IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 3-1223V
Filed: December 15, 2010
To be Published

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LEEANN WHIFFEN, parent of Clay Whiffen, a minor,	*
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Petitioner,	*
v.	*
	*
SECRETARY OF HEALTH AND HUMAN SERVICES,	*
	*
Respondent.	*
	*

* *

ORDER SETTING FORTH FACTS PERTAINING TO ATTORNEY FEES AND COSTS[1]

Vowell, Special Master:

On May 16, 2003, petitioner filed a Short-Form Petition for Vaccine Compensation in the National Vaccine Injury Compensation Program ["the Program"],[2] on behalf of Clay Whiffen. By using the special "Short-Form" developed for the Omnibus Autism Proceeding ["OAP"], petitioner alleged that various vaccinations injured Clay Whiffen. As the result of proceedings thus far in the OAP, counsel for petitioner has indicated that this case is among the many in which there is inadequate evidence of causation to prevail upon the merits.

[1] Because I have designated this order to be published, in accordance with Vaccine Rule 18(b), the parties have 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

[2] National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

In anticipation of a large number of cases in which OAP petitioners will move to dismiss their claims and apply for an award of attorney fees and costs,[3] counsel for the parties agreed to engage in informal efforts to resolve the attorney fees and costs award in this case and others. Through an alternative dispute resolution ["ADR"] process involving five firms representing over half the litigants in the OAP, the parties and the court have proposed a method for resolving attorney fees and costs incurred by petitioners' counsel in OAP cases. This order represents the court's attempt to implement the process to which the parties have agreed.

As an initial step in the ADR effort, the parties agreed to have special masters determine the number of attorney and paralegal hours and the costs reasonably incurred in an OAP case at various stages of processing on a firm-by-firm basis. My determination of these hours and costs is set forth in this order. Special Master Golkiewicz's determination is set forth in a separate order. The parties have represented that they will attempt to resolve petitioner's fees and costs request based on these determinations. The firm representing this petitioner has also represented that it will reimburse petitioner for any personal litigation costs compensable under the Vaccine Act from the award it receives in this process, obviating the need for a Vaccine General Order #9 statement. It is anticipated that any agreement reached by the parties regarding costs in future cases will include this provision as well.

I. THE OMNIBUS AUTISM PROCEEDING

This case is one of more than 5,400 cases filed under the Program in which petitioners alleged that conditions known as "autism" or "autism spectrum disorders" ["ASDs"] were caused by one or more vaccinations. A detailed history of the controversy regarding vaccines and autism, along with a history of the development of the OAP was set forth in the six entitlement decisions issued by three special masters as "test cases" for two theories of causation litigated in the OAP and will not be repeated here.[4] However, a very brief summary of that history follows.

Beginning in 1998, certain theories were publicly advanced suggesting that the measles-mumps-rubella ["MMR"] vaccine, and/or a mercury-based preservative known as "thimerosal" contained in several childhood vaccinations, might be causing ASDs. The emergence of those theories led to a large number of claims filed under the Program, each alleging that an individual's ASD was caused by the MMR vaccine, by

[3] Section 300aa-15(e) permits an unsuccessful petitioner to recover compensation for reasonable attorney fees and costs, provided that the petition was filed in good faith and upon a reasonable basis.

[4] The Theory 1 cases are *Cedillo v. Sec'y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Hazlehurst v. Sec'y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The Theory 2 cases are *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *King v. Sec'y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec'y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

thimerosal-containing vaccines, or by both. To date, more than 5,400 such cases have been filed with this court, and most of them remain pending.

To deal with this group of cases involving a common factual issue – *i.e*., whether these types of vaccinations can cause autism – the Office of Special Masters ["OSM"] devised special procedures. On July 3, 2002, the Chief Special Master, acting on behalf of the OSM, issued Autism General Order #1[5] establishing the OAP. A group of counsel selected from attorneys representing petitioners in the autism cases, known as the Petitioners' Steering Committee ["PSC"], was charged with obtaining and presenting evidence on the general issue of whether those vaccines can cause ASDs, and, if so, in what circumstances. The evidence obtained in that general inquiry was to be applied to the individual cases. Autism Gen. Order #1, 2002 WL 31696785, at *3, 2002 U.S. Claims LEXIS 365, at *8.

Ultimately, the PSC elected to present two different theories on the causation of ASDs. The first theory alleged that the measles portion of the MMR vaccine could cause ASDs. That theory was presented in three separate Program "test cases" during several weeks of trial in 2007. The second theory alleged that the mercury contained in thimerosal-containing vaccines could directly affect an infant's brain, thereby substantially contributing to the causation of ASD. That theory was presented in three additional "test cases" during several weeks of trial in 2008.

