In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 98-916V

(Filed: November 29, 2010)

NOT TO BE PUBLISHED[1]

THERESA CEDILLO and MICHAEL CEDILLO, as parents and natural guardians of Michelle Cedillo,	*	
Petitioners,	*	Vaccine Act Interim Fees and Costs; Fees for Omnibus Proceedings.
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

DECISION AWARDING INTERIM FEES

HASTINGS, ***Special Master***.

In this case under the National Vaccine Injury Compensation Program (hereinafter "the Program"), the petitioners seek, pursuant to 42 U.S.C. § 300aa-15(e),[2] an interim award for attorneys' fees and costs incurred in the course of the petitioners' attempt to obtain Program

[1]This document will not be sent to electronic publishers as a formally "published" opinion. However, because this decision contains a reasoned explanation for my action in this case, I intend to post it on the United States Court of Federal Claims' website. Therefore, each party has fourteen days within which to object to the disclosure of any material in this decision that would constitute "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." *See* 42 U.S.C. § 300aa-12(d)(4)(B)(2006); Vaccine Rule 18(b).

[2]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (2006). Hereinafter, for ease of citation, all § references will be to 42 U.S.C. (2006).

compensation. After careful consideration, I have determined to grant the request in part at this time as it pertains to the Shoemaker and Associates law firm, for the reasons set forth below.

I

BACKGROUND

This case concerning Michelle Cedillo is one of more than 5,000 cases filed under the Program in which it has been alleged that a child's disorder known as "autism," or a similar disorder, was 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 5,000 cases in this court, was set forth in my Decision filed in this case on February 12, 2009, and will not be repeated here. However, a brief summary of one aspect of that history is relevant to this Decision.

A. The Omnibus Autism Proceeding

In anticipation of dealing with such a large group of cases involving a common factual issue--i.e., whether 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 a document entitled the Autism General Order # 1,[3] which set up a proceeding known as the "Omnibus Autism Proceeding" (OAP). In 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 concerning the general issue of whether those vaccines can cause autism, and, if so, in what circumstances. The evidence obtained in that general inquiry was to be applied to the individual cases. Autism General Order # 1, 2002 WL 31696785, at *3, 2002 U.S. Claims LEXIS 365, at *8.

Ultimately, the PSC elected to present two different theories concerning the causation of autism. The first theory alleged that the *measles* portion of the MMR vaccine can cause autism, in situations in which it was alleged that thimerosal-containing vaccines previously weakened an infant's immune system. That theory was presented in three separate Program "test cases," including this *Cedillo* case, during several weeks of trial in 2007. The second theory alleged that the mercury contained in the thimerosal-containing vaccines can *directly affect* an infant's brain, thereby substantially contributing to the development of autism. The second theory was presented in three additional "test cases" during several weeks of trial in 2008.

---

[3]The Autism General Order # 1 is published at 2002 WL 31696785, 2002 U.S. Claims LEXIS 365 (Fed.Cl.Spec.Mstr. July 3, 2002). 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.

On February 12, 2009, decisions were issued concerning the three "test cases" pertaining to the PSC's *first* theory. In each of those three decisions, the petitioners' causation theories were rejected. I issued the decision in this case, *Cedillo v. Secretary of HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). Special Master Patricia Campbell-Smith issued the decision in *Hazlehurst v. Secretary of HHS,* No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). Special Master Denise Vowell issued the decision in *Snyder v. Secretary of HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009).

Those three decisions were later each affirmed in three different rulings, by three different judges of the U.S. Court of Federal Claims. *Hazlehurst v. Secretary of HHS*, 88 Fed. Cl. 473 (2009); *Snyder v. Secretary of HHS*, 88 Fed. Cl. 706 (2009); *Cedillo v. Secretary of HHS*, 89 Fed. Cl. 158 (2009). Two of those three rulings were then appealed to the U.S. Court of Appeals for the Federal Circuit, again resulting in affirmances of the decisions denying the petitioners' claims. *Hazlehurst v. Secretary of HHS*, 604 F. 3d 1343 (Fed. Cir. 2010); *Cedillo v. Secretary of HHS*, 617 F. 3d 1328 (Fed. Cir. 2010).

On March 12, 2010, the same three special masters issued decisions concerning three separate "test cases" pertaining to the petitioners PSC's *second* causation theory. Again, the petitioners' causation theories were rejected in all three cases. *King v. Secretary of HHS*, No. 03-584V, 2010 WL 892296 (Fed.Cl.Spec.Mstr. Mar. 12, 2010); *Mead v. Secretary of HHS*, No. 03-215V, 2010 WL 892248 (Fed.Cl.Spec.Mstr. Mar. 12, 2010); *Dwyer v. Secretary of HHS*, No. 03-1202V, 2010 WL 892250 (Fed.Cl.Spec.Mstr. Mar.12, 2010). None of the petitioners elected to seek review any of those three decisions.

B. The Request for "Interim" Fees and Costs in this Case

On August 19, 2008, the petitioners in this case filed their application for interim fees and costs. In their application, the petitioners sought a total of $2,180,885.29 for interim fees and costs. Respondent filed a lengthy response on November 12, 2008, and the petitioners filed a lengthy reply on January 26, 2009. This very large request reflected the fact that this case was, as explained above, one of the "test cases" in the OAP. Because this was a 'test case" in which the petitioners sought to present *all* of the "general causation" evidence concerning the theory that "MMR" vaccines can cause autism, several different law firms participated in the development and presentation of the evidence, while multiple expert witnesses prepared expert reports and testified at length for petitioners during the evidentiary hearing. The high total sought by petitioners reflects the participation of all those law firms and expert witnesses.

