

There was some feasibility to this argument. If the Supreme Court had imposed more stringent requirements on trial courts when they reduce attorneys' fees, then the Court may have held that the special master followed the wrong law. Special masters are not entitled to any deference on issues of law. Masias, 634 F.3d at 1288. In short, Perdue provided a reasonable basis for Dr. Broekelschen to file the June 16, 2011 motion for review.

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<sup>6</sup> Dr. Broekelschen also cited to Wasson v. Sec'y of Health & Human Servs., 24 Cl. Ct. 482, 486 (1991), in both his motion for review (page 8) and his November 23, 2011 reply in support of his request for supplemental attorneys' fees (page 2-3). Wasson does not help establish that the Final Fees Decision used an improper methodology because the Final Fees Decision relied upon Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517 (Fed. Cir. 1993), which was decided by the Federal Circuit after the Claims Court decided Wasson.

Additionally, a close reading of the Federal Circuit's opinion, available through Westlaw, shows that the 1991 Claims Court decision was not affirmed. Instead, the Federal Circuit affirmed a 1992 Claims Court decision, following a remand. Wasson v. Sec'y of Health & Human Servs., No. 92-5101, 1993 WL 18492 (Fed. Cir. Jan. 29, 1993).

This opportunity to challenge the methodology used in the Final Fees Decision was available for a limited time. A little more than one year after the Supreme Court issued Perdue, the Supreme Court again discussed the process for awarding attorneys' fees in the context of reviewing a trial court's decision to award attorneys' fees to a defendant, who had established that a portion of the plaintiff's civil rights lawsuit was frivolous. In remanding to the trial court, the Supreme Court commented upon the process for determining the reasonableness of attorneys' fees: "trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." Fox v. Vice, \_\_U.S. \_\_, 131 S.Ct. 2205, 2216 (2011).

The Supreme Court comments about the appellate court's role are also relevant in assessing the reasonable basis for a motion for review of a special master's decision awarding attorneys' fees. "We can hardly think of a sphere of judicial decision making in which appellate micromanagement has less to recommend it. . . . A trial court has wide discretion when, but only when, it calls the game by the right rules." 131 S. Ct. at 2216-17.<sup>7</sup>

The Supreme Court's instruction that trial courts should attempt, in awarding attorneys' fees, to achieve "rough justice" should minimize the amount of appellate litigation questioning the amount of any attorneys' fees award. After Fox, it would appear that these challenges would be closer to "basically hopeless appeals" about which a Federal Circuit judge warned in a concurring opinion. Phillips, 988 F.2d at 113 (Plager, J., concurring). Therefore, it is expected that motions for review of decisions on attorneys' fees will be reserved for cases in which a party may reasonably argue that the special master did not "call[] the game by the right rules." Motions for review that in substance challenge only the amount of the

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<sup>7</sup> When the "rules of the game" are uncertain, there are legitimate issues that require appellate resolution. For example, the appellate courts are providing guidance about interim fees after Avera stated that special masters could award attorneys' fees on an interim basis. Although the Secretary complains about the number of motions for review of a decision awarding attorneys' fees, an analysis shows that many of these appellate challenges concerned either interim fees or forum rate. See appendix 1.

award should be reserved for those cases in which the special master clearly abuses his (or her) discretion.

Of course, there are times when the special master makes an error that is correctable. One such example is a mathematical error in adding sums. See Sabella v. Sec'y of Health & Human Servs., 86 Fed. Cl. 201 (2009). Another example is after classifying work performed by an attorney as work compensable at a paralegal's rate, a failure to compensate for that work at the paralegal's rate. See Valdes v. Sec'y of Health & Human Servs., 89 Fed. Cl. 415 (2009). If a motion for reconsideration were brought to the special master's attention, these errors could be corrected without filing a motion for review. See Sabella, 86 Fed. Cl. at 218 n.6 (suggesting a motion for reconsideration); Masias v. Sec'y of Health & Human Servs., No. 99-697V, 2009 WL 1838979 (Fed. Cl. Spec. Mstr. June 23, 1999) (amending fees decision after motion for reconsideration), aff'd, 634 F.3d 1283; Vaccine Rule 23 (discussing motions for reconsideration).

In sum, Dr. Broekelschen had a reasonable basis for filing his motion for review because Perdue, arguably, changed the "rules of the game" regarding the process for determining attorneys' fees. Although this argument could have succeeded then, Fox shows that the basic process for determining a reasonable number of hours did not change.<sup>8</sup> If Dr. Broekelschen were to file the same motion for review today, his motion for review could lack a reasonable basis. The Secretary's objections regarding reasonable basis are, therefore, overruled.

## **B. Amount of Attorneys' Fees**

The remaining question is the amount of attorneys' fees to which Dr. Broekelschen is entitled. Dr. Broekelschen has requested \$26,917.50.<sup>9</sup> The

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<sup>8</sup> In opposing Dr. Broekelschen's pending fee application, the Secretary criticizes Dr. Broekelschen for failing to cite Fox in his June 16, 2011 motion for review because Fox was issued 10 days earlier. Resp't Resp. at 7-8. Whether Dr. Broekelschen actually knew about Fox is unknown. Given such a short interval, the failure to cite Fox is excusable, especially because the Secretary's response to the June 16, 2011 motion for review, which was filed on July 18, 2011, also did not cite Fox.