Decisions in each of the three "test cases" pertaining to the PSC's first theory rejected the petitioners' causation theories. *Cedillo*, 2009 WL 331968, *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst*, 2009 WL 332306, *aff'd*, 88 Fed. Cl. 473 (2009), *aff'd*, 604 F.3d 1343 (2010); *Snyder*, 2009 WL 332044, *aff'd*, 88 Fed. Cl. 706.[6] Decisions in each of the three "test cases" pertaining to the PSC's second theory also rejected the petitioners' causation theories, and petitioners in each of the three cases chose not to appeal. *Dwyer*, 2010 WL 892250; *King*, 2010 WL 892296; *Mead*, 2010 WL 892248. Thus, the proceedings in these six "test cases" are concluded. Petitioners remaining in the OAP must now decide to pursue their case, and submit new evidence on causation, or take other action to exit the Program. Counsel for this petitioner has represented that petitioner does not intend to pursue this claim.

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[5] Autism General Order #1 is published at 2002 WL 31696785, 2002 U.S. Claims LEXIS 365 (Fed. Cl. Spec. Mstr. July 3, 2002) ["Autism Gen. Order #1"]. I also note that the documents filed in the Omnibus Autism Proceeding are contained in a special file kept by the clerk of this court, known as the "Autism Master File." An electronic version of that file is maintained on this court's website. This electronic version contains a "docket sheet" listing all of the items in the file, and also contains the complete text of most of the items in the file, with the exception of a few documents that are withheld from the website due to copyright considerations or due to § 300aa-12(d)(4)(A). To access this electronic version of the Autism Master File, visit this court's website at www.uscfc.uscourts.gov. Select the "Vaccine Info" page, then the "Autism Proceeding" page.

[6] Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims.

Because the Vaccine Act permits the award of attorney fees and costs to unsuccessful litigants who brought their claims in good faith and upon a reasonable basis (*see* § 300aa-15(e)(1)), resolving the issue of attorney fees and costs in thousands of pending OAP cases presents a significant logistical challenge for both parties as well as the court. It would also require considerable expense as additional attorney and paralegal fees for time spent documenting, filing, and resolving fees and costs in each case would be necessary. For these reasons, counsel representing more than half the petitioners currently remaining in the OAP and counsel for respondent agreed to explore alternative methods for resolving the issue of fees and costs without the need for costly and time-consuming case-by-case adjudication.[7] My determination of a reasonable number of hours, and a reasonable amount of costs, for cases at various stages of development will guide the parties in that process.

This process is not expected to resolve all cases filed by the firms involved. Respondent has lodged objections to certain cases, based on timeliness or other issues, and pending appellate decisions may impact whether certain cases are timely filed. However, for the purpose of facilitating resolution of the many pending cases, respondent has agreed that OAP cases filed within 54 months of the vaccinee's birth present close factual issues under the Vaccine Act's statute of limitations. On a litigative risk basis, respondent has suggested that it will not interpose statute of limitations challenges to attorney fee applications filed with motions to dismiss for insufficient proof or for rulings on the record in cases falling within this 54 month window.

II. ATTORNEY FEES AND COSTS[8]

A. The Legal Framework.

My determination of the hours reasonably expended and costs reasonably incurred is guided by the legal framework for awarding attorney fees and costs in Program cases. This court applies the lodestar method to any request for attorney fees and costs. *Avera v. Sec'y*, *HHS*, 515 F.3d 1343, 1347-48 (Fed. Cir. 2008); *see also Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989). "Using the lodestar approach, a court first determines an initial estimate of a reasonable attorneys' fee by 'multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.'"

[7] The five law firms involved in the ADR process were those with well over 100 OAP cases per firm, for a total of approximately 2500 cases, and involved firms that presented two of the OAP "test cases." Because there are over 200 law firms or solo practitioners representing OAP petitioners, it was not feasible to involve all of the firms in this pilot project. Should this process prove successful in resolving fees and costs for petitioners represented by these firms, **other firms may consider a similar approach in resolving fees and costs in their own cases.** No firm will be required to do so, however. The involved special masters are prepared to assist other firms in resolving their cases.

[8] This firm has applied for and received reasonable attorney fees and costs for their work on the general causation issues in the OAP in a separate decision. *See Cedillo v. Sec'y, HHS*, No. 98-916V, 2009 WL 811449 (Fed. Cl. Spec. Mstr. Mar. 11, 2009).

Avera, 515 F.3d at 1347-48 (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984).[9] This standard is "generally applicable in all cases in which Congress has authorized an award of fees." *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983). An award of costs must also be reasonable. *Perreira v. Sec'y, HHS*, 27 Fed. Cl. 29, 34 (1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994).

