In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 06-287 V
Filed: October 17, 2011
To Be Published

WILLIAM R. STEWART and LEANOR SOTELO, on behalf of WILLIAM STEWART-SOTELO, a minor,	*	
Petitioners,	*	Attorneys' Fees and Costs; *Avera*; *Davis County* exception; Laffey Matrix; prior civil litigation; *Perdue v. Sonny A.*
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Richard Gage, Cheyenne, WY, for petitioners.
Katherine C. Esposito, Ann D. Martin, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING ATTORNEYS' FEES AND COSTS[1]

On April 10, 2006, William Stewart and Leanor Sotelo, on behalf of their son, William Stewart-Sotelo (hereinafter "William"), filed a petition for compensation under the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-10–34 (2006). An entitlement hearing was held on December 1, 2006. The undersigned ruled for petitioners on the issue of entitlement. *Stewart v. Sec'y of HHS*, No. 06-287V, 2007 WL 1032377 (Fed. Cl. Spec. Mstr. Mar. 19, 2007). Petitioners were awarded damages in an unpublished decision filed on July 23, 2008.

On August 5, 2008, petitioners filed a motion for attorneys' fees and costs. On August 22, 2008, respondent raised objections to petitioners' motion, and thus began extensive filings

[1] Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the categories listed above, the special master shall redact such material from public access.

from both parties on this phase of the case. Petitioners moved for the awarding of interim attorneys' fees and costs on March 30, 2009. More filings from both parties followed. On May 17, 2010, the undersigned awarded interim attorneys' fees and costs totaling $77,036.21 based on an undisputed amount, or irreducible minimum. *Stewart v. Sec'y of HHS*, No. 06-287V, 2010 WL 2342467, at *1 (Fed. Cl. Spec. Mstr. May 17, 2010). Petitioners' attorney Richard Gage received $200.00 an hour for 45.667 hours in 2006, 66.083 hours in 2007, and 34.75 hours through July 21, 2008. Respondent did not agree to any hours for Mr. Gage in 2009. His total fees in the interim award were $29,300.00. His costs in the interim award were $20,406.47. Petitioners' fees were $20,509.74. The attorney who initially represented petitioners, T. Christopher Pinedo, was awarded $200.00 an hour for 34.1 hours of work, amounting to $6,820.00 in attorneys' fees.

Petitioners' counsel Mr. Gage requested the undersigned wait before deciding the remainder of attorneys' fees and costs in this case until the Federal Circuit decided three pending attorneys' fees and costs cases: *Hall*, *Masias*, and *Rodriguez*. Petitioners' attorney in the instant action, Mr. Gage, argued *Hall*. His former partner, Robert T. Moxley, who also practices in Cheyenne, WY, argued *Masias*. The Federal Circuit issued *Hall*, *Masias*, and *Rodriguez* in April, March, and February 2011, respectively.

In *Hall v. Sec'y of HHS*, 640 F.3d 1351 (Fed. Cir. 2011), Mr. Gage argued on behalf of his client that the special master wrongly awarded him his local hourly rate instead of the forum hourly rate. The Federal Circuit rejected petitioner's arguments and affirmed the local hourly rate award. *Id.* at 1356-57. Reviewing the special master's application of the *Davis County* exception,[2] the Federal Circuit found the holding that there was a very significant difference between the forum hourly rate of $350.00 and Mr. Gage's local hourly rate of $220.00 to be within the special master's discretion. *Id.* at 1357 (noting that the "special master is also intimately familiar with the facts necessary to make the very significant difference determination;" id. at 1356-57).

In *Masias v. Sec'y of HHS*, 634 F.3d 1283 (Fed. Cir. 2011), Mr. Moxley, the same attorney who appeared for petitioners in *Avera v. Sec'y of HHS*, 515 F.3d 1343 (Fed. Cir. 2008), returned to the Federal Circuit to argue on behalf of his client that the Federal Circuit wrongly decided *Avera*. *Masias*, 634 F.3d at 1288. The court stated that *Avera* was thorough, well-reasoned, and remains binding precedent. *Id.* Accordingly, the court affirmed the special master's award based on an hourly local rate of $160.00 to $220.00. *Id.* at 1286, 1288 (affirming the application of the *Davis County* exception after comparison of Mr. Moxley's likely hourly forum rate of $350.00 to his local rate and the finding a very significant difference). The Federal Circuit also rejected Mr. Moxley's argument, on behalf of his client, that either Laffey Matrix[3]

[2] *Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. U.S. Envtl. Prot. Agency*, 169 F.3d 755,758 (DC Cir. 1999). The *Davis County* exception applies when an attorney performs the bulk of the work outside of the forum, i.e., Washington, DC, and the attorney's rates in the local market are substantially lower than the forum rates. *Avera v. Sec'y of HHS*, 515 F.3d 1343, 1348 (Fed. Cir. 2008). In such a case, the attorney would receive an award based on the local rates. *Id.*

[3] The Laffey Matrix is based on hourly rates allowed by the U.S. District Court for the District of Columbia in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (DC Cir. 1984), *overruled by Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1525 (DC Cir. 1988) ("We do not intend, by this remand, to diminish the value of the fee schedule compiled by the District Court in *Laffey*. Indeed, we commend its use for the year in which it applies.")

rates or a "federal specialty" rate should apply because Vaccine Act litigation is complex. *Id.* at 1290-92.

In *Rodriguez v. Sec'y of HHS*, 632 F.3d 1381 (Fed. Cir. 2011), petitioner's counsel Mr. John F. McHugh, who practices in New York City, sought Laffey Matrix fees. The Federal Circuit affirmed the special master's reasoning that vaccine litigation is not analogous to complex federal litigation and thus Laffey Matrix rates do not apply in Vaccine Act cases. *Id.* at 1385. The court acknowledged that:

> The Vaccine Act provides petitioners with an alternative to the traditional civil forum, applies relaxed legal standards of causation, and has eased procedural rules compared to other federal civil litigation. Vaccine Act proceedings . . . involve no discovery disputes, do not apply the rules of evidence, and are tried in informal, streamlined proceedings before special masters well-versed in the issues commonly repeated in Vaccine Act cases . . . .

Id. If a vaccine case were particularly challenging, the Federal Circuit stated that fact would be reflected in the number of hours expended, not the hourly rate sought. *Id.*

In April 2011, Mr. Moxley informed the undersigned during a telephonic status conference in another case that he was pursuing enhanced attorneys' fees under the recent holding of the United States Supreme Court in *Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010), in which the Supreme Court found that the presumptive lodestar fee could be enhanced only in rare and extraordinary circumstances, although the attorneys seeking enhancement in that case had not yet satisfied the criteria for enhancement. 130 S. Ct. 1662, 559 U.S. ___ (2010). The undersigned inquired of Mr. Gage in a communication from the undersigned's law clerk if he, like Mr. Moxley, believed that *Perdue* entitled him to enhanced attorneys' fees. Mr. Gage answered in the affirmative and both parties briefed whether *Perdue* would affect Mr. Gage's attorneys' fees in this case. Mr. Gage filed petitioners' brief on June 3, 2011. Respondent filed her responsive brief on July 5, 2011. Both parties have now had an opportunity to brief this issue.

After considering these memoranda, the undersigned holds that *Perdue* does not enhance petitioners' attorney's hourly rates.

I. Procedural History of Request for Attorneys' Fees and Costs

Prior to the issuance of the Federal Circuit's decisions in *Hall*, *Masias*, and *Rodriguez*, there was considerable procedural history involving attorneys' fees and costs in this case. At the time petitioners filed their petition, Mr. T. Christopher Pinedo was their attorney of record and was practicing in Corpus Christi, TX. On May 17, 2006, the court received oral notification that Mr. Pinedo planned to transfer the case to Mr. Gage. The actual notification of the transfer of this case was received by the court on June 19, 2006, and became effective on June 27, 2006.

In their August 5, 2008, initial motion for attorneys' fees and costs, petitioners requested a total of $287,948.06. The amounts were as follows:

	Fees	Costs
Richard Gage	$47,361.00	$20,406.47
T. Christopher Pinedo	$169,400.00	$29,747.93
R. Louis Branton (sic)	--	$522.92
Petitioners	--	$20,509.74

Petitioners originally brought their case to the Bratton Firm. In the motion for attorneys' fees and costs before this court, Mr. Bratton requested $522.92 for a half-hour of investigative work ($47.50) and filing fees for the civil lawsuit, *William R. Stewart et al. v. Merck & Co., Inc. et al.* which totaled $447.00.[4] Pet. Fee App., Tab G. Soon thereafter, the case was transferred from the Bratton Firm to the Watts law firm where Mr. Pinedo was employed at the time. The majority of Mr. Pinedo's attorneys' fees and costs submitted to this court were associated with his representation of petitioners in the civil suit against Merck Pharmaceutical Company ("Merck").[5] Pet. Fee App., Tab F. Mr. Pinedo billed his services at $500.00 an hour.