In response to this massive request for fees and costs encompassing many months of work by multiple attorneys and expert witnesses, the respective parties engaged in lengthy discussions. As to several of the law firms involved, after such discussions the law firm in question reduced its claim, and the respondent withdrew its objection to that firm's claim. The parties also agreed that it made sense, in these unusual circumstances, that the overall request be separated into parts, according to the various law firms involved, with several different "interim fees" awards being made if necessary.

Accordingly, I have filed a *series* of interim fees decisions in this case, each decision resolving a part of the overall claim. On November 18, 2008, I issued an interim costs award in this case reflecting the Cedillo family's out-of-pocket expenses. On March 11, 2009, I issued an interim award for fees and costs attributable to some of petitioners' attorneys: Conway, Homer & Chin-Caplan; Yen Pilch Komadina & Flemming, PC; and Williams Love O'Leary & Powers, PC. On May 21, 2009, I issued an interim award for fees and costs attributable to the Maglio Christopher & Toale law firm. On March 16, 2010, I issued an award for fees and costs attributable to the Williams Kherkher law firm. On November 8, 2010, I issued an award for fees and costs attributable to the Lommen Abdo law firm. The present decision will address only the fees and costs of the Shoemaker and Associates law firm that pertain to that firm's participation in the *Cedillo* case.

II

LEGAL STANDARD

Special masters have the authority to award "reasonable" attorney's fees in Vaccine Act cases. § 300aa-15(e)(1). This is true even when a petitioner is unsuccessful on the merits of the case, if the petition was filed in good faith and with a reasonable basis. (*Id*.) "The determination of the amount of reasonable attorneys' fees is within the special master's discretion." *Saxton v. Secretary of HHS*, 3 F.3d 1517, 1520 (Fed. Cir. 1993); see also *Shaw v. Secretary of HHS*, 609 F.3d 1372, 1377 (Fed. Cir. 2010). This court has employed the "lodestar" method to determine reasonable attorneys' fees. *Avera v. Secretary of HHS*, 515 F.3d 1343, 1347 (Fed. Cir. 2008); *Saxton*, 3 F.3d at 1521; *Rupert v. Secretary of HHS*, 52 Fed. Cl. 684, 686 (2002). The lodestar method, indeed, has been prescribed by the Supreme Court as the preferred method for the calculation of all attorneys' fees awarded by statute. *City of Riverside v. Rivera*, 477 U.S. 561 (1986); *Hensley v. Eckerhart*, 461 U.S. 424, 429-37 (1983).[4]

Under the lodestar approach, the basic calculation starts with the number of hours reasonably expended by the attorney, and then multiplies that figure by a reasonable hourly rate.[5] The reasonable hourly rate is "the prevailing market rate" in the relevant community for similar services,

---

[4]The Supreme Court has declared that "[t]he standards set forth in [the *Hensley*] opinion are generally applicable in all cases in which Congress has authorized an award of fees." *Hensley*, 461 U.S. at 433 n.7. In *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989), that Court reaffirmed its view that such approach is "the centerpiece of attorney's fee awards."

[5]Once a total, sometimes called the "lodestar," is reached by multiplying the reasonable hourly rate by the number of hours expended, it may then be appropriate in a few cases to adjust the lodestar upward or downward based on the application of special factors in the case. *Hensley*, 461 U.S. at 434; *see also Martin v. United States*, 12 Cl. Ct. 223, 227 (1987), *remanded on other grounds*, 852 F.2d 1292 (Fed. Cir. 1988). However, such adjustments are to be made only in the exceptional case, on the basis of a specific and strong showing by the fee applicant. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 898-902 (1984); *Hensley*, 461 U.S. at 434 n.9; *Copeland v. Marshall*, 641 F. 2d 880, 890-94 (D.C. Cir. 1980) (*en banc*). Here, the petitioners have not requested any such adjustment of the "lodestar" figure.

by lawyers of "comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). The burden is on the fee applicant to demonstrate that the rate claimed is appropriate. *Id*. As the Supreme Court recognized in *Blum*, the determination of an appropriate market rate is "inherently difficult." *Id*. In light of this difficulty, the Court gave broad discretion to the trial judge to determine the prevailing market rate in the relevant community, given the individual circumstances of the case. *Id*.

Further, as to all aspects of a claim for attorneys' fees and costs, the burden is on the *petitioner* to demonstrate that the attorneys' fees claimed are "reasonable." *Sabella v. Secretary of HHS*, 86 Fed. Cl. 201, at 215 (Fed. Cl. 2009); *Hensley*, 461 U.S. at 437; *Rupert*, 52 Fed.Cl. at 686; *Wilcox v. Secretary of HHS*, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr., Feb. 14, 1007). The petitioners' burden of proof to demonstrate "reasonableness" applies equally to *costs* as well as attorneys' fees. *Perreira v. Secretary of HHS*, 27 Fed. Cl. 29, 34 (1992), *aff'd* 23 F.3d 1375 (Fed. Cir. 1994). The petitioner is not given a "blank check to incur expenses." *Id*.

