IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

LAURA ELIZABETH TURPIN,	*	
	*	No. 99-535V
Petitioner,	*	Special Master Christian J. Moran
	*	
v.	*	Filed: December 23, 2008
	*	
SECRETARY OF HEALTH	*	Attorneys' fees and costs; accuracy
AND HUMAN SERVICES,	*	of attorney's records; paralegal
	*	functions; Dr. Greenspan.
Respondent.	*	

Clifford Shoemaker, Esq., Shoemaker & Associates, Vienna, VA, for Petitioner;
Althea Walker Davis, Esq., U.S. Dep't of Justice, Washington, D.C., for Respondent.

PUBLISHED DECISION ON ATTORNEYS' FEES AND COSTS[*]

Laura Turpin claimed that the hepatitis B vaccination, which she received on March 21, 1996, and April 25, 1996, caused her to suffer common variable immunodeficiency syndrome. Ms. Turpin sought compensation for this condition pursuant to the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa–10 et seq. (2006). The parties agreed to resolve this dispute before the case was determined on its merit.

Now, Ms. Turpin seeks reimbursement for her attorneys' fees and costs. However, respondent has objected to a number of items. After considering petitioner's request and

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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 such 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 banned 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).

respondent's objections, Ms. Turpin is awarded $20,833.88 in attorneys' fees and $13,594.67 in costs.

I. Procedural History

Acting through her attorney, Clifford Shoemaker, Ms. Turpin filed her petition on July 29, 1999. She did not file any medical records at that time. On October 20, 1999, Ms. Turpin saw Dr. Bellanti, who was retained as an expert in this matter, for a physical evaluation and lab work. Pet'r App'n for Fees and Costs, filed July 28, 2008, at 10. (Ms. Turpin did not file any records from her visit with Dr. Bellanti. However, Ms. Turpin submitted billing records as part of her application for attorneys' fees and costs.) The first 19 sets of medical records were filed on January 4, 2001. Ms. Turpin filed additional sets of medical records in 2003 and 2004.

Respondent filed his report, pursuant to Vaccine Rule 4, on June 27, 2006. Respondent denied that Ms. Turpin was entitled to compensation. Respondent noted that the case did not contain information from either a treating doctor or an expert retained for this case stating that the hepatitis B vaccine caused Ms. Turpin's injury. Resp't Rep't at 9.

The process for Ms. Turpin to obtain an expert report was lengthy. Approximately one year passed during which time Ms. Turpin filed six motions for enlargement of time to file an expert report. Ms. Turpin filed the report from Dr. Joseph Bellanti on May 21, 2007, as exhibit 41. Ms. Turpin also filed literature cited by Dr. Bellanti. Exhibits 42-44.

Dr. Bellanti's initial report, however, did not contain a statement that Dr. Bellanti believed that the hepatitis B vaccine caused Ms. Turpin to suffer from common variable immunodeficiency. Consequently, Ms. Turpin was required to file a supplemental report from Dr. Bellanti. Order, dated June 1, 2007. Ms. Turpin did so and also attached additional medical articles with Dr. Bellanti's supplemental report. Exhibit 45.

After Ms. Turpin filed Dr. Bellanti's supplemental report, respondent was ordered to file an expert report. Respondent did not. Instead, the parties reached an agreement to resolve this case based upon the costs and risks of continued litigation. Following a routine process, the parties' settlement agreement was incorporated into a decision awarding Ms. Turpin compensation. Decision, filed March 27, 2008.

Ms. Turpin filed a motion for an award of her attorneys' fees and costs. Respondent filed objections to the motion for attorneys' fees and costs. Additional briefs were then filed by respondent and Ms. Turpin.

During the briefing process, Ms. Turpin eliminated some items in her request for compensation. The most significant entries concern activities performed by Ms. Turpin's attorneys in a different case that Ms. Turpin filed on behalf of her son, Conor. The caption and docket number of this other case is Turpin v. Sec'y of Health & Human Servs., No. 99-564V.

On some occasions, Ms. Turpin's attorneys erroneously recorded their time under Laura Turpin's case, even though the work was actually performed in Conor Turpin's case. When the undersigned brought this issue to Mr. Shoemaker's attention, Mr. Shoemaker eliminated the request for this time in Laura Turpin's case. See Pet'r Status Report, filed Dec. 1, 2008.

It is clear that the error in time-keeping was an honest mistake. Conor Turpin's case has concluded and Mr. Shoemaker's request for fees in that case did not include entries wrongly placed in Laura Turpin's case. Phrased differently, Mr. Shoemaker did not bill duplicate entries in both cases. The mistakes are also understandable because some orders issued in Conor Turpin's case included the wrong docket number, docket number 99-535V.

Although the mistakes in entering time were both honest and understandable, the process for requesting fees provided an opportunity for Mr. Shoemaker to correct the mistakes. Some of the mistaken entries were fairly obvious, such as time spent filing a motion for voluntary dismissal in 2003. Because Ms. Turpin's case was active in 2008, Ms. Turpin's case could not have been dismissed in 2003. However, neither Mr. Shoemaker nor the attorney who prepared the fee application noticed the errors. During a status conference, Mr. Shoemaker stated that he would oversee fee applications more carefully to prevent these types of errors in the future.