Respondent filed an objection to petitioners' motion for attorneys' fees and costs. Respondent characterized the amounts incurred during petitioners' prior civil suit against Merck as not compensable under the Vaccine Act and noted that Mr. Pinedo's hourly fee was unreasonably high. Respondent also took issue with the hourly rates for Mr. Gage, citing them as unreasonably high, and noted miscalculation of his fees. Both sides continued to file information to substantiate and refute the motion, and status conferences were held in an effort to get the parties to settle this issue. On September 15, 2008, Mr. Gage submitted an invoice for $2,665 in fees and $23.81 in costs for his work on the attorneys' fee issues subsequent to his August 7, 2008 filing through September 12, 2008. Pet. Resp. to Resp't Resp., Tab E.

Petitioners moved for an award of interim attorneys' fees and costs on March 30, 2009. However, petitioners did not request a specific amount. Mr. Gage filed Petitioners' Proposed "Irreducible Minimum" Calculation on April 3, 2009. Again, Mr. Gage did not specify an amount that he should be paid. Instead, he wrote that the undersigned should look to the hourly rates paid him in either *Heflin v. Sec'y of HHS*,[6] No. 04-1541, 2008 WL 5024923 (Fed. Cl. Spec. Mstr. Oct. 8, 2008) (Mr. Gage as attorney; this was an Order requesting responses from counsel), or *Kuttner v. Sec'y of HHS*,[7] No. 06-195, 2009 WL 256447 (Fed. Cl. Spec. Mstr. Jan. 16, 2009) (Mr. Webb, an Idaho attorney, as counsel, in a decision before another special master), to arrive at the irreducible minimum amount for interim fees in this case. Mr. Gage did not agree to the reasonableness of those rates, or to a reduction of Mr. Pinedo's bill by proposing that the rates

[4] The suit was filed in the District Court of Travis County in Austin, TX on August 29, 2003.

[5] At the time the civil suit was filed, the Hepatitis A vaccine was not included in the Vaccine Injury Table and, thus, the civil court was petitioners' sole forum for recourse. Hepatitis A was added to the Vaccine Injury Table effective December 1, 2004. 69 Fed. Reg. 69945 (Dec. 1, 2004); 42 C.F.R. §100.3. With the addition of Hepatitis A to the Table in 2004, petitioners moved to terminate their civil suit against Merck on March 20, 2006 and filed their petition under the Vaccine Act on April 10, 2006.

[6] The hourly rates for attorneys' fees in *Heflin* for 2006, 2007 and 2008 were $200, $225, and $250, respectively.

[7] The hourly rates for attorneys' fees in *Kuttner* for 2006, 2007 and 2008 were $200, $220, and $240, respectively.

from either of those cases be used. On April 7, 2009, petitioners revised downward the interim fees request for Mr. Pinedo to $8,525.00. On May 14, 2009, respondent filed her objection to the payment of interim fees and costs, but, in the alternative, noted no objection to the payment of a total award of $78,741.21 in attorneys' fees and costs for Mr. Gage. Respondent revised downward Mr. Gage's hours submitted and suggested an hourly rate of $200.00 to calculate his total fees from 2006 until July 21, 2008. Respondent did not agree to the costs of Mr. Bratton or Mr. Pinedo.

Mr. Gage contacted the undersigned's chambers, and at his request, a status conference was held on March 17, 2010. The undersigned offered the parties a proposal to settle attorneys' fees and costs and strongly encouraged the parties to work together on resolving this issue. Mr. Gage filed a status report and a supplemental attorneys' fees request on April 2, 2010.[8] The additional request included 18.8 hours billed in 2009, and 10.4 hours billed in 2010, all at a rate of $410.00 per hour. Mr. Gage requested that the guardianship expense be considered as well as Mr. Pinedo's September 12, 2008 and March 2, 2009 filings before a final decision was rendered. The undersigned issued an Order which gave respondent until April 16, 2010, to file a response to petitioners' filings. On April 9, 2010, petitioners filed an affidavit from Stephen Kline, an attorney in Cheyenne, WY, which stated that his "client paid Richard Gage's fee at a rate of $300 per hour . . . ."

Respondent filed her response to petitioners' April 2, 2010 filings, objecting to petitioners' filing "nearly $12,000.00 in fees at this point, because the briefing on fees issues was otherwise complete in this matter." Resp't Resp. to Pet. at 2, Apr. 14, 2010. Respondent termed the additional submission unreasonable, and noted that respondent's attempt to contact petitioners' counsel regarding a proposed resolution of the amount at issue was met with "no response." *Id.*

On April 26, 2010, petitioners filed a memorandum on the application of the decision on attorneys' fees and costs in *Hall v. Sec'y of HHS*, 93 Fed. Cl. 239 (2010), to the instant case.[9] Respondent filed a response to petitioners' April 26, 2010 filing. The undersigned issued the interim attorneys' fees and costs decision in this case on May 17, 2010.

In the undersigned's decision on interim attorneys' fees and costs, the undersigned awarded petitioners a total of $49,706.47 for Mr. Gage's fees and costs, comprised of $29,300.00

[8] Mr. Gage's submission did not add the total hours in 2009 or 2010, and did not state the amount he sought in attorneys' fees. A note appears on the time sheets in the submission that Mr. Gage's rate per hour from 06/31/09 to 06/31/10 was $410.00. However the entries from 2009 were also billed at the $410.00 rate. As submitted, the additional fee request totaled $11,880.00.

[9] In *Hall*, Judge Bush affirmed Special Master Moran's decision awarding attorneys' fees and costs, noting that there would be a "very significant difference" when the difference between the forum rate and local rate was 50 percent or more. *Hall v. Sec'y of HHS*, 93 Fed. Cl. 239, 249 & n.13 (2010). Mr. Gage cited this footnote to establish a "50% rule" and illustrate that because the difference between the forum rate and the local rate was below 50 percent, it was not very significant, and he should be awarded forum rates. Pet.'s Mem.at 2, Apr. 26, 2010. Petitioner in *Hall* moved for reconsideration of Judge Bush's decision, which Judge Bush denied on June 3, 2010. Subsequently, petitioner in *Hall* appealed to the Federal Circuit. As mentioned earlier in this opinion, the Federal Circuit affirmed the finding that it was within the special master's discretion to find a very significant difference between the Washington, DC rate and the Cheyenne, WY rate. 640 F.3d at 1356.

for his fees and $20,406.47 for his costs. Mr. Pinedo received an interim award of $6,820.00 for his fees at a rate of $200.00 an hour for 34.1 hours. Mr. Pinedo received no interim award for his submitted costs. Mr. Bratton was not awarded anything in the interim decision. Petitioners were awarded all of their costs, $20.509.74. Both parties filed a joint notice not to seek review of the decision, and judgment was entered on May 28, 2010.

II. Discussion

This case presents five issues for resolution, which the undersigned addresses in the following order: (1) the fees Mr. Gage requested; (2) the fees Mr. Pinedo requested; (3) the costs Mr. Gage submitted; (4) the costs Mr. Pinedo submitted; and (5) the costs Mr. Bratton submitted.

A. Legal Standard for Attorneys' Fees and Costs

Section 15(e)(1) of the Vaccine Act permits the special master to award, as part of an award of compensation for a petition filed under section 300aa-11, an amount that covers "reasonable attorneys' fees" and "other costs." 42 U.S.C. § 300aa–15(e)(1). The fee-shifting provision under the Vaccine Act differs from most other fee-shifting statutes because petitioners need not prevail in the case-in-chief in order to receive fees and costs. When a petitioner does not prevail in the case-in-chief, a special master may award attorneys' fees and costs if petitioner brought the claim in "good faith" and with a "reasonable basis" to proceed. *Id.* The issues of good faith and a reasonable basis to proceed are presumed when a petitioner prevails, as petitioners did in this case. In such a posture, the sole question is reasonableness of the attorneys' fees and costs.