One test of the "reasonableness" of a fee or cost item is whether a hypothetical petitioner, who had to himself pay his attorney for Vaccine Act representation, would be willing to pay for such expenditure. *Riggins v. Secretary of HHS*, No. 99-382V, 2009 WL 3319818, at *3 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff'd by unpublished order* (Fed. Cl. Dec. 10, 2009), *appeal pending* (Fed. Cir.); *Sabella v. Secretary of HHS*, No. 02-1627V, 2008 WL 4426040, at *28 (Fed. Cl. Spec. Mstr. Aug. 29, 2008), *aff'd in part and rev'd in part*, 86 Fed. Cl. 201 (2009). In this regard, the United States Court of Appeals for the Federal Circuit has noted that--

> [i]n the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority.

Saxton, 3 F.3d at 1521 (emphasis in original), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433-34. Therefore, in assessing the number of hours reasonably expended by an attorney, the court must exclude those "hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley*, 461 U.S. at 434; see also *Riggins*, 2009 WL 3319818, at *4.

Additionally, while a special master may choose to utilize a "line-by-line" analysis to analyze a fees and costs application, the special master is not *required* to do so. Depending on the circumstances of the case, the special master may find it appropriate to make a *percentage reduction* of hours, to use his or her experience to *estimate* a reasonable number of hours that it should have taken to accomplish a particular task, or to use some other method to determine a reasonable amount for a fees or costs item. *Saxton*, 3 F. 2d at 1521 (50% reduction of attorney hours approved by Federal Circuit); *Wasson v. Secretary of HHS*, 24 Cl. Ct. 482 at 484-86 (Cl. Ct. 1991), *aff'd*. 988 F. 2d 131 (Fed. Cir. 1993); *Riggins*, 2009 WL 3319818 at *4; *Jeffries v. Secretary of HHS*, No. 99-670, 2006 WL 39303710, at *8 (Fed. Cl. Spec. Mstr. Dec. 15, 2006); *Ray v. Secretary of HHS*, No. 04-184V, 2006 WL 1006587, at *10 (Fed. Cl. Spec. Mstr. Mar. 30, 2006); *Broekelschen v. Secretary*

of HHS, No. 07-137, 2008 WL 5456319, at *6 (Fed. Cl. Spec. Mstr. Dec. 17, 2008); *Castillo v. Secretary of HHS*, No. 95-652V, 1999 WL 1427754, at *3 (Fed. Cl. Spec. Mstr. Dec. 17, 1999).

III

APPROPRIATENESS OF AN AWARD FOR INTERIM FEES AND COSTS

A detailed discussion of the appropriateness of an interim fees and costs award in this case, and also of the appropriateness of multiple interim fees and costs awards in this case, is set forth in my Decision filed on March 11, 2009, and will not be repeated here. As noted in that decision, respondent's counsel has represented that due to the unique nature of this *Cedillo* case as a "test case" in the Omnibus Autism Proceeding, respondent does not object to the issuance of a *series* of interim awards, to the several law firms that participated in the presentation of evidence in this specific case.

During an unrecorded telephonic status conference on March 16, 2010, counsel for both parties reported that concerning certain fees and costs issues in this case, that were not resolved in my prior decisions mentioned above, a decision by the special master would be required, since the parties could not reach agreement. This Decision will address only the fees and costs claim for the Shoemaker and Associates law firm.[6]

IV

LIST OF RELEVANT DOCUMENTS FROM THIS *CEDILLO* RECORD

The record of this *Cedillo* case, of course, is vast. The documents most specifically relevant to the determination of an appropriate "interim fees" award for the Shoemaker and Associates firm, however, are few. Those documents are as follows:

- "Petitioners' Application for Interim Fees and Costs," filed on August 19, 2008, Tab I (at pp. 503-509), Shoemaker and Associates attorneys' fees, and Tab J (pp. 510-511), Shoemaker and Associates costs.

[6]I note that there has been considerable delay between the status conference of March 16, 2010, when I was notified by the parties that they would not be able to settle the Shoemaker and Associates portion of the interim fees and costs request, and the issuance of this Decision. Under ordinary conditions, I would have been able to issue this Decision much more promptly after being so notified, and I regret that I was not able to complete this Decision sooner. However, during the time period in question, I had just finished the enormous task of preparing the decision in the autism "test case" which was filed as *King v. Secretary of HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mastr. March 12, 2010). During the many months that it took me to complete that *King* decision, a number of other matters "stacked up" for resolution, and I needed to finish those matters before turning my attention to this Decision in recent weeks.

- "Respondent's Response to Petitioners' Request for Interim Attorneys' Fees and Costs" filed on November 12, 2008, pp. 47-50.

- "Petitioners' Reply to Respondent's Response to Petitioners' Application for Interim Fees and Costs," filed on January 26, 2009, including "Summary of Opposition to Fees and Costs of Shoemaker and Associates," p. 6, and "Specific Response of Shoemaker and Associates," pp. 57-60.

- Transcript of telephonic status conference held on October 14, 2010.