It should also be noted that respondent did not raise the erroneous entries when presenting his response to Ms. Turpin's application for attorneys' fees and costs. Respondent, too, is expected to review petitioner's request with care.

Ms. Turpin's voluntary withdrawal of the hours actually worked in Conor's case eliminates one item of potential dispute. The remaining issues about attorneys' fees and attorneys' costs are resolved in the following sections.

II. Attorneys' Fees

A. Introduction

Petitioners in the Vaccine Program who receive compensation are entitled to an award for their attorneys' fees and costs. Like other litigation allowing a shift in attorneys' fees and costs, awards for attorneys' fees and costs in the Vaccine Program must be "reasonable." 42 U.S.C. § 300aa–15(e)(1) (2006).

Reasonable attorneys' fees are determined using the lodestar method – "'multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'" Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1347-48 (Fed. Cir. 2008) (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)).

One variable in the lodestar equation is the hourly rate. With one exception, the hourly rate is not disputed here. Apparently, Ms. Turpin's attorneys have agreed with attorneys from the

United States Department of Justice about their reasonable hourly rates. This agreement obviates the need for a case-by-case determination of the hourly rates in general. However, respondent has argued that some tasks performed by one attorney warrant compensation at a lower hourly rate because the tasks do not require an attorney's knowledge and skill.

The other variable in the lodestar formula is the number of hours billed. Respondent maintains, for various reasons, that Ms. Turpin has not established that her attorneys are entitled to compensation for all the hours that they claim.

For purposes of determining the reasonable amount of attorneys' fees, this case is divided into two separate periods. The first period runs from 1999 through the end of 2005. In this period, the primary task was gathering medical records. The second period begins in 2006 and runs until the present. These two periods are analyzed in sections II.B. and II.C., below.

B. Activities Performed Before 2006

Before 2006, this case was proceeding slowly. The primary task of Ms. Turpins's attorneys was to gather medical records.

For this period, Ms. Turpin seeks approximately $15,000 for work performed by her attorneys or their assistants. This amount consists of the following entries.

Attorneys' Fees Requested for Time before 2006			
Name	# Hours	Hourly Rate	Total
Clifford J. Shoemaker	33.92	$250	$8,480.00
Renee J. Gentry	1.00	$175	$175.00
Sabrina Knickelbein	30.14	$155	$4,671.70
J. Bradley Horn	7.20	$185	$1,332.00
Ghada Anis	1.20	$160	$192.00
Legal Assistants	3.50	$55	$192.50
TOTAL	76.96		$15,043.20

Pet'r Mot. at 1 (synopsis).[1]

[1] In the briefing process, Ms. Turpin's attorneys agreed to deduct various amounts. Ms. (continued...)

Respondent has challenged the reasonableness of some activities during this period for which Ms. Turpin is seeking compensation. Specifically, respondent maintains that entries such as "file review" are too vague to evaluate for their reasonableness. Resp't Resp., filed Sept. 19, 2008, at 3-5. Respondent also maintains that Ms. Knickelbein primarily performed tasks more commonly performed by paralegals, not attorneys. Thus, according to respondent's argument, Ms. Knickelbein should be compensated at a paralegal rate. Id. at 6-7.

1. Mr. Shoemaker

The analysis begins with Mr. Shoemaker, Ms. Turpin's counsel of record. Ms. Turpin seeks compensation for approximately 34 hours of work performed by him. Unlike some other cases involving the hepatitis B vaccine, Mr. Shoemaker received medical records from some of Ms. Turpin's treating doctors relatively early. For example, the time sheet indicates that Mr. Shoemaker was reviewing medical records in November and December 1999. (But, the records were not filed with the Court until January 2001.)

Respondent argues that some activities performed by Mr. Shoemaker should have been performed by someone else whose hourly rate was lower. In particular, respondent notes that Mr. Shoemaker spent 0.60 hour for reviewing a letter from Dr. Bundtzen who had requested that Mr. Shoemaker's office pay for medical records before the doctor would send the records.

In general, Mr. Shoemaker's activities during this time were appropriate for Ms. Turpin's counsel of record. He communicated with Ms. Turpin. He reviewed medical records. He delegated tasks to other people in his office, such as gathering other medical records. On the narrow point about Dr. Bundtzen, respondent is probably correct that Mr. Shoemaker could have delegated the task to a lower paid associate. On the other hand, for activities performed before 2006, this instance appears isolated. Senior attorneys may, on occasion, need to write routine letters. Because there is no pattern of Mr. Shoemaker performing work that is more economically done by someone else, an adjustment is not needed.

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[1](...continued)
Turpin agreed that Mr. Shoemaker's time as listed originally was overstated in the amount of 0.45 hours because Mr. Shoemaker had listed the amount of time for reviewing a notice of appearance as 0.50, rather than 0.05. Pet'r Reply at 2-3.

Ms. Turpin's attorneys agreed that Mr. Horn's time included a double entry of 0.10 hours. Pet'r Reply at 4 n.2.

Ms. Turpin's attorneys also agreed that Ms. Knickelbein's time included a double entry of 2.0 hours. Pet'r Reply at 6 n.6.

Ms. Turpin's attorneys also agreed to eliminate time for activities actually spent on Conor Turpin's case. Pet'r Status Report, filed Dec. 1, 2008.