In every case, petitioner has the burden to demonstrate the reasonableness of the request for fees and costs. *Saunders v. Sec'y of HHS*, 26 Cl. Ct. 1221, 1226 (1992), *aff'd*, 25 F.3d 1031 (Fed. Cir. 1994). The special master has discretion to determine the reasonableness of the request based on the case law and a review of the submission. *See Perreira v. Sec'y of HHS*, 27 Fed. Cl. 29, 34 (1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994) ("The special master is afforded wide discretion in determining the reasonableness of costs, as well as attorneys' fees."). The special master may also use her experience to review a petition for fees. *Saxton v. Sec'y of HHS*, 3 F.3d 1517, 1519 (Fed. Cir. 1993).

The seminal discussion of Vaccine Act attorneys' fees and costs is *Avera*. As described in *Avera*, to determine attorneys' fees, the special master applies the two-step lodestar method by first multiplying the number of hours reasonably expended by a reasonable hourly rate. *Avera*, 515 F.3d at 1347-48 (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). The reasonable hourly rate is defined in *Avera* as the "prevailing 'market rate' . . . in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Avera*, 515 F.3d at 1348 (quoting *Blum*, 465 U.S. at 896 n.11). The second step of the lodestar method allows for an upward or downward adjustment to the fee award based on specific findings. *Id*.

In *Avera*, the Federal Circuit adopted the *Davis County* exception to the lodestar calculation when the bulk of an attorney's work was not performed in Washington, DC[10] and "there is a *very significant* difference" between the rates of the two fora. *Avera*, 515 F.3d at 1349 (quoting *Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. U.S. Envtl. Prot. Agency*, 169 F.3d 755, 758 (DC Cir. 1999)) (emphasis in *Davis*)). A very significant difference has been found to be as low as a 46 percent difference in compensation. *See Sabella v. Sec'y of HHS*, 2008 WL 4426040, at *5 (Fed. Cl. Spec. Mstr. Sept. 23, 2008), *aff'd in part, rev'd in part on other grounds*, 86 Fed. Cl. 201 (2009).

While the Federal Circuit in *Avera* held that, in general, the forum rate should be used in the lodestar calculation, 515 F.3d at 1349, the Federal Circuit left unresolved whether the Laffey Matrix could be used to establish an attorney's hourly rate in each proceeding in this Program, *id.* at 1350. The Federal Circuit in *Rodriguez* and *Masias* answered that unresolved question. Its decision in *Rodriguez* affirmed the special master's holding that Vaccine Act litigation does not involve complex civil litigation and the Laffey Matrix does not apply. 632 F.3d at 1385. The Federal Circuit repeated its view that Vaccine Act litigation does not involve complex civil litigation in *Masias*. 634 F.3d at 1288 & n.6. Petitioners' arguments in the instant action that Laffey Matrix rates apply and that Vaccine Act litigation is complex civil litigation are decisively refuted by the Federal Circuit's decisions in *Rodriguez* and *Masias*.

The Supreme Court decision in *Perdue v. Kenny A.*, 130 S. Ct. 1662, 559 U.S. ___, (2010), concerned the award of enhanced attorneys' fees under 42 U.S.C. § 1988 for a successful civil rights class action on behalf of children in the Georgia foster care system and their next friends. *Id.* at 1669. The federal district court awarded enhanced fees of 75 percent beyond the lodestar because the lodestar did not account for the fact that counsel for the class advanced case expenses of $1.7 million over a three-year period, they were not being paid on an ongoing basis, and their only ability to recover fees and expenses depended on their success in this civil rights action. *Id.* at 1670. Furthermore, the district court was impressed with class counsel's skills, commitment, dedication, and professionalism. *Id.* The district judge also noted that the results that class counsel obtained were extraordinary and that, after 58 years as a practicing attorney and federal judge, the court had never seen another case in which a plaintiff class had achieved such a favorable result on such a comprehensive scale. *Id.* (quotation and citation omitted). The fee enhancement added $4.5 million to the fee award. *Id.* The Eleventh Circuit affirmed. The Supreme Court reversed and remanded.

Justice Alito, on behalf of the majority, stated that the lodestar method is generally the favored approach to awarding attorneys' fees and costs. *Id.* at 1673. In fact, there is a "strong presumption" that the lodestar method produces a fee that is reasonable. *Id.* The Court noted that although it has never sustained an enhancement of a lodestar amount for performance, it has repeatedly held that enhancements may be awarded in rare and exceptional circumstances. *Id.*

[10] Initially, the undersigned in the instant action thought that the Federal Circuit must have meant by "the bulk of an attorney's work" the most important work the attorney did in a case, i.e., the hearing. Thus, if a hearing were held in DC, the attorney would be entitled to the forum rates. This interpretation is expressed in a published Order 2008 WL 5024924 (Fed. Cl. Spec. Mstr. 2008) with the proviso that respondent could file a brief persuading the undersigned that the Federal Circuit meant by "bulk of the work" the actual numerical hours. *Id.* at *10-11. Respondent did file such a brief, persuading the undersigned that numerical hours is exactly what the Federal Circuit meant by "bulk of the work" in *Avera*.

Novelty and complexity, however, may not be used as a basis for enhancement because those factors would be fully reflected in the number of billable hours. *Id.* He stated that counsel who claim that an enhancement to the lodestar is appropriate must specifically prove that the lodestar fee would not be adequate to attract competent counsel. *Id.* at 1674.

Justice Alito listed three rare circumstances which, if counsel provided specific proof, might justify an enhancement. First, an enhancement might be appropriate if the lodestar calculation did not adequately measure the attorney's true market value. This might occur if the hourly rate were determined by a formula taking into account only one factor such as the year of admission to the bar, or perhaps only a few similar factors. Counsel would have to provide specific proof linking the attorney's ability to a prevailing market rate that the lodestar did not reflect. *Id.* Secondly, an enhancement might be appropriate if the attorney spent an "extraordinary" amount of money in costs and the litigation were "exceptionally protracted." *Id.* The amount of enhancement must be calculated by an objective method such as applying a standard rate of interest to the qualifying outlays of expenses. *Id.* at 1674-75. Thirdly, an enhancement might be appropriate if there were exceptional delay in the payment of fees. An attorney in a section 1988 action understands that his or her fees will not come until the end of the action, if at all. An enhancement may be appropriate when an attorney assumes costs "in the face of unanticipated delay, particularly where the delay is unjustifiably caused by the defense." *Id.* at 1675. Calculating this enhancement would employ the same method as used in obtaining reimbursement for expenses where there is exceptional delay. *Id.*

The majority found that the district judge did not provide proper justification for the large enhancement the judge awarded, calling the 75 percent figure arbitrary. The enhancement increased the top rate for counsel to more than $866 per hour without an indication of what an appropriate figure for the relevant market was. *Id.* at 1675-76. The district judge also did not indicate that the delay in the case was outside the normal range expected in a section 1988 action. *Id.* at 1676. Finally, the judge made the award on a subjective basis, i.e., the impression of the judge that unnamed prior cases did not have counsel of such high caliber, in contradistinction to the objective approach of the lodestar method, and thus the judge's decision eliminated any meaningful appellate review. *Id.* at 1676.

B. Analysis

In petitioners' brief on the application of *Perdue* to the instant action, they state that all three of the bases for enhancement of attorneys' fees that Justice Alito listed as rare and extraordinary occasions to depart from the lodestar method apply in this case. Pet. Brief, p. 2. For the first basis, petitioners state Mr. Gage is currently being paid in the Vaccine Program at an hourly rate of $250.00. Petitioners state that "someone" determined that this represents Mr. Gage's hourly rate in Cheyenne, WY. *Id.* Petitioners state this is not Mr. Gage's hourly rate in Wyoming, although petitioners admit that Mr. Gage does most of his work on a contingency fee basis, not on an hourly basis. But when Mr. Gage does bill on an hourly rate, petitioners state he receives $300.00 per hour. *Id.* Petitioners claim that, after working in this Program for over 20 years and handling many hundreds of cases, Mr. Gage "is an expert in this Program with a national reputation." *Id.* Petitioners state that the $250.00 hourly rate does not compensate Mr. Gage's true market value. Therefore, he deserves an enhancement to his hourly rate. *Id.* at 3-4.

For the second basis, petitioners claim that an extraordinary outlay of expenses and exceptionally protracted litigation "are present in virtually all cases which are litigated and compensated in this Program" and clearly apply in the instant action. Petitioners admits that they began paying the costs of this case at the beginning, but stopped, and Mr. Gage then paid the costs. *Id.* at 3. For the third basis, petitioners state that an exceptional delay in payment "is true in all Vaccine Program cases and is true in this case." *Id.*

Appended to petitioners' brief are two affidavits. The first is from Stephen H. Kline, an attorney who defended a Fair Labor Standards Act (FLSA) case in Cheyenne opposite Mr. Gage and another attorney. The FLSA contains a fee-shifting provision, and Mr. Kline's client paid Mr. Gage's fee at an hourly rate of $300.00. Klein Aff., pp. 1,2. The second affidavit is from Roberta Ashkin, an attorney who defended a wrongful death case in Wyoming. Mr. Gage was local counsel and was paid an hourly rate of $300.00. Ashkin Aff., p. 1.