<sup>9</sup> This amount represents \$25,426.00 in the November 9, 2011 request for attorneys' fees plus \$1,491.50 for the reply.

Secretary requests that the special master “reduce the requested fees substantially, based on his experience and discretion.” Resp’t Opp’n, at 11 n.6. To determine a reasonable amount of attorneys’ fees, trial courts use the lodestar method. Avera, 515 F.3d at 1347-48.

The primary activity for which Dr. Broekelschen seeks compensation is the work of his attorney (Ms. Roquemore) in drafting the motion for review on fees. Dr. Broekelschen has requested \$16,395.00 for this task, representing approximately 46 hours of Ms. Roquemore’s time plus approximately 10 hours of paralegal time.

A review of Ms. Roquemore’s timesheets suggests that drafting the motion for review was circuitous. Ms. Roquemore spent hours researching the law regarding attorneys’ fees, an excessive amount of time given that the special master’s underlying decision cited the leading Federal Circuit cases.<sup>10</sup> Ms. Roquemore spent hours drafting the motion but then also spent hours revising and condensing the motion to comply with the requirement in Vaccine Rule 24(b)(3) that motions for review be less than 20 pages. Ms. Roquemore also investigated an argument regarding Doe 11, but the Court rejected an argument based on that case because it “turn[ed] on an attempt to guess the number of hours for which petitioner’s attorney in that case was compensated.” Opinion and Order, 2011 WL 5600217, at \*13.

Overall, the impression is that Ms. Roquemore spent an amount of time that was “excessive.” Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). Almost all attorneys involved in litigation probably spend some time researching the law and revising briefs. But, the questions are whether the amount of time spent exceeded a reasonable amount of time and whether an attorney’s billing judgment to which the Supreme Court referred in Hensley would suggest that some reduction is appropriate. Here, the overall amount of time spent on the brief was unreasonable and the exercise of billing judgment would have reduced the amount requested. A reasonable number of attorney hours for this motion for review is 35 hours. See Greenhill v. United States, 96 Fed. Cl. 771, 782 (2011) (reducing time spent on a post-trial brief from 39.5 hours to 15 hours).

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<sup>10</sup> Ms. Roquemore did discuss the Supreme Court’s opinion in Perdue v. Kenny A., which was issued on April 21, 2010. However, as noted above, Ms. Roquemore did not cite Fox v. Vice, issued on June 6, 2011.

This finding is roughly in accord with other decisions discussing the reasonable amount of time for a motion for review. Significantly, in this very case, the undersigned found that the motion for review of the decision denying Dr. Broekelschen could have been written in 40 hours of attorney time plus 15 hours of paralegal time. Final Fees Decision, 2011 WL 2531199, at \*8 (Fed. Cl. Spec. Mstr. June 3, 2011). The Court found that this finding was not arbitrary. Opinion and Order, 2011 WL 5600217, at \*11.

Decisions from other cases, which necessarily have somewhat different factual circumstances, also suggest that 35 hours is a reasonable amount of time for a motion for review. With the exception of one outlying case, the cost for a motion for review has ranged from \$6,600 to \$11,000. See appendix 2.

Dr. Broekelschen is awarded \$13,661.00 for the motion for review. This sum represents 35 hours of Ms. Roquemore's time at \$355.00 per hour plus 10.3 hours of paralegal time at \$120.00 per hour.

In addition, Ms. Roquemore performed other tasks, such as filing a reply brief in support of the motion for review, briefing the pending request for attorneys' fees, and other miscellaneous tasks. The amount of time spent is reasonable. Thus, Dr. Broekelschen is also awarded \$10,522.50 for this work. **The total award is \$24,183.50.**

### **III. Conclusion**

The Clerk's Office is instructed to enter a judgment awarding Dr. Broekelschen \$24,183.50, unless a motion for review is filed. A check shall be made payable to Dr. Broekelschen and his attorney. The Clerk's Office is also instructed to provide a copy of this decision to the presiding judge.

**IT IS SO ORDERED.**

S/Christian J. Moran  
Christian J. Moran  
Special Master

## Appendix 1

### Published Decisions Resolving Motions for Review of Attorneys' Fees Between 2001 – 2006

\*Indicates review by the Federal Circuit.

<u>Name</u>	<u>Issues</u>
Brice v. Sec'y of Health & Human Servs., 55 Fed. Cl. 366 (2003)*	Petition Untimely Filed
Rupert v. Sec'y of Health & Human Servs., 55 Fed. Cl. 293 (2003) ( <i>Rupert IV</i> )	Lodestar Method
Rupert v. Sec'y of Health & Human Servs., 52 Fed. Cl. 684 (2002) ( <i>Rupert II</i> )	Lodestar Method
Hebern v. United States, 54 Fed. Cl. 548 (2002)*	Petition Untimely Filed
Mol v. Sec'y of Health & Human Servs., 50 Fed. Cl. 588 (2001)	Attorneys' Fees for State Court Guardianship

## Published Decisions Resolving Motions for Review of Attorneys' Fees Between 2006 – 2011

\*Indicates review by the Federal Circuit.