The burden lies with petitioner to provide adequate documentation at the time he submits his fee application that the requested fees and costs are reasonable. *Wasson v. Sec'y, HHS*, 24 Cl. Ct. 482, 484 n.1 (1991). The burden rests with petitioner to prove reasonableness, and petitioner is not given a "blank check to incur expenses." *Perreira*, 27 Fed. Cl. at 34. The Federal Circuit has stated that it is "well within the special master's discretion to reduce the hours [expended in a matter] to a number that, in his experience and judgment, [is] reasonable for the work done." *Saxton v. Sec'y, HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993); *see also Sabella v. Sec'y, HHS*, 86 Fed. Cl. 201, 211(2009) (citing 42 U.S.C. § 300aa-15(e)) ("The special master . . . is not required to award fees and costs for every hour claimed, he need only award fees and costs that are reasonable.").

In determining the number of hours reasonably expended, a court must exclude 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. 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*, 24 Cl. Ct. at 484 (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). Special masters may use their experience in Program cases to determine whether the hourly rate and the hours expended are reasonable. Just as "[t]rial 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*, 3 F.3d at 1521 (citing *Farrar v. Sec'y, HHS*, No. 90-1167V, 1992 WL 336502, at *2-3 (Fed. Cl. Spec. Mstr. Nov. 2, 1992) (requested fees of $24,168.75 reduced to $4,112.50); *Thompson v. Sec'y, 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 $9,000); *Wasson*, 24 Cl. Ct. at 483, *on remand*, No. 90-208V, 1992 WL 26662 (Cl. Ct. Spec. Mstr. Jan. 2, 1992), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993) (requested fees of $151,575 reduced to $16,500; the 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)).

[9] The reasonable hourly rate is "the prevailing market rate," which is defined as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 896 n.11.

Additionally, a special master may reduce an unreasonable fees and costs request *sua sponte*, regardless of whether respondent filed an objection to a particular request. In making such a reduction, a special master is not required to provide petitioner with an opportunity to explain the unreasonable request, as the burden lies with petitioner to provide an adequate description and documentation of all requested costs and fees in the first instance. *Sabella*, 86 Fed. Cl. at 208-09; *Saunders v. Sec'y, HHS*, 26 Cl. Ct. 1221, 1226 (1992); *see also Duncan v. Sec'y, HHS*, No. 99-455V, 2008 WL 4743493, at *1 (Fed. Cl. Aug. 4, 2008) ("the Special Master had no additional obligation to warn petitioners that he might go beyond the particularized list of respondent's challenges"); *Savin v. Sec'y, HHS*, 85 Fed. Cl. 313, 317-19 (2008) ("it is clear that the Special Master had every right to insist upon receiving accurate bills in the first instance and was not obliged to offer petitioners' counsel a second chance to do what he should have done *ab initio*").

In this case, the parties have already agreed to reasonable hourly rates for the attorneys and paralegals in the firm representing them, and thus I do not address that issue. This order concerns my evaluation of a reasonable number of hours for OAP cases, which will inform future agreements by the parties on the attorney fees and costs to be awarded, using the lodestar method. The factual findings set forth below regarding reasonable hours and costs should, absent highly unusual circumstances,[10] apply to other cases resolved through this ADR process.

B. The Process for Determining a Reasonable Number of Hours and Costs.

1. Background Information.

In order to facilitate a determination of a reasonable number of hours and reasonable costs for an OAP case, the parties agreed that most pending OAP cases fall into one of **four** general categories. These categories are based on where in the process of developing the case for resolution on the merits a particular case falls.

In 2008, as part of the process for moving OAP cases from the filing of a short-form petition to a resolution on the merits, the court began ordering OAP petitioners to file medical records establishing that the vaccinee had received vaccinations covered by the Program, that the vaccinee had an ASD diagnosis, and that the petition was timely filed. These orders, commonly referred to as "Phase 1" orders, were issued on a rolling basis, with no more than 200 orders issued each month, to avoid overwhelming counsel for the parties and the court.

[10] "Highly unusual circumstances" may include cases filed before the establishment of the OAP in which substantial work was performed prior to joining the OAP, cases that initially proceeded outside the OAP and joined it after substantial case-specific work was performed, and the so-called "grey area" cases prepared for a factual hearing to resolve statute of limitations issues.

After the required records were filed, petitioners were ordered to file a "Statement of Compliance," which triggered a review by respondent's counsel and a report to the court regarding whether respondent believed the case was properly a part of the OAP and whether it was timely filed. In some cases, respondent filed motions to dismiss or other motions, which may have triggered responsive filings by petitioners.

Petitioners who established that their case was timely filed, their child had a diagnosis on the autism spectrum, and their child had received covered vaccines were subsequently ordered to file additional medical records to complete the record. These orders were commonly referred to as "Phase 2" orders. When the records were complete, petitioners were instructed to file a "Statement of Completion," reflecting that the case was ready for adjudication on the merits at the conclusion of the appellate process in the OAP test cases.