V

SUMMARY OF PARTIES' CLAIMS AND ARGUMENTS

A. The Shoemaker firm's claim for compensation

The request for fees and costs pertaining to the Shoemaker and Associates law firm is contained in "Petitioner's Application for Interim Fees and Costs" ("Pet. App."), which was filed on August 19, 2008, at Tab I and Tab J. The relevant "fees" portion of this application consists of a six-page invoice, which documents 225.10 hours that Mr. Shoemaker claims for work on the *Cedillo* matter in 2007, billing at a rate of $310 per hour, for a total of $69,781. There is also a charge for 0.5 hours of work performed by Mr. Shoemaker in 2008 to "review billing record," billed at a rate of $324.26 per hour, which amounts to $162.13. Thus, the total amount for fees billed by Mr. Shoemaker is $69,943.13. Finally, there is a charge for one hour of attorney Renee Gentry's time, during which she prepared the firm's portion of the fees application, which was billed at a rate of $230 per hour. The firm's costs consist of parking expenses equaling $85.00. (Tab J.) Thus, the total attorneys' fees and costs that have been requested by the Shoemaker and Associates law firm amount to $70,258.13.

B. Respondent's position

Respondent's commentary on these fees and costs requested by the Shoemaker and Associates law firm is presented in "Respondent's Response to Petitioners' Request for Interim Attorneys' Fees and Costs" ("Response"), which was filed on November 12, 2008. That response states explicitly that respondent "does not object" to the hourly rates charged, or to the claimed costs.

Respondent did, however, register objections to many of the fees claimed by the Shoemaker firm. (Response, p. 48.) The first objection is the allegation that Mr. Shoemaker's primary duties during the Cedillo hearing "appeared to involve his assistance with technical aspects of the case," for which he should be awarded fees at the hourly rate of a paralegal, rather than an attorney rate. (*Id*.) Second, respondent alleges that Mr. Shoemaker's billing records are too vague to allow a determination of their reasonableness. Third, respondent objects to the "excessive" number of hours billed, particularly the fourteen-hour work days that Mr. Shoemaker claimed throughout the trial. (Response, p. 49.) Furthermore, under this category of "excessive billing," respondent expresses

doubt that Mr. Shoemaker's participation in *Cedillo* trial activities was actually reasonable or necessary, since several other experienced attorneys were participating as counsel for petitioners. (Response, p. 49, n. 92.) Lastly, respondent objects to the charge for Ms. Gentry's work. (Response, p. 50.) Based on these allegations, respondent "requests that the special master use his discretion to reduce Mr. Shoemaker's requested fees." (Response, p. 49.)

C. Petitioners' reply to respondent's objections

Petitioners answered respondent's four general objections to their application for fees and costs in a document entitled "Petitioner's Reply to Respondent's Response"("Reply"), which was filed on January 26, 2009. As discussed above, the general objections raised by respondent may be characterized as objections to: 1) paying for paralegal work at the rate of an experienced attorney; 2) vague billing records that do not allow a reasonableness determination; 3) the excessive number of hours billed by an attorney whose services were not necessary; and 4) the charge for preparing the fees application.

1. Technical work

Petitioners note that respondent has not offered any specific examples from the billing record of the "technical aspects" of Mr. Shoemakers work that should be compensated at a paralegal's rate of pay. Petitioners acknowledge that there are five specific entries from those records that "might fall under the definition of paralegal work, totaling 3.0 hours," while maintaining that such technical work was confined to only those five entries. (Reply, pp. 57-58.)

According to the petitioners, the rest of Mr. Shoemaker's billable time was spent "preparing for and managing the hearing, reviewing expert reports and presentations, preparing expert analyses, preparing cross-examinations of experts, reviewing and preparing presentations for the hearing." (Reply, p. 58.) Furthermore, petitioners maintain that such work was "precisely the same" as the services provided by the attorneys who actually performed the argument and the cross-examination of witnesses on behalf of petitioners during the *Cedillo* trial. (*Id*., p. 59.)

2. Vague billing

Petitioners' Reply does not address respondent's criticism that the Shoemaker and Associates' billing records are too vague to determine the reasonableness of the fees request.

3. Excessive hours

In response to the allegation that Mr. Shoemaker billed an excessive number of hours, and that his services during the trial were not necessary, petitioners offer a general description of his services performed during the trial, including legal consultations with co-counsel, assisting in the preparation of testimony, and developing responses to emerging issues. (Reply, p. 59.) Petitioners contend that Mr. Shoemaker met with co-counsel before each day of trial to assist in preparation of testimony. Following each day's testimony, he participated in discussions with co-counsel about testimony taken that day, and plans for the next day. He was also responsible for monitoring e-mails

from PSC members, who made suggestions throughout the trial. He also assisted by reviewing medical literature and developing responses to emerging issues. (*Id*.)

4. Billing for preparing fees application

Petitioners do not address Mr. Shoemaker's participation in the billing process. However, they contend that Ms. Gentry's review of the billing record involved retrieval of records, determination of their reasonableness, and confirmation of their accuracy. According to the petitioners, the amount of time expended for all of this preparation actually exceeded the one hour charged, but petitioners only charged for the time spent determining reasonableness. (Reply, p. 60.)

VI

MS. GENTRY'S HOURS, AND COSTS

Respondent does not dispute the claimed costs, and I find them reasonable. I also find reasonable the hour claimed for Ms. Gentry, for the reasons set forth in the Petitioners' Reply.