All changes are reflected in the chart in the text.

2. Associates

In regard to Mr. Shoemaker's associates, respondent questions the activities of Mr. Horn, Ms. Anis, and Ms. Knickelbein. Respondent did not object to any work performed by Ms. Gentry, although the amount of time billed by her was relatively small (only 1.0 hours after reduction for work performed in Conor Turpin's case) during this period.

The activities of Mr. Horn and Ms. Anis must be considered together. On December 28, 2000, Mr. Horn spent 2.20 hours for a "review of records." On January 3, 2001, he spent another 4.00 hours for a "review of records." Similarly, on May 29, 2001, Ms. Anis spent 0.80 hours on "file review" and another 0.40 hours on a task with the same description on June 12, 2001. Thus, respondent questions whether two attorneys should be "reviewing the file" within approximately six months. Obtaining more information about their work is difficult because neither Mr. Horn nor Ms. Anis work with Mr. Shoemaker any longer.

The question is should the Vaccine Injury Trust Fund compensate petitioner's law firm for activities, that when viewed in hindsight, constitute a duplication in work. Phrased somewhat differently, would Ms. Turpin (or a hypothetical reasonable client) be willing to pay for Mr. Horn and Ms. Anis to review her case. Substituting Ms. Turpin for the Vaccine Injury Trust Fund is permissible because the Supreme Court stated that "[h]ours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority." Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983)(emphasis in original).

Whether a reasonable client would pay for a second or a third attorney in the same firm to review the file for her case is fairly debatable. On one hand, Ms. Turpin has no control over the attorneys working in Mr. Shoemaker's office. If someone is responsible for the departure of an attorney from Mr. Shoemaker's office, it is not Ms. Turpin. Thus, she should not have to bear the cost of getting another attorney up to speed on her case. On the other hand, Mr. Shoemaker is not necessarily blameworthy either. Mr. Horn and Ms. Anis may have left his firm for reasons that are completely unrelated to Mr. Shoemaker's office. In this sense, Mr. Shoemaker does not deserve to lose money because attorneys left his firm.

The resolution of this issue is that Mr. Horn's time will be credited and Ms. Anis's time will not be. One reason is that Mr. Horn worked on Ms. Turpin's case first. A reasonable client would probably agree to pay for one attorney, other than Mr. Shoemaker, to learn about her case. However, the reasonable client would have stronger ground to object to a third attorney. Therefore, Ms. Anis's time (1.2 hours) is not reasonable. See Exhibitors' Service, Inc. v. American Multi-Cinema, Inc., 583 F.Supp. 1186, 1993 (D.C. Cal. 1984) (stating "time spent by the associate Carlo when she replaced the associate Davis in 1983, after Davis had worked on the case for two years, is not recoverable.")

Evaluating the reasonableness of Mr. Horn's and Ms. Anis's activities is more difficult because of the vague language used in the task description. While it is reasonable to conclude

that Mr. Horn and Ms. Anis were working on some portion of Ms. Turpin's case, more specificity regarding the type of work that was being performed would help. Neither respondent nor the undersigned can tell what Mr. Horn and Ms. Anis were doing. (For that matter, Mr. Shoemaker's reply provides no additional specifics.)

The vague entries created by Mr. Horn and Ms. Anis contrast with some more detailed entries created by Mr. Shoemaker. For example, Mr. Shoemaker's own entries show that he spent time reviewing the records of Dr. Musto, Dr. Bruchalski, and Dr. Nigro. Entries on Dec. 6, 1999. Mr. Shoemaker identifies these doctors by name. Therefore, it is easy to understand that when Mr. Shoemaker reviews records from Alexandria Hospital on January 4, 2000, Mr. Shoemaker is not duplicating work. The same analysis cannot be done for the entries created by Mr. Horn and Ms. Anis. The vagueness in Ms. Anis's entries constitutes a secondary reason for not crediting her time.

Respondent's strongest objection with regard to attorneys' fees for work performed before 2006 concerns the activities performed by Ms. Knickelbein. Ms. Knickelbein spent approximately 33 hours on this case during this time. Respondent argues that Ms. Knickelbein should be compensated not as an attorney ($155 per hour), but at a lower rate because she was functioning as a paralegal. Respondent maintains that he did not agree to compensate Ms. Knickelbein at the rate of $155 per hour for all types of work – only work that must be performed by an attorney.

Ms. Turpin argues that Ms. Knickelbein is entitled to compensation as an attorney because she was acting as an attorney. Pet'r Reply, filed Aug. 28, 2008, at 6-7. This argument is wholly unpersuasive.

Ms. Turpin's argument that Ms. Knickelbein was acting as an attorney is not supported. Many of Ms. Knickelbein's activities could have been performed by a paralegal. The following entries constitute examples of tasks that could have been performed by a paralegal. On July 14, 2003, she "review[ed] file for names and addresses of doctors." On the next day, she "review[ed] medical records for names and address of doctors and see what medical records we need." On September 8 and 9, 2003, her entry states "Emails to and from client regarding medical records from Mt. Sinai." On September 10, 2003, she "prepare[d] subpoena and request letter to Dr. Bell; note to file." Other examples of tasks a paralegal is capable of doing include: preparing exhibits for filing, filing exhibits, and reviewing the docket sheet. See, e.g., entries on September 10, 2003; December 10, 2003; December 16, 2003; and May 5, 2004. Paralegals – or perhaps even a judicial assistant – can also note deadlines on a calendar. See, e.g., entries for August 1, 2006; October 10, 2006; February 15, 2007.