Of note, Phase 1 orders had not been issued in all cases by the time that the appellate review process of the test cases was completed. Furthermore, some petitioners filed all the medical records at the time of the Phase 1 order, and thus a Statement of Completion may have been filed earlier in this process or not at all.

In the ADR process, the parties agreed to group cases into **four** general categories, representing various levels of attorney and paralegal involvement. The hours billed for each category may vary, based on the business model followed by individual law firms. For example, some firms collected medical records in cases prior to receiving Phase 1 orders while other firms did not. In some cases where no Phase 1 order was ever issued, the case file and work conducted on the case may consist only of a short-form petition; in others without a Phase 1 order the firm involved may have collected all relevant medical records and conducted substantial case processing. **Thus, not all firms will receive the same compensation for cases in the same category.**

Category A is comprised of cases in which no Phase 1 order was issued. For most firms, these files consist of the short-form petition described above, but few, if any, medical records. Depending on the law firm business model, medical records may have been collected, but not filed. Little court-ordered activity would have occurred in a Category A case after the filing of the petition. Based on the need to establish court jurisdiction and proper placement in the OAP, procurement of minimal additional records may be required before the court can take action on the merits and award attorney fees and costs.

Category B is comprised of cases in which petitioner filed a petition and medical records, whether in response to a Phase 1 order or otherwise. Respondent either did not respond, or responded with a statement regarding whether she believed the case should proceed in the OAP. If respondent filed such a statement, a petitioner in a Category B case did not respond to that statement.

Category C is comprised of cases in which petitioner filed a petition and medical records, respondent filed a statement or motion necessitating a response, and petitioner filed a substantive response to that statement and may have filed additional medical records as a part of that response.

Category D is comprised of cases in which petitioner filed a petition and medical records, whether in response to a Phase I order from the court or otherwise. Respondent, in turn, indicated that the case was properly and timely filed in the OAP, and thereafter filed more medical records and a Statement of Completion in response to a Phase 2 order from the court.

In the ADR effort, the parties agreed to an evaluation process by two special masters. The special masters would recommend what would be a reasonable number of hours and a reasonable amount of costs for OAP cases in the described categories. The parties agreed to a selection process for cases in each category for review. The purpose of this review was to recommend, based on the business models of the firms participating in the ADR process, what constituted a reasonable number of hours for cases falling in each category on a firm-by-firm basis.

2. The Evaluation Process.

I reviewed 36 cases from each of 3 firms[11] and 27 cases from one firm[12] to provide representative samples of each firm's activity in typical cases. The court randomly selected three cases in each of the four categories. Petitioners and respondent both selected three different cases within each of the four categories. Accordingly, I had before me nine cases in each category evaluated.

The firms provided me with the billing records and costs statements from the selected cases. Along with a second special master, the OSM staff attorney, and two judicial law clerks, I reviewed the actual billing records and costs statements. I evaluated the billing records with each firm's business model and case management processes in mind. I evaluated how much time was spent on areas such as client contact, medical record review, drafting and filing documents, reviewing the court's and respondent's filings, and many other tasks. After reviewing the time and costs actually expended in the nine cases in a category, I determined a reasonable number of attorney and paralegal hours, as well as the reasonable costs, for that category.

[11] Conway, Homer & Chin-Caplan, P.C., processed all the cases in which Mr. Harry Potter of Williams Kherkher was counsel of record. These two firms represent approximately 1200 OAP petitioners. Because the processing was substantially similar, the firms involved proposed that I survey only 36 cases, rather than 72, from these two firms.

[12] This firm did not have any cases fitting into Category D.

III. FINDINGS ON REASONABLE NUMBER OF HOURS AND REASONABLE COSTS

On November 8-10 and 18, 2010, Special Master Golkiewicz and I, accompanied by three court staff members, traveled to Houston, Texas, and Boston, Massachusetts, to review the billing and cost records provided by five firms involved in this process. With one exception, the five firms each used a different business model, as reflected in the billing records, court filings, and our previous reviews of case records. Some firms relied more heavily on paralegal support, with paralegals performing tasks appropriate for either attorneys or paralegal specialists to perform. Some firms employed law clerks who functioned more like paralegals; others had law clerks who functioned more like junior attorneys, based on the tasks billed. Two firms collected records in most cases; others appeared to have collected minimal records initially, and collected others only in response to court orders to do so. All of these individual variations were appropriate approaches to cases in the OAP, but consequently resulted in different levels of reasonable billable hours.