VII

MR. SHOEMAKER'S CLAIMED HOURS

A. General analysis of Mr. Shoemaker's role

I find some, but not all, of the hours claimed by Mr. Shoemaker to be reasonably compensable, for reasons to be set forth below. I begin with some comments concerning Mr. Shoemaker's *general role* in the *Cedillo* trial preparation and trial. Mr. Shoemaker has explained that he was asked by the lawyers from the Conway, Homer, Chin-Caplan firm, who were representing the Cedillo family and managing the trial, to assist them both in pre-trial preparation and during the trial itself. (Pet. Reply, p. 58; transcript of status conference held on October 14, 2010.) This explanation persuades me that Mr. Shoemaker likely provided valuable services to the lawyers who actually tried the *Cedillo* case for petitioners. Clearly, that small petitioners' trial team needed some assistance in analyzing the massive amount of evidence presented by the respondent. Mr. Shoemaker provided such assistance, during the weeks immediately prior to the trial and during the three-week trial itself.

B. Pre-trial period

I have studied the hours billed by Mr. Shoemaker, during the immediate pre-trial period, between March 27, 2007, and June 10, 2007. I conclude, in general, that during this period, Mr. Shoemaker was primarily engaged in legitimate activity in helping to prepare the petitioners' case for the trial, as discussed above. The total number of hours billed for this period was 58.7. I will allow most of those hours, with a few reductions.

1. Work that appears to be paralegal work on its face

As discussed, above, petitioners themselves acknowledge that three of the hours billed for May 24 through May 30 might be characterized as "paralegal" work. (Pet. Reply at 57-58.) I conclude that those hours should be categorized as paralegal work, and therefore I will compensate those three hours at a paralegal rate of $125.00 per hour.[7] In this regard, the case law is clear that tasks performed by attorneys that could be completed by a paralegal or a legal assistant, such as scheduling conference calls, should not be billed at an attorney's rate. *See*, *e.g.*, *Sabella v. Secretary of HHS*, 2008 WL 4426040, at *22 (Fed. Cl. Spec. Mstr. Aug. 29, 2008), *aff'd on this point and rev'd on other point*, *Sabella v. Secretary of HHS*, 86 Fed. Cl. 201, 216 (2009); *Valdes v. Secretary of HHS*, 89 Fed. Cl. 415, 425 (2009), *affirming Valdes v. Secretary of HHS*, No. 99-310V, 2009 WL 1456437, at *4 (Fed. Cl. Spec. Mstr. Apr. 30, 2009); *Plott v. Secretary of HHS*, No. 92-633V, 1997 WL 842543, at *4 (Fed. Cl. Spec. Mstr. April 23, 1997); *Savin v. Secretary of HHS*, No. 99-537V, 2008 WL 2066611, at *2-3 (Fed. Cl. Spec. Mstr. Apr. 22, 2008), *aff'd*, 85 Fed. Cl. 313 (2008); *Turpin v. Secretary of HHS*, No. 99-535V, 2008 WL 5747914, at *5-7 (Fed. Cl. Spec. Mstr. Dec. 23, 2008); *Riggins v. Secretary of HHS*, No. 99-382V, 2009 WL 3319818, at *21, *25 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff'd by unpublished order* (Fed. Cl. Dec. 10, 2009); *Lamar v. Secretary of HHS*, No. 99-584V, 2008 WL 3845157, at *14 (Fed. Cl. Spec. Mstr. July 30, 2008); *Gabbard v. Secretary of HHS*, No. 99-451V, 2009 WL 1456434, at *5-7 (Fed. Cl. Spec. Mstr. Apr. 30, 2009); *Duncan v. Secretary of HHS*, No. 99-455V, 2008 WL 2465811 at *2-3 (Fed. Cl. Spec. Mstr. May 30, 2008), *aff'd*, 2008 WL 4743493 (Aug. 4, 2008); *Drost v. Secretary of HHS*, No. 01-502V, 2010 WL 3291933, at *8-9 (Fed. Cl. Spec. Mstr. July 30, 2010); *Borden v. Secretary of HHS*, No. 90-1169V, 1992 WL 78691, at *1 (Cl. Ct. Spec. Mstr. Mar. 31, 1992).

I note also that a number of other billing entries from this period also appear to describe paralegal work involving scheduling matters, including:

5-29-07	.2 hour	"Email from Ron re SC on Thursday; check schedule and reschedule other SC"
5-30-07	.1 hour	"PC with Don Palmer about meeting at Court of Claims"
6-3-07	.1 hour	"Email from Tom re Cedillo prep call"

[7]There is no evidence in this case concerning what a reasonable rate for paralegal work in the Washington, D.C. area (where Mr. Shoemaker works) would have been for 2007 work. However, in two recent decisions, one of my colleagues found that work performed by one of Mr. Shoemaker's associate attorneys was paralegal in nature, and therefore determined a paralegal rate for that attorney's work. In those cases, Special Master Moran awarded $105 per hour for such work performed prior to 2006, and $125 per hour for such work performed in 2007. *Turpin v. Secretary of HHS*, No. 99-535V, 2008 WL 5747914, at *6-8 (Fed. Cl. Spec. Mstr. Dec. 23, 2008); *Drost v. Secretary of HHS*, No. 01-502V, 2010 WL 3291933, at *7-8 (Fed. Cl. Spec. Mstr. July 30, 2010).