In Respondent's Response to Petitioners' Brief, respondent states that enhancement to the lodestar arises only in rare and exceptional cases, requiring specific evidence that the lodestar fee would be inadequate to attract competent counsel. Resp., p. 2. There was no extraordinary delay in this case. Petitioners filed their petition on April 10, 2006. A hearing was held eight months later on December 1, 2006. *Id.* at 4. Judgment entered on damages August 7, 2008. The remaining issue has been the battle over attorneys' fees and costs, resulting in an interim award of $77,036.21 on May 17, 2010, and the resulting balance of fees and costs to be decided. *Id.* at 5. Respondent remarks that the course of proceedings in the instant action related to entitlement and damages was typical of Vaccine Act cases. *Id.* This case does not fall within the category of the rare and exceptional cases about which the Supreme Court discussed in *Perdue*. *Id.* Respondent also notes that the special masters do not rely on one single factor such as years admitted to the bar or similar factors in determining the lodestar rate, indicating a method which undercuts petitioners' market value for his services. *Id.* at 6. Citing *Hall*, respondent states the Federal Circuit approved the special master's method for determining that Mr. Gage's hourly rate in Vaccine Act cases from 2006 to 2009 ranged from $220.00 to $240.00. *Id.* at 6-7. Respondent also comments that the two affidavits supporting Mr. Gage's effort to increase his hourly rate describe work performed in 2009 and 2010, whereas the instant action was terminated when judgment entered August 7, 2008. Moreover, neither affiant describes the type of work involved in FLSA or wrongful death cases and whether those cases are analogous to the work involved in a Vaccine Act case. *Id.* at 7 n.3.

Although Mr. Gage has considerable experience in the Vaccine Program, he is not unique as a vaccine attorney. There is nothing to distinguish him in any respect that would make his services more indispensable than any of the many other vaccine attorneys who are frequent counsel in this Program. Frequent counsel who come to mind are Mr. Altom Maglio, Mr. Curtis Webb, Ms. Anne Toale, Mr. F. John Caldwell, Ms. Diane Stadelnikas, Mr. Joseph Pepper, Mr. Clifford Shoemaker, Mr. Raymond Rodriguez, Mr. David Terzian, Ms. Christina Ciampolillo, Ms. Amy Fashano, Mr. Ronald Homer, Ms. Sylvia Chin-Caplan, Ms. Renee Gentry, Mr. Robert Moxley, Ms. Mari Bush, Mr. Brian Arnold, Mr. Michael McLaren, Ms. Sherry Drew, Ms. Lisa Roquemore, Ms. Sheila Bjorklund, Mr. Thomas Gallagher, Ms. Carol Gallagher, Mr. Paul Dannenberg, and Mr. John McHugh. These 25 attorneys, plus approximately 65 other attorneys listed on the court's vaccine attorney list, litigate these cases. An outlier such as Mr. Pinedo in

the instant action would be likely to hand off the case to someone with more experience in the Vaccine Program (as Mr. Pinedo did in referring the case to Mr. Gage), but there is no noticeable litigative weather vane pointing in Mr. Gage's direction to the exclusion of the 25 other vaccine attorneys the undersigned calls to mind on a moment's reflection.

As for extraordinary delay in the instant action, there was none. Petitioners filed a petition on April 10, 2006. Less than two months later, in an Order dated June 6, 2006, the undersigned described the medical records including treating physicians' opinions that hepatitis A vaccine caused the vaccinee's cerebellar ataxia, mentioned two Federal Circuit cases that would support petitioners prevailing, and suggested the parties settle. There was a short delay while Mr. Pinedo withdrew as petitioners' counsel and Mr. Gage substituted as petitioners' counsel. On July 27, 2006, the undersigned set a status conference with counsel for July 21, 2006, at 11:30 a.m. (EDT), after the undersigned's law clerk established that counsel were available on that date and at that time. Mr. Gage did not appear for the first status conference on July 21, 2006. He did appear for the next-scheduled status conference on August 31, 2006.

On September 8, 2006, Mr. Gage filed the supplemental expert opinion of petitioners' expert. By the next status conference on September 12, 2006, counsel were discussing the location of the entitlement hearing. On October 5, 2006, the undersigned issued a hearing order, setting the hearing for December 1, 2006. During the November 6, 2006 status conference, Mr. Gage stated he was going to try to settle the case the following week because that was when petitioners' life care planner Terry Arnold would have a damages figure for him. Respondent's counsel wanted a demand. Mr. Gage stated he had updated the records. Respondent's counsel stated Mr. Gage had not filed any recent neurology records. Obviously, this case was proceeding on two alternate tracks: entitlement hearing and settlement. On November 7, 2006, the undersigned issued an Order stating petitioners were to make a demand on respondent as soon as possible.

On November 21, 2006, the undersigned held a prehearing status conference. On December 1, 2006, the undersigned held a hearing with the vaccinee's father, petitioners' expert, and respondent's expert testifying. Certain items remained to be filed, including a videotape which both experts would need to see and about which they would write a report on whether the videotape showed neurologic injury. The expert reports were due at the end of January 2007. In addition, there were medical articles petitioners' expert mentioned which petitioners had yet to file, and answers to Mr. Gage's questions from a treating physician to file. The undersigned made the same treating physician available to respondent if respondent wanted to question him or take his deposition. These items were filed in January and February 2007.

On February 26, 2007, petitioners moved for a decision on the record. On February 28, 2007, the undersigned issued an Order after a status conference on February 27, 2007, and gave respondent until March 2, 2007 to file a status report indicating whether she was going to depose the vaccinee's treating neurologist. On March 2, 2007, respondent filed a status report stating she did intend to take the treating neurologist's deposition. The undersigned issued an Order on March 5, 2007, recounting the status conference of March 2, 2007, and noting that a deposition of the treating neurologist would necessitate additional testimony from respondent's neurological expert. The undersigned held another status conference on March 7, 2007, during which

respondent indicated she wanted to respond to petitioners' motion for a ruling on the record. On March 9, 2007, Mr. Gage filed petitioners' objections to respondent's reopening the record to take the treating neurologist's testimony. On March 12, 2007, respondent filed a 21-page response to petitioners' motion for a decision on the record or, in the alternative, for the scheduling of further testimony.

On March 19, 2007, the undersigned issued a published ruling on entitlement, holding that petitioners had prevailed. Also on March 19, 2007, the undersigned issued a damages order, listing elements of damages and setting a status conference for May 7, 2007, a deadline of June 18, 2007 for petitioners to file their life care plan, with respondent's life care plan due 45 days after petitioners' filing, and a status report due 60 days after that.

On March 23, 2007, petitioners filed updated pediatric notes, speech therapy notes, and a special education report. On March 29, 2007, petitioners filed supplemental speech therapy notes. On April 12, 2007, petitioners filed a school report to the parents and supplemental school records. At the request of respondent, the status conference set for May 7, 2007 was moved to May 4, 2007. During that status conference, respondent identified her life care planner as Suzanne Lubansky. Mr. Gage had not yet determined whether petitioners would make a claim for wage loss in the case. The life care planners were trying to set up a school visit. Petitioners were working on calculating past unreimbursed medical expenses. The next status conference was set for July 9, 2007. On July 9, 2007, counsel informed the undersigned that the life care planners had done their site visit and were waiting for a report from a neuropsychologist. Mr. Gage stated he wanted to wait to determine if petitioners would pursue a wage loss claim. He said there was no Medicaid lien involved in the instant action but he would get a Medicaid release from the State of Texas.

During the next status conference on August 29, 2007, Mr. Gage stated that he needed a Medicaid release from the State of Texas even though the vaccinee was not on Medicaid. The undersigned informed him that he did not need the release. He agreed not to seek the release. He was still waiting for the neuropsychologist's evaluation in order to complete petitioners' life care plan. The next status conference was held on October 1, 2007, during which Mr. Gage informed the undersigned and respondent's counsel that the neuropsychologist had not yet done the report because he was on vacation. The undersigned set another status conference for October 30, 2007. During that conference, Mr. Gage stated that petitioners had received the neuropsychological report. Mr. Gage intended to file petitioners' life care plan by the end of November 2007 (which was five and one-half months after the initial deadline the undersigned set in the damages order of March 19, 2007). He was not sure if he would make a demand for pain and suffering at the time he filed the life care plan. He thought he would make a claim for wage loss.