Other firm business practices were less reasonable, based on the posture of the cases within the OAP. Frequent interoffice conferences involving several senior partners and more junior firm members on cases that were, in effect, on hold for a number of years do not represent a reasonable use of attorney time, absent any indication that the case was being considered as a test case or for withdrawal from the OAP. Billing 12-24 minutes of time by multiple members of a firm for reading routine filings[13] are not reasonable exercises of billing judgment, and should not be compensated. Other firms divided hours for tasks common to all their OAP filings, such as reading and summarizing the test case decisions, and billed them in each case. The difficulty with this approach is that it makes determination of the actual compensation for such tasks nearly impossible. For tasks that affected all cases, such as reading the decisions in the test cases, the more appropriate approach is to claim those hours in one particular case.[14]

[13] Such routine filings included notices of appearance by a new respondent's counsel, standard OAP orders, and other matters not specific to that particular case. In most cases reading the Rule 4 report is important and petitioners' counsel are fully compensated for reviewing it. In the OAP cases, the Rule 4 report was largely a pro forma and virtually identical document containing no substantive case information that merely noted the absence of any medical records and respondent's objections to the short-form petitions. Compensation for a very brief perusal of the Rule 4 reports filed in response to short-form petitions by one firm attorney and one paralegal was considered appropriate and time for such perusal was included in the hours listed for each firm.

[14] For those firms already compensated for their "general causation" hours through one of the test cases, compensation for such tasks was already awarded. For the firms that did not participate in the test cases or otherwise receive compensation as a part of the PSC's general causation effort, selecting one case in which to bill the reading and analyzing of the test case decisions or other matters common to most OAP cases is appropriate. Otherwise, bills for one hour of time in every case handled by a firm with hundreds of OAP cases would result in a gross overcompensation of that firm for the tasks involved.

In nearly every examined file, there were hours billed to draft, review, and mail what appeared to be "mass mailings," that is, information common to all OAP clients in that firm, such as information on the results in individual test cases. Obviously, it is appropriate to keep clients informed about case developments, and mass mailings are appropriate methods for so doing. However, the minor editing necessary to personalize a particular mailing to the client involved did not appear to warrant the attorney hours claimed in most cases. The paralegal hours for preparing and mailing these informational updates appeared appropriate. The initial drafting of the letter is compensable, but not compensable in each individual case in which it was sent.

In reviewing the billing records provided, I considered time spent in the following ways to be reasonable expenditures of attorney and paralegal time: client contact; record collection; case management; review of court and respondent filings; drafting, revising, reviewing, and filing of petitioners' exhibits, motions, and responsive filings; and legal or medical research. However, this should not be viewed as approval of each and every hour claimed on such tasks. The times claimed were, in some cases, excessive, and identical tasks were claimed on behalf of too many people in some files. I considered costs to obtain records, copy and transmit records, make long distance telephone calls, and conduct legal or medical research to be reasonable. Filing fees were also reasonable and compensable, **but are not reflected in the costs computed for each firm**, as the filing fee varied based on the date of filing. In most OAP cases, it was $150.00 per case, but the exact amount paid is easily ascertainable from the court docket.

In computing a reasonable number of hours expended by attorneys and paralegals on a firm-by-firm basis, I considered the tasks above, plus reasonable time to obtain records establishing jurisdiction in those cases in which no records have been filed and no costs for obtaining them billed. The total reasonable hours also include calculation of a small number of attorney and paralegal hours required to file motions to dismiss, stipulations regarding fees and costs, notices regarding appellate review, and notices regarding the filing of a civil action. These hours were readily ascertainable, based on my experience in reviewing numerous applications for fees and costs.

The process of determining a reasonable number of hours expended involved, of necessity, a line-by-line review of the hours contained in all billing records selected and examined. Although a line-by-line analysis was performed, this factual ruling does not reflect the analysis in each case. *See Wasson*, 24 Cl. Ct. at 484 (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). Instead, it reflects a review of the files selected in each category and a determination of what each individual firm's business model dictated, constrained by our determination of what tasks were reasonably performed. It does not represent an average of the hours billed in the selected files.

The files examined reflected very few hours for case-specific research, either medical or legal. Based on the posture of these cases and what transpired in the OAP, this is not surprising. Most of the firms involved in this ADR process received compensation for general medical and legal research in one of the test cases. To the extent that a firm has not filed for fees and costs common to all their OAP cases (such as reading and summarizing the test case decisions or the hours involved in coordinating with the court on selection of cases for activation and filing of medical records, or other matters common to several cases), the firm should select a timely-filed case in which to bill those hours.

My firm-by-firm analysis is set forth below. Although this factual order is issued in this specific case, I set forth the analysis of each firm's billing practices as that analysis affected my determination of a reasonable number of hours expended in cases fitting these categories by this firm. It is also set forth for purposes of providing guidance to the parties in resolving other cases. Although decisions of special masters tend to be fact-specific, and are not binding in other cases on the same special master or other special masters, these factual conclusions represent what Special Master Golkiewicz, other special masters, and I are likely to award in similarly postured cases.