As Special Master Moran wrote in *Turpin*, the rates that he awarded in that case may be "a little high" for paralegal work (2008 WL 7547914 at *7), but I find the $125 rate for 2007 to be reasonable for the paralegal-level work performed by Mr. Shoemaker in this case.

6-3-07	.1 hour	"Email to Tom re availability for conf. call"
6-10-07	.1 hour	"Email from Altom re tomorrow's schedule"
6-10-07	.1 hour	"Email from Altom re tomorrow"

Thus, an additional .7 hours will be subtracted from the "attorney hours" category, and compensated instead at a paralegal rate.

2. Vague description of work

Another problem with Mr. Shoemaker's billing for the pre-trial period, respondent has argued, is the *lack of specificity* concerning exactly what services he performed during each period billed. For example, there are four entries stating merely, "hearing prep; work on literature and organizing materials for cross," that are dated June 6, 7, 8, and 9, of 2007. These billing records could have stated that Mr. Shoemaker was analyzing the expert report or medical literature filed by a certain one of respondent's experts, for example, but no such specificity was offered. This lack of specificity makes it difficult to judge the reasonableness of the hours expended. Further, it makes it impossible to determine whether Mr. Shoemaker was engaging in actual attorney work, or engaging at times in organizational and scheduling tasks that amount to paralegal work.

As another example, Mr. Shoemaker during this period billed for writing and answering numerous e-mails. Again, it is impossible to determine whether Mr. Shoemaker was engaging in actual attorney work, or instead engaging in organizational and scheduling tasks that amount to paralegal work.

The Vaccine Act caselaw indicates that when an attorney's billing entries are vague and do not describe the attorney's work adequately, a special master has discretion to reduce the claim in some appropriate fashion, such as by denying compensation for all or some portion of the hours vaguely described. See, *e.g.*, *Savin v. Secretary of HHS*, 85 Fed. Cl. 313, 316-17 (2008), *affirming Savin v. Secretary of HHS*, No. 99-537V, 2008 WL 2066611 at *2-3 (Fed. Cl. Spec. Mstr. Apr. 22, 2008); *Riggins v. Secretary of HHS*, No. 99-382V, 2009 WL 3319818, at *24 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff'd by unpublished order* (Fed. Cl. Dec. 10, 2009); *Lamar v. Secretary of HHS*, No. 99-584V, 2008 WL 3845157, at *16 (Fed. Cl. Spec. Mstr. July 30, 2008); *Jeffries v. Secretary of HHS*, No. 99-670V, 2006 WL 3903710, at *9 (Fed. Cl. Spec. Mstr. Dec. 15, 2006); *Densmore v. Secretary of HHS*, No. 99-588V, 2006 WL 5668063, at *4-5 (Fed. Cl. Spec. Mstr. Aug. 14, 2006).

In this particular case, I will not, as a result of this vague description of work for much of the pre-trial period, *wholly deny* compensation for any of the hours claimed. However, it seems likely that at least some of the vaguely-described hours involved some paralegal-level work *mixed in* with attorney work. Accordingly, for the overall pre-trial period, I will subtract another five hours from the attorney category (approximately 9% of the total attorney hours claimed for this period), and compensate those hours at the paralegal rate.

3. Work not clearly related to trial

Additionally, some of the billing entries do not seem to describe work that actually advanced the Cedillos' case in any way, as far as I can tell. Thus, I will not compensate those claimed hours at all. Specifically, I deduct .3 hours for "Review Transcript" on June 6, 2007 (not clear what transcript) and .2 hours for "Review David Kirby comments" on June 8, 2007 (not clear how comments of David Kirby, a journalist, relate to trial issues).

4. Summary for pre-trial period

There were 58.7 hours claimed for this period. Of those hours, 8.7 are subtracted from the "attorney rate" group, and instead compensated at a paralegal rate (see pp. 10-11 above). Also, .5 hours are deducted entirely (see this page above). This leaves 49.5 hours at the attorney rate, and 8.7 hours at the paralegal rate.

C. Trial period

1. Mr. Shoemaker's general role during the trial

Analysis of the reasonableness of Mr. Shoemaker's hours billed for the period of trial (June 11 through June 26, 2007) is a closer question. I am keenly aware, of course, that other attorneys did the primary work on the petitioners' behalf during the *Cedillo* trial. Attorney Sylvia Chin-Caplan acted as "lead counsel," handling the largest share of the actual examination and cross-examination of witnesses. Attorney Thomas Powers also participated substantially in witness examination. Attorney Kevin Conway, a law partner of Ms. Chin-Caplan, clearly worked closely with her throughout the trial as well. And attorney Sheila Bjorklund also billed a number of hours for assisting the petitioners' main trial attorneys during the trial period. In my interim fees award made in this case on March 11, 2009, I awarded considerable compensation for the trial work of attorneys Chin-Caplan, Conway, and Powers, and in my award issued on November 8, 2010, I awarded fees for certain services of Ms. Bjorklund during the *Cedillo* trial. I realize, of course, that it is highly unusual for five different attorneys representing one side to bill substantial hours for trial work in a single trial.

However, this is a highly unusual case, in two different and important respects. First, in my Decision concerning the merits of this case, filed on February 12, 2009, I described at length the *massive amount* of the evidence in this *Cedillo* case, as well as the *extreme complexity* of the scientific issues. (2009 WL at 14-15.) Clearly, there was enough material to be mastered in this case to productively use the time of multiple attorneys, by both sides.