On December 4, 2007, petitioners filed their life care plan. On December 12, 2007, the undersigned held another status conference. Petitioners filed an economist's report on wage loss on December 14, 2007 and made a demand for pain and suffering. During the December 12th status conference, respondent's counsel stated her life care planner would be out of town at the end of January 2008 and the beginning of February 2008. The undersigned set a deadline for respondent's filing her life care plan on February 15, 2008.

On February 8, 2008, the Federal Circuit issued its decision in *Avera*, holding *inter alia* that petitioners may receive interim attorneys' fees and costs. Since this decision was published and Mr. Gage's partner Mr. Moxley had argued the case on behalf of his clients, there is no question that Mr. Gage was aware of this decision. If there had been any hardship, undue expenses, or an expectation of unusual delay in the instant action, Mr. Gage knew or should have known that he could have moved for interim fees in this case at this point.

On February 14, 2008, respondent moved for an extension of time to file her life care plan in response to petitioners' life care plan because questions arose that the vaccinee's neurologist would have to answer. Although respondent's counsel preferred a telephone conference, Mr. Gage preferred written interrogatories. Respondent supplied 11 interrogatories to Mr. Gage on February 8, 2008. Respondent requested 45 days for the doctor to answer the interrogatories and an extension of time until March 31, 2008 to file her life care plan. On February 22, 2008, the undersigned granted respondent's motion and rescheduled the status conference previously set for February 29, 2008 to April 7, 2008.

On March 28, 2008, respondent moved for a second extension of time because the doctor had not responded to the interrogatories that Mr. Gage sent him on behalf of respondent. Respondent moved to file her responsive life care plan or, in the alternative, a status report, on April 28, 2008, and to postpone the scheduled April 7th status conference. Mr. Gage did not object to this motion. On April 2, 2008, the undersigned granted respondent's motion and rescheduled the status conference until May 6, 2008.

On April 24 2008, respondent moved for a third extension of time because the doctor had not responded to the interrogatories that Mr. Gage sent him on behalf of respondent. Respondent moved to file her responsive life care plan or, in the alternative, a status report, on June 3, 2008. Mr. Gage did not object to this motion. On April 28, 2008, the undersigned granted respondent's motion, calling to Mr. Gage's attention that the neurologist's failure to respond to the interrogatories Mr. Gage had sent him on behalf of respondent was impeding petitioners' ability to resolve timely the outstanding damages issues, and canceled the May 6, 2008 status conference. The undersigned wanted Mr. Gage to persuade the neurologist to answer the interrogatories or more delay would result (and there had already been three months of delay because of the failure of the neurologist to respond to the interrogatories Mr. Gage sent him).

Just 11 days later, on May 9, 2008, Mr. Gage filed the neurologist's responses to respondent's interrogatories, as well as answers from petitioners' economist and another neurologist. On June 2, 2008, respondent filed her responsive life care plan. On June 6, 2008, the undersigned filed an Order setting a status conference for June 16, 2008.

At the June 16, 2008 status conference, Mr. Gage stated that the parties had nearly finished damages. Petitioners accepted respondent's life care plan, respondent's offer on pain and suffering, and respondent's offer on wage loss. There was only one item in dispute, which was the growth rate for future payments. The undersigned told the parties what the undersigned considered an acceptable growth rate. Respondent's counsel stated she was still waiting for Mr. Gage to provide her with past unreimbursable expense information. Mr. Gage said he had asked

the vaccinee's father to gather past unreimbursable expense information. Respondent's counsel stated she wanted in writing the fact there was no Texas Medicaid lien pending. The undersigned memorialized this in an Order dated June 17, 2008, and stated that as soon as respondent received the requested information, respondent would file a proffer.

On June 23, 2008, Mr. Gage filed petitioners' past unreimbursable expense information. On June 24, 2008, respondent filed her proffer. On July 16, 2008, Mr. Gage filed petitioners' acceptance of respondent's proffer and moved for a decision. On July 23, 2008, the undersigned issued a damages decision based on respondent's proffer. On July 25, 2008, the parties filed a joint notice not to seek review. On August 5, 2008, petitioners filed an application for attorneys' fees and costs. On August 7, 2008, judgment was entered on the damages decision.

On August 22, 2008, respondent responded to petitioners' application for attorneys' fees and costs. The rest of the history of this case concerns the battle over fees and costs. Mr. Gage moved for interim fees and costs on March 30, 2009. Mr. Gage's terming this motion as a motion for interim attorney's fees is actually a misnomer. There was nothing interim about it. The case in chief was over. Judgment had entered. What Mr. Gage wanted was an award of attorneys' fees and costs that were an irreducible minimum, i.e., attorneys' fees and costs to which respondent would not object. In *Avera*, 515 F.3d at 1352, the Federal Circuit stated similarly that Mr. Moxley's motion on behalf of his clients for attorneys' fees and costs after the case in chief was over was not a motion for an interim award (even though interim awards are permissible): "[T]here is no basis for an interim award here. . . . In this case, . . . appellants only sought interim fees pending appeal. . . ."

The undersigned issued an "interim" attorneys' fees and costs award in the instant action on May 17, 2010, with Mr. Gage requesting that a final decision on attorneys' fees and costs wait until the Federal Circuit decided *Hall*. The pendency of *Masias* and *Rodriguez* before the Federal Circuit was also of moment. Then, when Mr. Moxley communicated to the undersigned that he would pursue another argument in his search for an enhanced hourly rate stemming from the Supreme Court's decision in *Perdue*, the undersigned asked Mr. Gage to file a brief concerning the applicability *vel non* of *Perdue* to this case if he were similarly pursuing enhanced fees.

Contrary to Mr. Gage's assertion that fee enhancement is applicable to this case because this case satisfies all three criteria of *Perdue*, it satisfies none of them. First, there has been no extraordinary delay in the case in chief. Through frequent status conferences and an early hearing, with some delay due to the failure of doctors to provide reports and answer interrogatories promptly as well as Mr. Gage's delay in providing essential information, the case in chief was concluded in petitioners' favor with damages in a relatively quick period of time.

Secondly, there was no extraordinary amount of money in costs that Mr. Gage spent, beyond the fact that the litigation was not exceptionally protracted. Petitioners themselves expended $20,509.74 in costs which the undersigned awarded them in the "interim" fees and costs decision. Mr. Gage expended $20,406.47 as an irreducible minimum in costs which the undersigned awarded in the same "interim" fees and costs decision. In addition to those costs, the undersigned is now awarding Mr. Gage an additional $6,763.81 in costs in this decision. In

other words, the undersigned previously awarded all costs to petitioners and most costs to Mr. Gage in the "interim" award. The total is not an extraordinary amount, and most of the reimbursement of costs was not protracted.

Thirdly, if there has been any extraordinary delay in the payment of fees, it has arisen solely because Mr. Gage refused to accept the Federal Circuit's decision in *Avera* which obviously applied to him because it applied to his then-partner Mr. Moxley. There are two delays in the payment of attorneys' fees in this case. The first, until the "interim" award of fees and costs, arose because Mr. Gage would not accept the hourly rate affirmed in *Avera*. Principally to remunerate his clients for their $20,000.00 cost expenditure, Mr. Gage moved for "interim" fees and costs, and the undersigned granted them after the parties haggled back and forth. The second delay was occasioned by the triad of attorneys' fees decisions pending before the Federal Circuit (*Masias*, *Rodriguez*, and *Hall*) which included Mr. Gage as advocate in *Hall* and Mr. Moxley as advocate in *Masias*. The delay in issuing this opinion comes from Mr. Gage's request of the undersigned to wait for the Federal Circuit's decisions in those cases. As for responding to the effect *vel non* of *Perdue* on the award of attorneys' fees in these cases, once Mr. Moxley indicated interest in pursuing this line of argument, it was necessary to obtain the views of Mr. Gage since it was more prudent to decide the issue of the applicability of *Perdue* in this decision rather than to wait for an appeal and a remand to consider the issue at that point.