The collection of medical records is a task that can be performed by paralegals. In the Vaccine Program, the usual standard of practice is that the attorneys' support staff gather and file the medical records. Mr. Shoemaker's use of an attorney appears to be unique to his practice. Mr. Shoemaker has not demonstrated why his firm should be different from other firms. See

Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993) (stating "Vaccine program special masters are also entitled to use their prior experience in reviewing fee applications.")

Routinely, attorneys from other firms obtain their client's medical records using a paralegal or other support staff. Frequently, but not always, attorneys are authorized to issue a subpoena to acquire medical records. See Vaccine Rule 7(c). But, even when a subpoena is issued, the paralegal or legal assistant identifies the medical provider to whom the subpoena is to be sent, prepares the paperwork, and communicates at least initially with the medical provider. There may be rare situations in which an attorney must step into the process but these cases are rare. Ms. Turpin has not indicated that Ms. Knickelbein was required to use her more advanced legal training to obtain any records in this case. This omission probably stems from the fact that the acquisition of Ms. Turpin's medical records appears to be routine.

Categorizing and collecting medical records as a paralegal task is well established. Approximately 15 years ago, a special master commented upon the division of responsibility between attorneys and support staff. "The problem for Mr. Shoemaker is that he does not use any paralegal staff or junior attorneys to assist him in his work. A substantial portion of the work performed by him- *such as* reviewing and summarizing records, scheduling appointments, calling records custodians, review of medical literature-could just as well have been performed by a person commanding a lower rate." Borden v. Sec'y of Health & Human Servs., No. 90-1169V, 1992 WL 78691 *1 (Cl. Ct. Spec. Mstr. March 31, 1992).

Other decisions of similar vintage also state that paralegals can collect medical records. Hamilton v. Sec'y of Health & Human Servs., No. 90-1011V, 1992 WL 35792 *3 (Cl. Ct. Spec. Mstr. Feb. 10, 1992) (noting that the attorney "was able to keep attorney hours to a minimum by employing a paralegal-capable of performing many of the tasks such as gathering medical records-for a significant number of hours."); Kosse v. Sec'y of Health & Human Servs., No. 90-930V, 1992 WL 26196 * 2 (Cl. Ct. Spec. Mstr. Jan. 30, 1992) ("It should be noted that Mr. Webb properly reduced the necessary attorney hours by employing paralegals to gather the medical records, essentially a clerical task. Vaccine cases do not always require the full application of a range of legal skills.")

This practice has not changed in the intervening 16 years. Decisions within the last few years continue to state that paralegals can perform the task of collecting medical records. E.g., Gardner-Cook v. Sec'y of Health & Human Servs., No. 99-480V, 2005 WL 6122520 *2-3 (Fed. Cl. Spec. Mstr. June 30, 2005).

Consequently, Ms. Turpin's argument that the task of collecting medical records is a task that should be performed by an attorney is rejected. There is almost no support for this argument. The nature of Ms. Knickelbein's work is far more consistent with the duties commonly and effectively performed by paralegals than the work typically performed by attorneys. Ms. Turpin has not explained why Ms. Knickelbein should receive an hourly rate

given to attorneys for work that could have been performed by paralegals. Ms. Knickelbein will be compensated in accord with rates for paralegals.[2]

[2] Ms. Turpin has not argued that using a paralegal rate for Ms. Knickelbein is precluded by the agreement between Mr. Shoemaker and the government. In other cases, the undersigned has filed a copy of the agreement. Sabella v. Sec'y of Health & Human Servs., No. 02-1627V, 2008 WL 4531828 *6 (Fed. Cl. Spec. Mstr. September 23, 2008), motion for review filed Oct. 15, 2008); Duncan v. Sec'y of Health & Human Servs., No. 99-455V, 2008 WL 1265811* 3 (Fed. Cl. Spec. Mstr. May 30, 2008), aff'd (Aug. 4, 2008). Thus, the undersigned is aware that the agreement generally lists hourly rates for attorneys in Mr. Shoemaker's firm to which respondent will not interpose an objection.

An order filed on October 2, 2008 indicated that the undersigned understood that Ms. Turpin was arguing that the agreement prevent respondent from objecting to Ms. Knickelbein's hourly rate and invited Ms. Turpin to file a copy of the agreement. However, Ms. Turpin has disavowed this argument. Ms. Turpin's brief states: "The Special Master indicates that Petitioner has argued that Respondent is precluded from challenging Ms. Knickelbein's hourly rate because of the informal agreement between the parties. This is not true." Pet'r Status Rep't, filed Oct. 29, 2008, at 1 (emphasis in original). In addition, Ms. Turpin has explicitly refrained from submitting the agreement at issue. Id. at 2.

Despite the different interpretations of the agreement regarding hourly rates, the meaning of this agreement is not being determined. Interpreting the agreement necessarily starts with the language of the agreement. Coast Federal Bank, FSB v. United States, 323 F.3d 1035, 1038 (Fed. Cir. 2003) (en banc). But, here, the parties have not introduced the agreement. Therefore, the agreement cannot be considered.