The second factor is the *extreme importance* of this case. This *Cedillo* case was the initial "test case" in the Omnibus Autism Proceeding, in which the petitioners were advancing the general theory that the MMR (measles-mumps-rubella) vaccine and/or thimerosal-containing vaccines can contribute to the causation of autism. The outcome of the case would influence the fates of the cases of approximately 5,000 different autistic children, who all filed petitions alleging that their autistic conditions were vaccine-caused.

In these extremely unusual circumstances, unique in the history of the Vaccine Act, I find that it was reasonable that Mr. Shoemaker acted, in effect, as an additional attorney member of the petitioners' trial team during the trial. The extreme complexity and importance of the case warranted his participation as well as that of the other attorneys.

In this regard, I note that respondent has urged that it is not reasonable to compensate Mr. Shoemaker for all of the time that he spent on the trial, in light of the fact that his participation was in *addition* to that of the other attorneys described above. I do find this to be a difficult "judgment call," as to which reasonable minds could differ. But because of the unique importance and complexity of the *Cedillo* trial, described above, I find it reasonable to give the participating petitioners' counsel the "benefit of the doubt" concerning this issue.[8] I find it reasonable to compensate Mr. Shoemaker for a substantial portion of the hours claimed during the period of the *Cedillo* trial.

2. Excessive hours billed

However, during the trial period, from June 11 through 26, 2007, Mr. Shoemaker billed an extremely large number of hours. In the billing record, the entries for each of the eleven relatively full days of trial state "Hearing in Cedillo case; meetings before and after; preparation back at the office in the evening." The amount of time billed for those days was fourteen hours for eight of the days, twelve hours on one occasion, ten on another, and 18 hours for one single day, June 12. Taken together, these entries amount to a total of 152 hours, billing at a rate of $310 per hour, which would equal $47,120 in compensation for just those 11 trial days.

It should be noted that the duration of the actual hearing on each of these 11 days of trial varied considerably. For example, according to the transcript, on June 11, the hearing lasted 8.3 hours; on June 14, it lasted 4.25 hours; and, on the longest day, June 18, it lasted 10.5 hours. Yet Mr. Shoemaker's billing for these days was recorded uniformly as 14 hours for each day. As respondent notes[9], in one instance, on June 12, the hearing lasted 8.5 hours, while Mr. Shoemaker's billing for the day totaled 18 hours.

Respondent pointed out that Mr. Shoemaker's hours billed during the trial period were similar to those billed by Sylvia Chin-Caplan, the "lead counsel" in the case. (Response, p. 49.) However, to determine whether the hours Mr. Shoemaker billed were excessive, it is far more relevant to compare his claim with those of the two participating attorneys who were *not* serving as lead counsel; that is, Kevin Conway and Thomas Powers. A close examination of the billing records reveals a pattern in which Mr. Shoemaker consistently billed significantly longer hours than those other two counsel.

---

[8]It is noteworthy that the respondent also utilized the services of a number of different attorneys during the trial.

[9]Response, p. 49, n 93.

Mr. Conway, during the eleven full days of the trial billed[10] a total of ten hours per day on six occasions; twelve hours per day on three occasions; thirteen hours on one occasion; and 10.5 hours on one occasion. Mr. Powers was also a very active participant in the trial, participating in witness examination and closing argument. He billed[11] a total of ten hours per day on five occasions, but on six of the 11 full trial days, he billed for 9.5 hours or less.

The final, twelfth day of the trial, June 26, 2007, took only one hour of actual trial time, including brief closing argument. Mr. Powers billed three hours for his participation that day, including his closing statement. Mr. Conway also billed three hours on that day, while Ms. Chin-Caplan billed 2.4 hours. However, on that same day, Mr. Shoemaker billed[12] four hours for his participation. Thus, on the final day of trial, Mr. Shoemaker billed a significantly larger amount of time than the three lead counsel.

This comparison of billing and record-keeping practices among counsel who were active participants in the Cedillo hearing illustrates the "billing judgment" of the various counsel. The amount of time that was *actually* expended is not necessarily the same amount of time that was *reasonably* expended. *See Copeland v. Marshall*, 641 F.2d 880 (D.C.Cir.1980). The Supreme Court observed in *Hensley v. Eckerhart* that "[i]n the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours 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 434 (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C.Cir.1980) (en banc)) (emphasis in original). Therefore, "[t]he applicant should exercise 'billing judgment' with respect to hours worked." *Id.* at 437.

In this situation, where Mr. Shoemaker was a member of the trial team, but not lead counsel and not even a secondary participant in actual witness examination or argument, I conclude that the number of hours billed by Mr. Shoemaker during the trial period did not reflect appropriate "billing judgment," and exceeded a reasonable amount.[13] I find it appropriate, rather, to compensate him for

---

[10]Mr. Conway's billing record during the *Cedillo* hearing is intermingled with that of Ms. Chin-Caplan, in Petitioners' Application, Tab A, pp. 97-102

[11]Mr. Powers' billing record during the Cedillo hearing is located in Petitioners' Application, Tab E, pp. 454-60.

[12]Mr. Shoemaker's billing record is located in Petitioners' Application, Tab I, pp. 503-509.