Justice Alito, in *Perdue*, mentioned an additional rare and exceptional circumstance in which an attorney's hourly rate might be enhanced above the lodestar rate: where there is superior attorney performance that the lodestar rate does not adequately take into account. 130 S. Ct. at 1674. To obtain this enhancement requires "specific evidence that the lodestar fee would not have been 'adequate to attract competent counsel'. . . . [citing *Blum*, at 465 U.S. at 897]." The Federal Circuit in *Masias* stated there is no federal specialty rate for Vaccine Act litigation in light of the fact that Vaccine Act cases do not constitute complex civil litigation. 634 F.2d at 1289-90. Mr. Gage in the instant action has not provided "specific evidence" as Justice Alito required in *Perdue* that the lodestar fee is inadequate to attract competent counsel. 130 S. Ct. at 1674. There are 29 pages of attorneys listing their availability on the court's website (www.uscfc.uscourts.gov/list-attorneys-accepting-referrals-certain-vaccine-injury-cases) to litigate Vaccine Act cases.

Petitioners herein do not satisfy any of the three criteria (or the "superior attorney performance" exception) of *Perdue* for the rare and exceptional circumstance in which attorneys' fees may be enhanced above the lodestar rate. The undersigned holds that the hourly rate of the geographic locale in which Mr. Gage practices applies here.

1. Mr. Gage

a. Hourly rate

The instant case is a "case on all fours" with *Avera* which Mr. Moxley who, at the time, was Mr. Gage's partner, argued.[11] Mr. Moxley originally requested $200.00 an hour for his attorney's fees in *Avera* and, in an amended petition, cited his long experience practicing in the Program to argue that he should be paid $574.00-$598.00 per hour under the *Laffey* Matrix. In

[11] Mr. Gage started his own firm and notified the Court on December 5, 2007, that he and Mr. Moxley were no longer in practice together.

Avera, since all of Mr. Moxley's work was carried out in Cheyenne, WY, and there was a very significant different between the rates of the two fora, i.e., DC and Cheyenne, the *Davis County* exception applied and Cheyenne rates were used to calculate Mr. Moxley's fees.

Here, the situation of the attorneys' fees requests of Mr. Moxley and Mr. Gage are identical. Besides the fact that they worked together and have similar expertise in the Program,[12] they both have been awarded attorneys' fees and costs in this Program for their services based on the local rate in Cheyenne, WY. The decision not to award Mr. Gage (and Mr. Moxley) Laffey Matrix rates has been issued in numerous cases. See *Masias* 2009 WL 889703, at *4 (awarding Mr. Moxley $200.00 to $220.00 per hour for the years 2004-09); *Avila v. Sec'y of HHS*, No. 05-685V, 2009 WL 2033063, at *4 (Fed. Cl. Spec. Mstr. June 26, 2009) (finding the *Davis County* exception applied to Mr. Moxley, awarding him hourly rates of $200.00 from 2004 to August 31, 2006, and $250.00 thereafter); *Hall*, 2009 WL 3094881, at *4 (awarding Mr. Gage hourly rates between $220.00 to $240.00 for the years 2006-09).

Under *Avera* and considering the *Davis County* exception, the undersigned must first determine where the bulk of Mr. Gage's work took place and, secondly, compare the Washington, DC forum rate with the Cheyenne, WY rate. While vaccine cases usually last several years, a non-DC attorney may spend only one or two days, if any, in Washington, DC to participate in a hearing. Therefore, it is very unlikely that the bulk of any non-DC attorney's work would ever take place in Washington, DC so as to substantiate using the Washington, DC forum rate under the *Davis County* exception. If the attorney practiced outside Washington, DC in a locale whose rate was either the same or higher than the Washington, DC rate, as in *Rodriguez*, the *Davis County* exception would not apply.

In the instant action, Mr. Gage conducted the bulk of the work outside Washington, DC. He originally submitted 194 hours in this case, of which 5.5 occurred while he was physically present in Washington, DC for the December 1, 2006 hearing. This computes to only 2.8 percent of Mr. Gage's billed hours. Using the plain meaning of "bulk of [an attorney's] work" and considering how rates have been awarded in this Program in the past, the undersigned rules that Mr. Gage did the bulk of his work in Cheyenne, WY.

The undersigned awards Mr. Gage the local rates for Cheyenne, WY that the special masters have consistently awarded in the past under this Program, ranging from $200.00-$250.00 spanning 2006 through 2009. *See Doe 11 v. Sec'y of HHS*, No. 99-212V, 89 Fed. Cl. 661 (2009), *aff'g in part, rev'g in part*, 2009 WL 1803457 (Fed. Cl. Spec. Mstr. June 9, 2009) (finding the rates used in *Hall* "reasonable" and awarding Mr. Gage $239.00 per hour for his work in 2008 and 2009); *Heinzelman v. Sec'y of HHS*, No. 07-01V, 2009 WL 3719215 (Fed. Cl. Spec. Mstr. Oct. 16, 2009) (awarding a stipulated hourly rate for Mr. Gage of $200.00 per hour in an interim attorneys' fees and costs decision); *Teller v. Sec'y of HHS*, No. 06-840V, 2009 WL 1856199 (Fed. Cl. Spec. Mstr. June 8, 2009) (providing Mr. Gage with an interim award of $200.00 per hour for attorneys' fees and costs).

[12] Mr. Moxley has been practicing in the Vaccine Program since its inception in 1988 and has been involved in close to 100 vaccine cases. Mr. Gage has been practicing in the Vaccine Program since 1990 and has been involved in close to 200 cases.

Thus, both prongs of the *Davis County* exception, the bulk of the work and a very significant difference between the Washington, DC forum rate and the local Cheyenne, WY rate are met. The undersigned awards Mr. Gage hourly rates of $200.00 for his work done in 2006, $225.00 for his work done in 2007, and $250.00 for his work done in 2008.[13]

In an attempt to raise the Cheyenne, WY hourly rate so as to eliminate the very significant difference from the forum rate, Mr. Gage initially provided affidavits from other attorneys in Wyoming who attested to the prevailing hourly rates for "complex litigation" in Wyoming as between $325.00 and $405.00, arguably substantiating his submitted hourly rate of $325.00 (which in his latest filing dropped to $300.00). The affidavits are not persuasive. Evidence of the rate which an attorney in vaccine proceedings charges to non-Program clients is not necessarily dispositive of the issue of the appropriate hourly compensation for services rendered in the Program. *Masias*, 2009 WL 1838979, at *10. Simply including affidavits of other attorneys, especially those who do not have personal knowledge of the Vaccine Program, to substantiate counsel's requested hourly rate is not sufficient to justify such amounts. *Avila*, 90 Fed.Cl. at 595.

The affidavits from the attorneys initially supporting Mr. Gage's fee application characterized the Vaccine Program as complex litigation. The practice areas of these affiants include civil litigation, pharmaceutical products liability, commercial construction, and energy litigation, all inapposite to vaccine litigation. Moreover, the Federal Circuit in *Masias* and *Rodriguez* noted with approval the special masters' determinations in each of those cases that Vaccine Act practice does not constitute complex civil litigation. 634 F.2d at 1288 n.6, 1290; 632 F.3d at 1385.

As respondent notes in her response to petitioners' latest brief requesting an hourly rate of $300.00 for Mr. Gage, there is no evidence in the record that an FLSA case or a wrongful death case has the same work requirements as a Vaccine Act case. As the Federal Circuit noted with approval in *Rodriguez,* the special master there identified the salient differences between complex federal litigation and Vaccine Act litigation—the Vaccine Program has relaxed legal standards of causation, eased procedural rules, the absence of discovery and of the federal rules of evidence, and informal, streamlined proceedings before special masters "well-versed in the issues commonly repeated in Vaccine Act cases. . . ." 632 F.3d at 1385. In the instant action, the undersigned issued an Order within two months of petitioners' filing of their petition, stating that petitioners had a strong likelihood of prevailing, and recommending settlement. It does not require an arduous amount of work to conclude a case in one's clients' favor when the decision-maker has strongly encouraged resolution and cited cases in support of petitioners' prevailing. The undersigned suspects that an FLSA case and a wrongful death action require more effort than Mr. Gage expended here during the case in chief. Thus, petitioners' argument in favor of an hourly rate of $300.00 is unpersuasive. In addition, as respondent noted, the case in chief here

[13] These rates are consistent with those the undersigned awarded to Mr. Gage in *Heflin v. Sec'y of Health and Human Servs.*, No. 04-1541, 2008 WL 5024923 (Fed. Cl. Spec. Mstr. Oct. 28, 2008), in which the undersigned awarded Mr. Gage an hourly rate of $200.00 for 2006, $225.00 for 2007, and $250.00 for 2008. While special masters are not "bound by their own decisions nor by cases from the Court of Federal Claims, except, of course, in the same case on remand," the impact of previous decisions regarding a particular attorney or a particular forum should be considered. *Hanlon v. Sec'y of HHS*, 40 Fed. Cl. 625, 630 (1998).

was completed on July 23, 2008 when the undersigned filed a damages decision. Affidavits attached to petitioners' latest filing stating that Mr. Gage received $300.00 an hour in an FLSA case and a wrongful death case in 2009 and 2010 are not relevant to his 2006-08 hourly rate.