<u>Name</u>	<u>Issue</u>
McKellar v. Sec'y of Health & Human Services, 101 Fed. Cl. 297 (2011)	Reasonable Basis
Morse v. Sec'y of Health & Human Servs., 93 Fed. Cl. 780 (2010)	Reasonable Basis
Friedman v. Sec'y of Health & Human Servs., 94 Fed. Cl. 323 (2010)	<i>Davis</i> Exception; Local Hourly Rate
Hall v. Sec'y of Health & Human Servs., 93 Fed. Cl. 239 (2010)*	<i>Davis</i> Exception; Local Hourly Rate
Gruber v. Sec'y of Health & Human Servs., 91 Fed. Cl. 773 (2010)	Reasonable Amount of Attorneys' Fees and Costs (Number of Hours)
Warfle v. Sec'y of Health & Human Servs., 92 Fed. Cl. 361 (2010)	Interim Fees
Rodriguez v. Sec'y of Health & Human Servs., 91 Fed. Cl. 453 (2010)*	Forum Rate
Shaw v. Sec'y of Health & Human Servs., 88 Fed. Cl. 463 (2009)*	Interim Fees
Avila v. Sec'y of Health & Human Servs., 90 Fed. Cl. 590 (2009)	Local Hourly Rate
Doe/11 v. Sec'y of Health & Human Servs., 89 Fed. Cl. 661 (2009)	Interim Fees
Morse v. Sec'y of Health & Human Servs., 89 Fed. Cl. 683 (2009)	Reasonable Amount of Costs
Valdes v. Sec'y of Health & Human Servs., 89 Fed. Cl. 415 (2009)	Reasonable Amount of Attorneys' Fees and Costs
Sabella v. Sec'y of Health & Human Servs., 86 Fed. Cl. 201 (2009)	Reasonable Number of Hours; Expert Costs
Carrington v. Sec'y of Health & Human Servs., 85 Fed. Cl. 319 (2008)	Reasonable Amount of Attorneys' Fees and Costs
Savin v. Sec'y of Health & Human Servs., 85 Fed. Cl. 313 (2008)	Reasonable Amount of Attorneys' Fees and Costs

Kay v. Sec'y of Health & Human Servs., 80 Fed. Cl. 601 (2008)*	Petition Untimely Filed
Iannuzzi v. Sec'y of Health & Human Servs., 78 Fed. Cl. 1 (2007)	Attorneys' Fees for General Autism Causation in OAP Proceeding
Avera v. Sec'y of Health & Human Servs., 75 Fed. Cl. 400 (2007)*	Forum Rate; Interim Fees

Appendix 2: Recent Decisions Awarding Attorneys' Fees for Motions for Review

Name	Citation	Presiding Official	Attorney	Issue on MFR	# Hours	Value
Hocraffer	2011 WL 6292218	Judge Firestone	Mr. Dannenburg	Amount of Fees	49.8	\$9,960.00
Hocraffer	2011 WL 3705153	SM Golkiewicz	Mr. Dannenburg	Three on entitlement	44.9, 35.8, and 40.0	\$8,980.00, \$7,160.00, \$8,000.00 <sup>1</sup>
Riggins	2011 WL 1087252	SM Golkiewicz	Mr. Shoemaker	Amount of Fees	Unspecified	\$25,081.44 <sup>2</sup>
Friedman	2010 WL 4340986	SM Moran	Mr. Moxley	Amount of Fees <sup>3</sup>	30.0	\$6,600.00
Stone	2010 WL 379027	SM Golkiewicz	Mr. Gage	Entitlement	34.4	\$8,256.00 <sup>4</sup>
Morse	93 Fed. Cl. 780	Judge Bush	Mr. Homer	Reasonable Basis / Fees	32.0 + 13 paralegal	\$11,000.00
Doe/11	89 Fed. Cl. 661	Judge Williams	Mr. Gage	Two on entitlement	160.2 + 11.9 travel	\$39,715.80

<sup>1</sup> For purposes of simplicity, the values in Hocraffer assume an hourly rate of \$200. The special master actually awarded used a lower hourly rate, depending on exactly when the motion for review was filed.

<sup>2</sup> The amount awarded in Riggins “primarily pertained to” appeals, both a motion for review to the Court of Federal Claims and an appeal to the Federal Circuit. The decision does not specify amounts for each activity.

<sup>3</sup> Friedman also presented whether the Court could split a special master’s decision awarding attorneys’ fees into two components, a final portion and an interim portion. The number of hours in the chart (30) is only for work regarding the amount of fees.

<sup>4</sup> The amount in Stone is calculated using \$240.00 per hour.