[13]I note that in a number of prior Vaccine Act cases, special masters or judges have concluded that Mr. Shoemaker billed an excessive number of hours, and/or displayed a lack of "billing judgment." *Riggins v. Secretary of HHS*, 2009 WL 3319818, at *5-6 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff'd by unpublished order* (Fed. Cl. Dec. 10, 2009) ("[Mr. Shoemaker] has a history of failing to monitor the fees and costs associated with his cases; this poor judgment has been noted [in many Vaccine Act cases]; * * * the instant fees and costs submission represents the height of unreasonableness"); *Savin v. Secretary of HHS*, 85 Fed. Cl. 313, 316-17 (2008), *affirming Savin v. Secretary of HHS*, No. 99-537V, 2008 WL 2066611 at *2 (Fed.Cl.Spec.Mstr. Apr. 22, 2008); *Ray*
(continued...)

a number of hours similar to the hours billed by the two attorneys who participated actively on the trial team, but were, like Mr. Shoemaker, not acting as "lead counsel." I refer, of course, to Mr. Powers and Mr. Conway, whose billings for the trial period are described above. Looking to the hours billed by those two attorneys, I find it reasonable to compensate Mr. Shoemaker for ten hours per day for the eleven relatively full trial days, and for three hours for the final very short trial day.

3. Summary for trial period

For the reasons set forth above, I will compensate Mr. Shoemaker for 113 hours for the 12 days of trial, plus the 7.7 hours claimed for the weekend days of June 16, 17, and 23, for a total of 120.7 hours for the trial period.

D. Post-trial period

Mr. Shoemaker also billed three hours for the post-trial period. (Pet. App., Tab. I, pp. 5-6.) I will deny compensation for the hours billed for June 30 and July 9, 2007, because it is not clear from the face of the billing record how those hours contributed to advancing the Cedillos' claim. I will also deny the claim for April 4, 2008, since I have already granted one hour of time for Ms. Gentry's work on the fee application, and see no justification for another ½ hour for "review" by Mr. Shoemaker. I will allow the .2 hours claimed for July 6, 2007, but at a paralegal rate.

---

[13](...continued)
v. Secretary of HHS, No. 04-184V, 2006 WL 1006587 at *10-11 (Fed.Cl.Spec.Mstr. Mar. 30, 2006); *Duncan v. Secretary of HHS*, No. 99-455V, 2008 WL 2465811 at *5-6 (Fed.Cl.Spec.Mstr. May 30, 2008), *aff'd* 2008 WL 4743493 (Fed. Cl. Aug 4, 2008); *Densmore v. Secretary of HHS*, No. 99-588V, 2006 WL 5668063, at *4-5 (Fed.Cl.Spec.Mstr. Aug. 14, 2006); *Hamrick v. Secretary of HHS*, No. 99-683V, 2007 WL 4793152, at *8-9 (Fed.Cl.Spec.Mstr. Nov. 19, 2008); *Turner v. Secretary of HHS*, No. 99-544V, 2007 WL 4410030 at *12 (Fed.Cl.Spec.Mstr. Nov. 30, 2007); *Turner v. Secretary of HHS*, No. 99-544V, 2007 WL 5180524, at *4 (Fed.Cl.Spec.Mstr. Aug. 31, 2007); *Melbourne v. Secretary of HHS*, No. 99-694V, 2007 WL 2020084, at *7-9 (Fed.Cl.Spec.Mstr. June 25, 2007); *Jeffries v. Secretary of HHS*, No. 99-670V, 2006 WL 3903710, at *9-12 (Fed.Cl.Spec.Mstr. Dec. 15, 2006); *Beatty v. Secretary of HHS*, No. 98-911V, 2003 WL 21439671, at *3 (Fed.Cl.Spec.Mstr. Mar. 17, 2003); *Gabbard v. Secretary of HHS*, No. 99-451V, 2009 WL 1456434, at *5-7 (Fed.Cl.Spec.Mstr. Aug 30, 2009); *Drost v. Secretary of HHS*, No. 01-502V, 2010 WL 3291933, at *9-10 (Fed.Cl.Spec.Mstr. July 30, 2010); *Stott v. Secretary of HHS*, No. 02-192V, 2006 WL 2457404, at *3 (Fed.Cl.Spec.Mstr. July 31, 2006).

VIII

SUMMARY OF FEES AND COSTS AWARDED

A. Mr. Shoemaker

1. Hours allowed at attorney rate

Pre-trial period	49.5
Trial period	120.7
	170.2 hours x $310 per hour = $52,762

2. Hours allowed at paralegal rate

Pre-trial period	8.7
Post-trial period	.2
	8.9 hours x $125 per hour = $1,112.50

B. Ms. Gentry

1 hour x $230 per hour = $230

C. Costs

$85

D. Total award for Shoemaker and Associates

($52.762) plus ($1,112.50) plus ($230) plus ($85) = $54,189.50

IX

CONCLUSION

Pursuant to 42 U.S.C. § 30011-15, I hereby award a lump sum of $54,189.50, to be awarded in the form of a check payable jointly to petitioners and their counsel of record. This amount is to be promptly forwarded to the Shoemaker and Associates firm.

In the absence of a timely-filed motion for review of this Decision, the Clerk of this court shall enter judgment accordingly.

/s/ George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master