A. Matthews & Associates ["Matthews"].

The Matthews firm files reflected, in general, an approximately even split between the hours reasonably billed by the firm's more junior counsel and those billed by the senior firm counsel. The firm made extensive and appropriate use of their paralegal support staff and law clerks. In general, it did not appear that the firm collected medical records or other supporting evidence in advance of court orders to do so, thus files in Category A reflected little attorney time and no costs. The firm did not have any cases in Category D.

In all categories of files examined, I found an excessive number of hours billed for review of routine court filings. For example, it was usual for the firm to bill 12 minutes each of attorney and paralegal time to read a notice of appearance of counsel. This filing would take less than a minute for an attorney to read and only a few minutes for a paralegal to note on the firm's case files or database.

In many of the case files examined, the Matthews firm substituted David Matthews as counsel for an attorney who was either never associated with the firm, or was no longer associated with the firm, and the files reflected four hours of paralegal time in each case to effect a transfer of counsel in 2008. This appeared excessive.

In Category C cases, client contact hours were much higher than in the other two categories, reasonably reflecting efforts to contact clients to obtain information to respond to respondent's motions or to court orders.

Costs for the Matthews firm were substantially lower than those of the other firms examined. This was particularly evident in costs attributed to the acquisition of medical records. This may have reflected that records had been previously obtained at no cost to the firm.

Based on the firm's business model and review of the sample records submitted, I have determined that the following hours per category of case are reasonable and should be compensated for cases fitting the following categories:

Category	**Attorney Hours**	**Paralegal Hours**	**Costs (not including filing fee)**
A[15]	3.2 hours	7.5 hours	$80.00
B	3.8 hours	11.5 hours	$350.00
C	6.9 hours	15.0 hours	$350.00

B. The Gallagher Law Firm ["Gallagher"].

The Gallagher firm's business model did not involve up-front collection of medical records in most cases. They were collected and filed primarily in response to court orders, and thus the Category A cases represented minimal attorney or paralegal time and effort.[16] This firm made effective and substantial use of paralegal specialists, in both court and client contact. It used a law clerk much like a junior associate. When an attorney recorded hours for work on a case, it was generally, but not exclusively, a senior attorney involved.

Unlike most other firms involved in representing OAP petitioners, the firm filed substantive petitions for compensation reflecting the facts of individual cases, rather than using the short-form petitions. This represented a somewhat greater expenditure of time in the preparation and filing of a petition, one that I considered reasonable.

[15] The Category A amount for the Matthews firm includes my determination of reasonable hours and costs for obtaining and filing the minimal documentation necessary to establish jurisdiction. Establishing jurisdiction is one predicate for the award of fees and costs. This minimal documentation includes a vaccine record, a diagnosis on the autism spectrum, and a birth certificate. I have added a small number of hours to the number determined reasonable based upon the Matthews billing records, because the Matthews Category A case billing records consistently reflected no effort to obtain medical records. As the Matthews firm records reflected no costs for Category A cases, other than the filing fee, I have determined $80.00 to be reasonable to obtain the medical records and other documents necessary to establish jurisdiction.

[16] My determination of reasonable time and costs for Gallagher Category A cases also includes time and costs for obtaining medical records establishing jurisdiction.

The billing records reflected the firm's relative unfamiliarity with billing on an hourly basis under the Program's Guidelines for Practice.[17] The firm billed the same blocks of time in nearly every case. For example, it billed 2.5 hours of paralegal time in each case for initial case efforts. Other identical billings included: two hours for reviewing the test case decisions billed in each case; 1.5 hours for drafting, reviewing, and mailing a letter to each client about the test case decisions billed in each case; 2.5 hours billed in each case for a discussion of *Cloer v. Sec'y, HHS*, 603 F.3d 1341(Fed. Cir. 2010), *vacated*, No. 09-5052 (Fed. Cir. Oct. 25, 2010) (order granting rehearing en banc), including in cases already determined to be timely filed; 0.8 hours billed in each case for a discussion of the "aggregate program"; 1.7 hours billed in each case for preparing for the initial ADR meeting and assembling the billing records for those individual cases; 0.5 hours billed in each case for reading an email from the PSC; and 0.5 hours spent discussing case selections for the Phase 1 and Phase 2 orders by the court. **Many of these entries, which apply to each of the Gallagher cases, are properly compensable, but should be filed in the aggregate in one individual case to avoid over-billing.** For example, it is highly unlikely that an attorney spent 18 hours, billed as 0.5 hours in each of the 36 reviewed cases, reviewing an email from the PSC regarding the initiation of the Phase I orders process and reviewing an attached sample order.