To the extent that omission of the agreement reduces the award for Ms. Turpin's attorneys, petitioner's attorneys, themselves, are responsible. Ms. Turpin bears the burden of submitting the agreement for related reasons. She wants to use the agreement as evidence of the reasonableness of the hourly rates. See Fee App'n at 1 (referencing the agreement). Moreover, the agreement could serve as a rebuttal to respondent's objection to the proposed hourly rate for Ms. Knickelbein. Finally, as the party requesting fees, Ms. Turpin bears the burden of justifying her request.

Ms. Turpin decided not to submit the agreement. Pet'r Status Rep't, filed Oct. 29, 2008, at 2. This decision seems to constitute a knowing waiver of any argument based upon the agreement. See Vaccine Rule 8(f). Why Ms. Turpin refrained from submitting the agreement is far from clear, but an understanding of her reasons is not necessary. She was given a chance to submit the agreement and did not.

The only remaining question is what is the reasonable hourly rate for a paralegal. The parties have not submitted any evidence directly on this point. However, "legal assistants" in Mr. Shoemaker's office receive $55 per hour for work performed before 2006. The parties agree that Ms. Knickelbein was entitled to $155 per hour for tasks that at least required an attorney's training. A reasonable amount of compensation for a paralegal is halfway between these two amounts – $105 per hour. This amount ($105 per hour) may be a little high for paralegal work performed before 2006. But, a slightly higher rate is appropriate because Ms. Knickelbein either may have performed some duties more quickly than a paralegal or may have done some work that is truly the work for an attorney. This estimate, although somewhat rough, is reasonable.

3. Determination

The following table accounts for the adjustments discussed in the previous sections:

Attorneys' Fees Awarded for Time before 2006			
Name	# Hours	Rate	Total
Clifford J. Shoemaker	33.92	$250	$8,480.00
Renee J. Gentry	1.00	$175	$175.00
Sabrina Knickelbein	30.14	$105	$3,164.70
J. Bradley Horn	7.20	$185	$1,332.00
Ghada Anis	0.0	$160	$0.00
Legal Assistants	3.50	$55	$192.50
TOTAL	75.76		$13,344.20

Therefore, Ms. Turpin will be awarded $13,344.20 in attorneys' fees for work that her attorneys performed before 2006.

C. Activities Performed in and after 2006

Beginning in 2006, this case moved at a more normal pace. The parties reached a settlement in November 2007, and a decision awarding Ms. Turpin compensation was issued in March 2008.

For this period, Ms. Turpin seeks nearly $10,000 for work performed by her attorneys or their assistants. This amount consists of the following entries.

Attorneys' Fees Requested for 2006-2008				
Name	Year	# Hours	Rate	Total
Clifford J. Shoemaker	2006	6.5	$300	$1,950.00
Clifford J. Shoemaker	2007	11.8	$310	$3,658.00
Clifford J. Shoemaker	2008	1.09	$324.26	$353.44
Renee J. Gentry	2007	1.1	$215	$236.50
Renee J. Gentry	2008	8.5	$230	$1,955.00
Sabrina Knickelbein	2006	6.2	$155	$961.00
Sabrina Knickelbein	2007	3.5	$165	$577.50
Sabrina Knickelbein	2008	0.3	$175	$52.50
TOTAL		38.99		$9,743.94

Pet'r Mot. at 1 (synopsis).[3] Notably, in 2006-2008, when the case was actually being litigated, Ms. Turpin's attorneys spent just under 40 hours. In the time from 1999-2005, when the primary task was collecting medical records, the attorneys spent approximately 77 hours (or approximately twice as much time as in the litigation phase).

Respondent's objections for activities performed in 2006 through 2008 primarily concern Mr. Shoemaker's work. Respondent challenges the time spent by Mr. Shoemaker in working with Dr. Mark Greenspan. For the reasons explained in section III.C below, engaging Dr. Greenspan to work on this case duplicated the work of Dr. Bellanti. Because it is not reasonable to compensate Dr. Greenspan, it is also not reasonable to compensate attorneys for working with him.

Determining exactly how many hours attorneys spent with Dr. Greenspan is not possible because the attorneys sometimes grouped tasks into one entry. This practice, which is sometimes known as "block billing," is relatively innocuous in this case because most entries are for less than one-half hour. Thus, how much of the specific entry is determined to be related to Dr. Greenspan is unlikely to affect the bottom line in a significant way.

In 2006, it appears that Mr. Shoemaker spent 1.2 hours with Dr. Greenspan and Ms. Knickelbein spent 0.7 hours. For 2007, Mr. Shoemaker worked 1.7 hours and Ms. Knickelbein merely 0.1 hours. These hours are eliminated.

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[3] The chart is modified to reflect that Ms. Gentry spent 3.5 hours in preparing the reply brief on attorneys' fees. Pet'r Reply at 10-11.

Besides sustaining respondent's objection to the attorneys' work relating to Dr. Greenspan, two additional changes are warranted. These changes, although small in amount, are significant as they relate to the process for applying for fees.