Special Master Christian Moran, in considerable detail, specified in *Hall*, No. 02-1052V, 2009 WL 3423036, at *7 (Fed. Cl. Spec. Mstr. Oct. 6, 2009), the reasonable hourly rate for Cheyenne, WY attorneys in determining the reasonable hourly rate for Mr. Gage: $200 to $250 per hour. The Federal Circuit affirmed the special master's findings, holding they were within his discretion. 640 F.3d at 1356-57. Special Master Moran also determined the forum rate in order to compare it with the local rate and held that "the reasonable rate for Mr. Gage, if he practiced in Washington, D.C., is $350 per hour." 2009 WL 3423036, at *19. The Federal Circuit affirmed, holding this finding was within the special master's discretion. 640 F.3d at 1357. The comparison of $220 per hour and $350 per hour yielded a difference of 59 percent which the Federal Circuit affirmed as within the special master's discretion as satisfying the *Davis County* exception to the forum rule for the rate of attorneys' fees. Id.

Special Master Denise Vowell determined forum rates in *Rodriguez*, 06-559V, 2009 WL 2568468, at *7, 13 (Fed. Cl. Spec. Mstr. July 27, 2009), to be $300.00 per hour in 2001-03 and $360.00 per hour in 2009. That works out to an increase of $10.00 per hour from 2003 to 2009 ($310.00 in 2004; $320.00 in 2005; $330.00 in 2006; $340.00 in 2007; $350.00 in 2008). If one were to extrapolate forward, the forum rate would be $360.00 in 2009, and $370.00 in 2010. The Federal Circuit affirmed the special master's reasoning in awarding Mr. McHugh, a NYC attorney, forum rates of $310.00 for 2006, $320.00 for 2007, and $335.00 for 2009. 632 F.3d 1381, 1383.

While the rates the undersigned is awarding Mr. Gage for 2006-08 are consistent with those awarded in the past, the undersigned relies on the special master's determination in *Masias* for determining the hourly rates in 2009 and 2010. In *Masias*, the special master used the Consumer Price Index (CPI) as applied to Wyoming to gauge any increased rates in each successive year.[14] Therefore, the undersigned will use the annual inflation rate for the State of Wyoming to increase Mr. Gage's hourly rates for 2009 and 2010.[15]

For Mr. Gage's 2009 work, the previous year's rate, $250.00 an hour, will be increased by the rate of inflation using the CPI for the State of Wyoming, which lists the second and fourth quarters per year for the yearly CPI.[16] The undersigned uses the fourth quarter for the entire yearly CPI in Wyoming. The 2009 Wyoming statewide CPI fourth quarter was 2.7 percent. Using this rate in the calculation results in Mr. Gage's hourly rate for 2009 being set at $257.25, rounding off to $255.00. The 2010 Wyoming statewide CPI for the fourth quarter was 2.9

[14] *See Masias*, 2009 WL 1838979, at *8-9, *44 (Table 4A [the Wyoming CPI is higher than the national CPI as depicted in Table 4B]).

[15] This approach, used in *Masias*, 2009 WL 1838979, at *8, starts with an established rate and then increases the rate annually using the Wyoming Consumer Price Index.

[16] The annual inflation rate for the State of Wyoming and the Consumer Price Index can be found at respondent's Ex. J to her Reply to Petitioners' March 2, 2009 Response, Table IV at page 5 of the exhibit. This table goes only to the second quarter of 2008. Each year is divided into the second quarter and the fourth quarter. To obtain information on the Wyoming CPI to 2010, the last year for which petitioners filed for attorneys' fees and costs herein, the undersigned used the current Wyoming CPI, available at http://eadiv.state.wy.us.

percent. Using this rate in the calculation results in Mr. Gage's hourly rate for 2010 being set at $262.39, rounding off to $260.00.

A fair comparison therefore between Mr. Gage's local geographic rate of $200.00 per hour in 2006 to the forum rate of $330.00 shows a 65 percent difference between the local rate and the forum rate. In 2007, the local rate is $225.00 per hour whereas the forum rate is $340.00, which is a 51 percent difference. In 2008, the local rate is $250.00 per hour whereas the forum rate is $350.00, which is a 40 percent difference. In 2009, the local rate is $255.00 whereas the forum rate is $360.00, which is a 41 percent difference. In 2010, the local rate is $260.00 whereas the forum rate is $370.00, which is a 42 percent difference. These differences between the local geographic rate and the forum rate are very significant, sufficient to put Mr. Gage's attorneys' fee rate within the *Davis County* exception to *Avera*.

The undersigned awards Mr. Gage an hourly rate of $200.00 for 2006, $225.00 for 2007, $250.00 for 2008, $255.00 for 2009, and $260.00 for 2010.

b. Compensable Hours

A request for attorneys' fees and costs must be complete when submitted. *Duncan v. Sec'y of HHS*, No. 99-455V, 2008 WL 4743493, at *1 (Fed. Cl. Spec. Mstr. Aug. 4, 2008). The petitioner must "submit evidence sufficient to support the number of hours expended and the hourly rates claimed." *Plott v. Sec'y of HHS*, No. 92-633V, 1997 WL 842543, at *8 (Fed. Cl. Spec. Mstr. Apr. 23, 1997). The special master does not have an obligation to cure defects or errors in the request for fees and costs by asking counsel to supply additional information, although this can be and often is done. *Saunders*, 26 Cl. Ct. at 1226 . Still, a special master should not perform excessive, line-by-line calculation and conversion to arrive at an attorney's fees and costs.

A special master may reduce a petitioner's fee request *sua sponte*. *See Carrington v. Sec'y of HHS*, 85 Fed. Cl. 319 (2008) (affirming special master's discretion to reduce petitioner's fee award even if respondent does not object). In the case of a *disputed* fee application, "the Special Master has an independent responsibility to satisfy himself that the fee award is appropriate and not limited to endorsing or rejecting respondent's critique." *Duncan*, 2008 WL 4743493, at *1. Relying on experience and judgment, a special master can use discretion to reduce the hours and the fees requested. Saxton, 3 F.3d at 1521.

Petitioners' original Motion for Award of Attorneys' Fees and Reimbursement of Costs included 12 pages of billing entries spanning May 10, 2006 through July 21, 2008. Filing of Aug. 5, 2008, Tab E. The entries included the date, a description of the work done, the amount of time spent described in hours and minutes, Mr. Gage's rate, and the calculation of his fees for each time entry. The hourly rates used to calculate Mr. Gage's fees in this submission were $295.00 (2006), $310.00 (2007), and $325.00 (2008).

Seven months later, Mr. Gage submitted his billing entries again, but with a few notable differences from the first submission. In the new submission, Mr. Gage used the higher rates from the Laffey Matrix to calculate his fees: $375.00 (2006 through May 2007), $390.00 (June 2007 through May 2008), and $410.00 (June 2008 through February 2009). Mr. Gage also

included three pages of additional hours that covered his services dating from July 2008 through February 24, 2009. Filing of Aug. 5, 2008, Tab E. For the second set of submissions, Mr. Gage's hours were in 1/10 of an hour increments.

Certainly, a careful review of Mr. Gage's submitted hours is warranted. Respondent originally raised the issue that the sum of the hours and minutes in the submission did not equal the number of hours claimed by Mr. Gage in his Irreducible Minimum calculation. Whereas Mr. Gage claimed 69.2 hours for 2006, the sum of the hours and minutes from the submission produced 45.67 hours. The same was seen in 2007 (69.4 submitted vs. 66.08 tabulated) and 2008 (55.4 submitted vs. 33.67 tabulated). Additionally, there are entries where Mr. Gage has not consistently used the same hourly rate throughout the year. As a number of issues raised in respondent's objection to petitioners' first fee application appeared to remain in the second submission, the undersigned undertook a detailed review of Mr. Gage's submitted fees and costs.

i. 2006

In his second submission, Mr. Gage included a time entry on December 1, 2006 for 7.8 hours described as "Trial Prep, Met with Client and Expert." Pet. Resp. to Spec. Mstr. Oct. 23, 2008 Order, Tab C, p. 3. Of note, the entitlement hearing took place on December 1, 2006. Respondent previously raised the issue that Mr. Gage's original time submission did not appear to bill for his time spent in the hearing which lasted 5.5 hours. The second submission also did not include an entry that described Mr. Gage's attendance and participation at the hearing, but instead included entries only for trial preparation and a phone conversation with Dr. Donald H. Marks, one of the witnesses, on the date of the hearing.