As standard practice, the firm billed 0.2 hours or more for review of routine and repetitive court filings by both a paralegal and an attorney. Review by both is reasonable; the time claimed is not.

Based on the firm's business model and review of the sample records submitted, I have determined that the following hours per category of case are reasonable and should be compensated for cases fitting the following categories:

Category	**Attorney Hours**	**Paralegal Hours**	**Costs (not including filing fee)**
A	4 hours	13 hours	$80.00
B	5 hours	22 hours	$373.00
C	6.5 hours	22.5 hours	$662.00
D	5.5 hours	20 hours	$767.00

Although it may be counterintuitive to find fewer paralegal hours reasonably billed in the Category D cases than in the Category B and C cases, the Category D cases were ones that were timely filed and thus involved less client contact to discuss problems regarding timely filing or failure to collect and file adequate records. This firm used paralegals for most client contact. The attorney hours dropped from Category C to Category D because Category C cases involved more attorney hours in response to

[17] Guidelines for Practice under the National Vaccine Injury Compensation Program, http://www.uscfc.uscourts.gov/sites/default/files/OSM.Guidelines.pdf.

motions filed by respondent. Although I expected hours to increase in the Category D cases based on the filing of additional records, they did not.

C. R.G. Taylor, II, P.C. & Associates ["R.G. Taylor"].

This firm's business model was somewhat unique among the firms surveyed in this ADR effort. However, the model employed was generally reasonable. This firm sent a multi-page questionnaire to new and prospective clients assessing such matters as vaccination dates, maternal health, prenatal infections, vaccinations, and diet; detailed health, diagnosis, and treatment history for the vaccinee; and many other matters. It collected all available medical records up front, reimbursing clients as the records were supplied. Collection of records up front resulted in less court and respondent time spent responding to motions for extension of time to file records. In many cases, a physician reviewed the files. The billing records reflected extensive attorney-client contact across the board. Viewed over the period in which the OAP cases were pending, the hours claimed for client contact were reasonable and appropriate; they averaged about one hour per year. In most cases, the contact involved attorney hours. Although paralegals can effectively handle much client contact, it is not unreasonable for a firm with OAP cases to make a business judgment that an attorney should deal with client concerns and provide periodic updates.

The billing records reflected that this firm put more time and effort into case development than most other firms surveyed. The records reflected individual work on cases, rather than "canned" billing of the same entries at similar times. However, the billing records reflected excessive review of routine court filings and extensive and excessive interoffice meetings. For example, in one case two senior partners billing at $325 per hour, one more junior attorney billing the same task twice at $280 per hour, a law clerk billing at $130 per hour, and a paralegal specialist billing at $105 per hour each billed 0.2 hours to review an order converting the case from paper filing to electronic filing and the notice of that conversion. This resulted in a bill of $289 for an order containing a list of case names, case numbers, and two substantive sentences, and a template notice of conversion explaining electronic filing in the Court of Federal Claims. That specific order converted more than 100 cases to electronic filing, and upon examination, counsel billed to review this conversion in several of the affected cases, though not as many individuals billed for such review in these other cases. A more expensive example involves the attendance of one junior attorney and two senior partners at a case status meeting for a case effectively "on hold," resulting in a bill for $680. *See* Autism Gen. Order #1 at 6-8 (explaining that OAP cases would be stayed pending the results of the test cases). Even if such meetings were reasonable, paying for the attendance of that many attorneys is not. In comparing this firm to others that utilized a similar business model, the R.G. Taylor firm's hourly billing was unreasonably high.

Based on the firm's business model and review of the sample records submitted, I have determined that the following hours per category of case are reasonable and should be compensated for cases fitting the following categories:

Category	**Attorney Hours**	**Paralegal Hours**	**Costs (not including filing fee)**
A	14.5 hours	12 hours	$196.00
B	20 hours	14.5 hours	$330.00
C	29.5 hours	15 hours	$434.00
D	21.5 hours	20.0 hours	$307.00

D. Conway, Homer & Chin-Caplan, P.C. ["CHCC"].

The CHCC firm practices almost exclusively in the Vaccine Act, and their billing records reflected that expertise. They made the most efficient use of paralegal support staff among the firms surveyed. This firm also collected medical records in many cases "up front."[18] Based on their understanding of the Vaccine Act processes and the OAP (which was patterned on other "omnibus" proceedings in which this firm had participated), they needed minimal interoffice communication, efficiently reviewed court filings, and relied more extensively on their well-trained and experienced paralegals to do tasks that were, in less experienced firms, handled by attorneys. For these reasons, only negligible deductions from the hours billed by attorneys and paralegals were taken.