First, 0.3 hours of Mr. Shoemaker's hours from February to May 2006 are eliminated. In this case, Mr. Shoemaker has charged for reading orders for which he has previously received compensation several times. Efforts for additional reimbursement have been denied. See Lamar v. Sec'y of Health & Human Servs., No. 99-583V, 2008 WL 3845165 *8 (Fed. Cl. Spec. Mstr. July 20, 2008); Duncan v. Sec'y of Health & Human Servs., No. 99-455V, 2008 WL 2465811 (Fed. Cl. Spec. Mstr. May 30, 2008).

Second, respondent notes – and the undersigned agrees – that petitioner's reply criticized respondent's counsel on a personal level. Resp't Resp., filed Sept. 19, 2008, at 4 n.2, citing Pet'r Reply at 4-5. Personal criticisms of opposing counsel are not appropriate and will not be tolerated. Therefore, 1.0 hours of time will be eliminated.

This chart reflects the amount of time awarded from 2006-2008. The chart reflects an adjustment to the hourly rates for Ms. Knickelbein's work. As explained in the decision, she performed primarily paralegal work.

Attorneys' Fees Awarded for 2006-2008				
Name	Year	# Hours	Rate	Total
Clifford J. Shoemaker	2006	5.0	$300	$1,500.00
Clifford J. Shoemaker	2007	10.1	$310	$3,131.00
Clifford J. Shoemaker	2008	1.09	$324.26	$353.44
Renee J. Gentry	2007	1.1	$215	$236.50
Renee J. Gentry	2008	6.5	$230	$1,495.00
Sabrina Knickelbein	2006	5.5	$115	$632.50
Sabrina Knickelbein	2007	3.4	$125	$425.00
Sabrina Knickelbein	2008	0.3	$135	$40.50
TOTAL		31.99		$7,489.68

D. Summary

For attorneys' fees, Ms. Turpin is awarded $20,833.88.

III. Costs

Ms. Turpin seeks nearly $17,000 in attorneys' costs. Respondent has not objected to four items (postage, printing, photocopies, and a fee for a review by a nurse). Thus, these costs are awarded in full at $757.71. Respondent, however, has objected to two significant items – a charge for Dr. Mark Greenspan ($4,275.00) and a charge for Dr. Joseph Bellanti ($11,725.00). These two points are addressed in sections B and C, below.

A. Standards for Adjudication

Ms. Turpin is entitled to an award for the reasonable costs incurred by her attorneys. 42 U.S.C. § 300aa–(15)(e). The reasonable amount of an expert's compensation is determined using the same lodestar method used to determine the reasonable amount of compensation for an attorney. Simon v. Sec'y of Health & Human Servs., No. 05-941V, 2008 WL 623833 * 1; (Fed. Cl. Spec. Mstr. Feb. 21, 2008); Kantor v. Sec'y of Health & Human Servs., No. 01-679V, 2007 WL 1032378 *4-8 (Fed. Cl. Spec. Mstr. Mar. 21, 2007).

"Reasonableness" may be evaluated from a paying client's perspective. The United States Supreme Court stated that "[h]ours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority." Hensley, 461 U.S. at 433-34 (emphasis in original). If a hypothetical yet reasonable client would be willing to pay for an expert's report, then it is appropriate to award compensation for that expert's report. Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections, 522 F.3d 182, 184 (2d Cir. 2008) (stating a trial court "must act later to ensure that the attorney does not recoup fees that the market would not otherwise bear. Indeed, the district court (unfortunately) bears the burden of disciplining the market, stepping into the shoes of the reasonable, paying client, who wishes to pay the least amount necessary to litigate the case effectively"); Goos v. National Ass'n of Realtors, 68 F.3d 1380, 1386 (D.C. Cir. 1995) (phrasing the question as "would a private attorney being paid by a client reasonably have engaged in similar time expenditures"); Norman v. Housing Authority of the City of Montgomery, 836 F.2d 1292, 1302 (11th Cir. 1988) (recognizing that "in the private sector the economically rational person engages some cost benefit analysis."); Presault v. United States, 52 Fed. Cl. 667, 680 (2002). The client must be pictured hypothetically because individual attributes of Ms. Turpin (for example, her wealth or poverty) should not determine whether the cost is reasonable. Furthermore, it must be assumed that the client would have to pay for the expert because the client's self-interest would lessen the likelihood that the client would invest money into the expert needlessly.

One aspect of the general rule that costs must be reasonable to be compensable is that costs are not awarded for work that is not necessary work. Duplicative work is presumptively unnecessary. Attorneys are not entitled to compensation for performing work that is not necessary. Hensley, 461 U.S. at 434. The same principle restricts experts. Kantor, 2007 WL 1032378 *4-8.