Unlike the other firms involved, this firm submitted several cases that were filed prior to the creation of the OAP. These earlier cases were processed differently within the firm than the remainder of the OAP cases, and were thus "outliers" in the categories concerned. Based on review of these files, they do not properly fit the model of Categories A-D, and should thus be compensated outside this portion of the ADR process. It may be helpful to create a separate category of "pre-OAP" cases for this firm and others with substantial numbers of pre-OAP cases. Additional "outliers" submitted by this firm were several "grey area" cases in which statute of limitations issues resulted in preparation for onset hearings. Because these cases were outliers and not typical of the other cases, I examined the files submitted, but did not give them much weight in determining what constituted a reasonable number of hours expended for cases in the categories involved.

The costs billed reflected relative consistency across the range of cases submitted in each category. Unlike some of the other firms, carefully documented cost

[18] The firm also indicated that they have a substantial number of cases in which no records were ever obtained to support the petition. If CHCC is able to obtain and file records sufficient to establish jurisdiction in these cases, I may find it reasonable that they be compensated at a reduced level for these cases.

data were provided in each case, and thus the determination of reasonable costs for this firm is slightly higher than those for other firms.

The most senior attorney in the firm generally billed 1.5-2.0 hours in each case, with the remaining hours billed by one of the other partners, generally Mr. Homer. Occasional hours were billed by a junior associate.

Based on the firm's business model and review of the sample records submitted, I have determined that the following hours per category of case are reasonable and should be compensated for cases fitting the following categories:

Category	**Attorney Hours**	**Paralegal Hours**	**Costs (not including filing fee)**
A	5.0 hours	19.5 hours	$375.00
B	6.0 hours	27.5 hours	$440.00
C	7.5 hours	33.5 hours	$480.00
D	6.0 hours	35.0 hours	$620.00

E. Comparisons Between Firms.

Comparisons between firms are inevitable. However, I considered and dismissed direct comparisons after reviewing the documents. The primary reasons for dismissing an exact comparison and thus an expectation that the relative time should be comparable are experience with Program cases and different business models.

For example, CHCC has been litigating vaccine cases over the entirety of the Program. Accordingly, their knowledge base translates into certain efficiencies. The attorneys know the law, and they are familiar with the court's orders and the respondent's positions. CHCC attorney time is unnecessary or is minimal in dealing with court orders and respondent's routine filings. Because of CHCC's experience, the firm has developed a business model that relies heavily on paralegal efforts in the processing of cases, while reserving attorney time for later in the case when hearings, briefing, and argument dominate. Since the OAP cases at issue here did not progress to these later tasks, CHCC's bills show minimal attorney time and heavy paralegal time. That was expected from this firm.

In contrast, R.G. Taylor lacked Program experience. Thus, as would be expected and is reasonable, the attorneys spent more time reviewing court orders and respondent's filings. Their billing totals showed a ratio of attorney time to paralegal time opposite that of CHCC. While this is reasonable, I scrutinized carefully the level of attorney involvement to ensure that the time spent was in fact both necessary and reasonable given the task accomplished. I carefully examined the records to ensure that the tasks performed were reasonably performed in the particular cases examined. Additionally, I shifted some of the attorney time to paralegal time, as even inexperience did not justify the billing of attorney time for some of the claimed tasks. Finally, I note

that, unlike all the other firms surveyed in this ADR effort, R.G. Taylor actively worked up each case, many to the point of a medical review. Although, in retrospect, such efforts proved unnecessary, preparing cases as contemplated by the filing requirements of the Vaccine Act itself is not unreasonable, even in the context of an omnibus proceeding, absent any court orders to do otherwise.

In the end, I was comfortable that while the R.G. Taylor billings were higher than those of CHCC, the adjusted hours fall within the range of reasonableness. No two firms conduct business exactly alike and the needs of individual clients vary, and thus there is no one "reasonable" bill for similar cases.

As stated at the beginning of this Order, different firms operate under different business models and thus firms' billings vary under the four categories analyzed herein. In analyzing the four firms, I considered and compared the firms for reasonableness—there should be consistency across firms in time spent on certain tasks like reviewing court orders and decisions—but in the end, I recognized and credited the overriding factor of the business model in determining reasonable time for each firm.

IV. CONCLUSION

After a painstaking review of billing records for 135 cases represented by five firms, Special Master Golkiewicz and I have proposed reasonable hours and costs for handling OAP cases in four different stages of development. The intent and hope of the parties is that this guidance will promote resolution of significant numbers of the involved firms' cases, as well as resolution of OAP cases handled by other firms.

The factual determinations set forth in this order are intended to guide the parties in an informal resolution of attorney fees and costs, in this case as well as in others that fit the agreed categories. The parties shall discuss these findings and shall file a joint status report by no later than **Friday, January 14, 2011**, advising me as to whether they expect to reach an informal resolution.

IT IS SO ORDERED.

s/ Denise K. Vowell
Denise K. Vowell
Special Master