As the party requesting an award of costs, petitioners bear the burden of establishing their reasonableness. Presault, 52 Fed. Cl. at 670; Hines v. Sec'y of Health & Human Servs., 22 Cl. Ct. 750, 755 (1991). When petitioners fail to meet their burden of proof, such as by not submitting appropriate documentation, special masters have refrained from awarding compensation. See, e.g., Gardner-Cook v. Sec'y of Health & Human Servs., No. 99-480V, 2005 WL 6122520 *4 (Fed. Cl. Spec. Mstr. June 30, 2005). This practice is consistent with how the Federal Circuit and the Court of Federal Claims, two courts that review decisions of special masters, have interpreted other fee-shifting statutes. See Naporano Iron and Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987) (the Equal Access to Justice Act); Presault, 52 Fed. Cl. at 679 (the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970). On the other hand, special masters have also compensated experts when the petitioner failed to submit information about the expert's hourly rate. See, e.g., English v. Sec'y of Health & Human Servs., No. 01-61V, 2006 WL 3419805 *16 (Fed. Cl. Spec. Mstr. Nov. 9, 2006). These principles are the basis for evaluating whether the cost of a specific person is reasonable in the following sections.

B. Dr. Bellanti

Dr. Bellanti seeks a total of $10,600.00, representing 30 hours of work at $350 per hour.[4] A reasonable amount of compensation is $9,275.

Dr. Bellanti participated in this case periodically. In October 1999, Dr. Bellanti says he spent a total of seven hours over two days, reviewing records and meeting with Ms. Turpin and Mr. Shoemaker. About two years later, Dr. Bellanti says he spent 12 hours researching reactions to the hepatitis B vaccine. Another two years later (July 2003), Dr. Bellanti had two meetings with Mr. Shoemaker, totaling 3.5 hours. Finally, in March 2007, Dr. Bellanti began working on his two reports and spent 11 hours.

1. Hourly Rate

Petitioner proposes that a reasonable hourly rate for Dr. Bellanti is $350 per hour. Petitioner has not submitted any documentation justifying Dr. Bellanti's hourly rate. On the other hand, respondent has not opposed the hourly rate.

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[4] Originally, Dr. Bellanti requested $11,725.00, representing 33.5 hours at $350 per hour. However, Dr. Bellanti agreed to eliminate 3.5 hours. Pet'r Status Rep't, filed Dec. 1, 2008, at 2-3.

The circumstances leading to the reduction in Dr. Bellanti's hours are somewhat troubling. Dr. Bellanti's original invoice included a charge of 3.5 hours for seeing Ms. Turpin and Mr. Shoemaker on October 20, 1999. Fee App'n at 36. Ms. Turpin paid Dr. Bellanti $1,500 for a visit on that same date. Id. at 3, 10. Respondent raised this issue in his response. Resp't Resp., filed Aug. 14, 2008, at 8-9.

Petitioner argued that Dr. Bellanti did two separate tasks on October 20, 1999 – conduct a physical examination of Ms. Turpin for which he billed her $1,500 plus lab work and meet with Ms. Turpin and Mr. Shoemaker for 3.5 hours for which he billed $1,225 (3.5 hours * $350 per hour) to the Program. Pet'r Reply at 10.

The assertions in petitioner's reply relating to Dr. Bellanti are highly questionable. If the reply brief is correct, then Dr. Bellanti essentially spent an entire working day with only one patient. It is unlikely that the reasonable cost for a doctor's examination, even a "comprehensive examination" in 1999 was $1,500 plus an additional fee for laboratory work. Thus, there seems a fair chance that the reply brief contains assertions that were made without consulting either Ms. Turpin or Dr. Bellanti.

Furthermore, if Dr. Bellanti did conduct an examination of Ms. Turpin, then Ms. Turpin should have requested reimbursement from her insurance company. 42 U.S.C. § 300aa--15(g). She obtained reimbursement for some of laboratory expenses. Fee App'n at 17.

When the undersigned raised the accuracy of the October 20, 1999 billing during a status conference, Mr. Shoemaker was instructed to obtain additional information. Order, dated Nov. 21, 2008. The result was that Dr. Bellanti withdrew the charge of $1,500.

The proposed hourly rate of $350 per hour for Dr. Bellanti is accepted. It matches the hourly rate approved by special masters for Dr. Bellanti. Savin v. Sec'y of Health & Human Servs., No. 99-537V, 2008 WL 2066611 *4 (Fed. Cl. Spec. Mstr. April 22, 2008), aff'd (Sept. 24, 2008).

2. Number of Hours

Respondent maintains that the number of hours is unreasonable. A small adjustment is made.

The time billed by Dr. Bellanti in 2003 (3.5 hours) is eliminated. There seems to be no productive result from Dr. Bellanti's meeting with Mr. Shoemaker. The meeting was not the genesis for a report from Dr. Bellanti. In fact, Dr. Bellanti's initial report and supplemental report was not generated until 2007, almost four years later. There is no other evidence submitted by Ms. Turpin demonstrating the reasonableness of the time spent during this meeting in 2003. Therefore, this time will be deducted.

Except for these changes, the time spent by Dr. Bellanti is reasonable. He spent 11 hours in 2007 writing two reports. Although he was required to write a supplemental report to address causation, the total amount of time for the two reports is reasonable. After Ms. Turpin filed Dr. Bellanti's supplemental report, the case resolved without a hearing. A fair inference from this chronology is that Dr. Bellanti's reports advanced Ms. Turpin's case so that respondent was persuaded to resolve this case.

After deducting 3.5 hours, Dr. Bellanti is compensated for 26.5 hours (30 - 3.5). Because his hourly rate is $350 per hour, the total amount of compensation for Dr. Bellanti is $9,275. This amount is nearly all (87.5 percent) that he requested. The amount of compensation for Dr. Bellanti affects the amount of compensation for Dr. Greenspan.

C. Mark Greenspan

Mark Greenspan is both a doctor (surgeon) and a lawyer. Dr. Greenspan seeks a total of $4,275.00, which is 14.25 hours at $300 per hour. No compensation is awarded for Dr. Greenspan's work because it was unnecessary in that it duplicated Dr. Bellanti's work.

The bulk of Dr. Greenspan's work comes from three days in August 2006, when he reviewed the exhibits, assembled a chronology of Ms. Turpin's medical treatment, and drafted an opinion letter. Later, in June 2007, Dr. Greenspan spent one hour on reviewing an expert report, reviewing literature, and an email to a potential additional expert.

Respondent objects to the time spent by Dr. Greenspan and also to the time spent by Mr. Shoemaker in working with Dr. Greenspan. The primary argument is that Dr. Greenspan's work appears to duplicate the work being performed by Dr. Bellanti. Resp't Opp'n at 6.

Respondent's opposition is well founded. For Ms. Turpin, Mr. Shoemaker had retained Dr. Bellanti in 1999. Before Dr. Greenspan started work on this case, Dr. Bellanti spent 22.5 hours working on Ms. Turpin's case. This investment of time and resources with Dr. Bellanti makes Dr. Greenspan's work redundant and unnecessary.

Mr. Shoemaker attempts to justify Dr. Greenspan's work by arguing that Dr. Greenspan's "usual role is to review records, do a preliminary assessment of the likelihood of a vaccine injury given the state of the records, state of the literature and state of the science, identify experts and often act as a liaison between experts and counsel." Pet'r Reply at 8. This statement may be accurate, although it cannot be confirmed because Dr. Greenspan's report has not been filed. (It may be exempt from disclosure because of the attorney work product doctrine.)

Even if accurately described, this list of Dr. Greenspan's tasks simply repeats what Dr. Bellanti had already done before August 2006. For example, Dr. Bellanti spent at least three hours reviewing records in 1999. Dr. Bellanti reviewed the "state of the literature" in 2001. Dr. Bellanti, presumably, came to a preliminary assessment of the likelihood of a vaccine injury when he discussed the case with Mr. Shoemaker in 2003. With these tasks already completed by Dr. Bellanti, there was nothing for Dr. Greenspan to do.

A reasonable client would easily perceive the redundancy of Dr. Greenspan's work. If Ms. Turpin had already compensated Dr. Bellanti for work from 1999-2003, Ms. Turpin would be extremely unlikely to agree to compensate Dr. Greenspan in 2006. This opposition would be more pronounced because Dr. Greenspan, unlike Dr. Bellanti, does not testify. Thus, any work performed by Dr. Greenspan would merely be a prelude to retaining another expert who would testify.

The earlier participation by Dr. Bellanti indicates that Dr. Greenspan's work was not necessary. The activities performed by Dr. Greenspan duplicate work performed primarily by Dr. Bellanti and, to a lesser extent, the attorneys. This conclusion is supported by other decisions that questioned the reasonableness of Dr. Greenspan's fee. Sabella v. Sec'y of Health & Human Servs., No. 02-1627V, 2008 WL 4531828 *40-42 (Fed. Cl. Spec. Mstr. September 23, 2008), motion for review filed Oct. 15, 2008; Lamar v. Sec'y of Health & Human Servs., No. 99-584V, 2008 WL 3845157 *11-14 (Fed. Cl. Spec. Mstr. July 30, 2008); Savin v. Sec'y of Health & Human Servs., No. 99-537V, 2008 WL 2066611 *4 (Fed. Cl. Spec. Mstr. April 22, 2008), aff'd (Sept. 24, 2008).

D. Costs Paid by Ms. Turpin Personally

Ms. Turpin also seeks reimbursement for $3,516.96 in expenses paid by her personally. Respondent has not objected to these costs. Resp't Sur-Reply at 11. Thus, these costs are awarded in full.

E. Summary

The following items of costs are awarded:

Item	Amount
Atty Miscellaneous Costs	$ 757.71
Dr. Bellanti	$ 9,275.00
Dr. Greenspan	$ 0.00
Ms. Turpin's Personal Costs	$ 3,516.96
TOTAL	$13,594.67

IV. Conclusion

Awarding petitioners an amount for their attorneys' fees and costs is one responsibility of a special master. Special masters can perform this duty more easily when petitioners present accurate statements of the amount of time spent by their attorneys and experts.

Here, the original application contained several errors. See footnotes 1 & 4, above. Even if these errors were not motivated by greed or an attempt to receive an inflated award, they are errors nonetheless. Repeated errors suggest that the attorneys are not practicing at a level consistent with the hourly rates that they seek and further deductions may be warranted. See Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1348 (Fed. Cir. 2008) (stating "[o]nce a court makes that initial calculation, it may then make an upward or downward departure to the fee award based on other specific findings.")

In Ms. Turpin's case, no general downward deduction will be made. The specific adjustments and the reasons for them are described in the decision. For the reasons stated, Ms. Turpin is awarded $20,833.88. in attorneys' fees and $13,594.67 in costs.

The Clerk's Office is instructed to enter judgment in accord with this decision unless a motion for review is filed.

IT IS SO ORDERED.

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