The manner in which Mr. Gage submitted his billing information is certainly not standard or easy to replicate. While it is not typical for submissions to include calculations based on both hours-minutes and 1/10 of an hour computation, because Mr. Gage chose that method, the undersigned will accordingly review it. The undersigned strongly advises Mr. Gage in future to decide on a consistent methodology for calculating his time. Furthermore, since Mr. Gage has extensive experience in this forum and takes pride in his work, the undersigned expects him to submit his bills with more careful attention to detail in the future. In the instant action, he had an additional seven months to clarify his submission.

Respondent is correct to add the number of hours and minutes submitted in the invoice and to take issue with the discrepancy. It is not the responsibility of respondent or of the special master to receive petitioners' counsel's billing hours in hours and minutes, and to convert them to another format. As submitted, the number of hours petitioners' counsel spent totals 69.2 in 2006. The undersigned allows for 65 hours by adding the hours for work done in 2006 (60.7 hours) and half the time submitted for travel (half of 8.5 hours).

ii. 2007

Mr. Gage's second submission had inconsistencies that appear to stem from the original submission. For the February 15, 2007 entry, Mr. Gage submitted "5 minutes" and billed this at $310.00 an hour (instead of the $375.00 hourly rate for the same time period), apparently failing to convert and update that entry from the previous submission. In the second submission, Mr. Gage altered the date of service for previous entries from February 23, 26, 27, and 28, 2007, this time representing that the services were rendered on May 23, 26, 27, and 28, 2007. Pet. Resp. to

Spec. Mstr. Oct. 23, 2008 Order, Tab C, pp. 6-7. May 2007 entries appear before and intermixed with March 2007 entries. *Id.* at 7. The second submission does not reflect a careful review and update of the previous submission.

The second submission included 69.4 hours for 2007; the undersigned considers these hours to be compensable.

iii. 2008

Mr. Gage also included an entry for April 24, 2008, whereas it appears that the services were rendered on April 24, 2007. For the January 23, 2008 entry, Mr. Gage submitted "35 minutes" and billed this at $325.00 an hour whereas the other entries for 2008 were billed at $390.00 an hour, again apparently failing to convert and update that entry from the previous submission. Pet. Resp. to Spec. Mstr. Oct. 23, 2008 Order, Tab C, p. 13. For May 20, 2008, Mr. Gage's entry for 2.2 hours includes a phone conversation with "Terry Arnold about bill, . . . Bill Stewart about guardianship, . . .phone with Chris Pinedo". Pet. Resp. to Spec. Mstr. Oct. 23, 2008 Order, Tab C, p. 16. The next entry dated May 27, 2008, is described as "Phone with client, called Terry Arnold" and is also billed for 2.2 hours. *Id.* In the original submission, the phone call on May 27, 2008, was only for 5 minutes (which would be 0.1 hour). Ms. Arnold has no entry of a conversation with Mr. Gage on this date. Pet. Resp. to R. Resp., Tab A, p. 7. Looking at the subsequent entries and their times from May 27, 2008 onward and comparing this information to the original petition, the undersigned finds that the duplicate entry of 2.2 hours for May 27, 2008 apparently altered the time entries going forward. Taken together, the undersigned does not award 2.2 hours for May 27, 2008.

The June 23 and 24, and July 7, 2008 entries were again in minutes instead of the 1/10 of an hour measurements. *Id.* The undersigned converted these times and reimburses Mr. Gage for his time.

Mr. Gage has 8.9 hours in 2008 related to guardianship activities. The undersigned has declined to award guardianship costs under the Vaccine Program in previous cases after the decision issued in *Mol v. Sec'y of HHS*, 50 Fed. Cl. 588, 591 (2001), *rev'g Mol v. Sec'y of HHS*, No. 96-549V, 2001 WL 914444 (Fed. Cl. Spec. Mstr. July 24, 2001) (holding attorneys' fees and costs associated with a state court guardianship proceeding were not compensable under the Act, even when guardianship was established pursuant to a settlement provision). However, fees and costs associated with guardianship proceedings necessary to resolve a case have been compensated in more recent cases. *See Gruber v. Sec'y of HHS*, No. 00-749V, 91 Fed. Cl. 773 (2010), *aff'g in part, rev'g in part*, 2009 WL 2135739 (Fed. Cl. Spec. Mstr. June 24, 2009) (finding a reduction of the attorneys' fees paid to probate counsel for guardianship proceedings was not warranted and ordering that the guardianship fees be compensated as guardianship was a condition of the settlement). Therefore, the undersigned will award reasonable fees and costs associated with guardianship proceedings that are necessary to the administration of awards in the Vaccine Program. The undersigned compensates petitioners for the 8.9 hours in 2008 related to guardianship activities.

Mr. Gage's second submission not only sought to clarify his original August 5, 2008 submission, but also included fees for the seven months of work he did related to the second fee application. Special masters in the past have awarded counsel compensation for substantial

hours expended in the preparation of a fee application. *See Masias*, 2009 WL 1838979, at * 34. Surely, an attorney should be compensated for the time necessary to resolve and clarify his fee application. At the same time, those hours that are not "reasonably expended" should not be included in a fee submission or compensated. *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (holding petitioner should "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary"). The court may reduce the amount of an attorney's fees and costs for lack of documentation to substantiate the submission. *Wasson v. Sec'y of HHS*, 24 Cl. Ct. 482, 484 n.1 (1991).

The issues stemming from Mr. Gage's original August 5, 2008 application for attorneys' fees and costs resulted in the undersigned's October 23, 2008 Order. While both petitioners and respondent were asked to respond to that Order, this did not preclude either party from communicating telephonically with each other to attempt to clarify or resolve underlying issues. Furthermore, petitioners' second submission still contained errors, typographical errors, confusing entries, and items that were clearly not compensable. Petitioners' second submission is not of sufficient quality to justify the full 6.7 hours requested in 2008. The undersigned awards 5.2 hours for this work. and 18.9 hours requested in 2009 related to the post-August 5, 2008 fee responses. For this reason, the undersigned believes that a reduction in the fees used to prepare the second submission is warranted.

The undersigned compensates petitioners for a total number of 48.1 hours in 2008.

iv. 2009

In the April 2, 2010 status report and supplemental request for attorneys' fees and costs, Mr. Gage billed 18.8 hours from March 2, 2009 through July 6, 2009 at a rate of $410.00 an hour. Mr. Gage's interim fee application, as previously noted, was not complete when filed. At no point do Mr. Gage's entries reflect an attempt to contact respondent (via phone, or written or electronic correspondence) to resolve this issue.

Furthermore, petitioners failed to meet their burden to demonstrate that the hours claimed are reasonable by not clearly and carefully compiling their submissions. *See Hensley*, 461 U.S. at 437; *Rupert*, 52 Fed. Cl. at 686; *Wilcox*, 1997 WL 101572, at *4. Excluding the 2.2 hours related to the duplicate entry, the undersigned will award only a portion of the 19.9 hours requested in 2009 for the post-August 5, 2008 fee preparation: 8.1 hours. Of the 2009 hours billed in the April 2, 2010 filing, the undersigned will award 17 hours of the 18.8 requested. This results in a total number of 24.8 hours compensable in 2009.

v. 2010

For his work in 2010, Mr. Gage requested 10.4 hours. On April 9, 2010, Mr. Gage filed the affidavit of attorney Stephen H. Kline, an attorney in Cheyenne, WY, which stated that his "client paid Richard Gage's fee at a rate of $300 per-hour . . . ." Respondent filed her response to petitioners' April 2, 2010 filings, objecting to petitioners' filing "nearly $12,000.00 in fees at this point, because the briefing on fees issues was otherwise complete in this matter." Resp. p. 2. Respondent termed the additional submission unreasonable, and noted that respondent's attempt to contact petitioners' counsel regarding a proposed resolution of the amount at issue was met with "no response."

Mr. Gage thus ignored respondent's attempt to resolve this matter informally. Instead, Mr. Gage proceeded to amass fees by filing a memorandum concerning how he believed a judge's decision on attorneys' fees and costs should be applied to this case. The undersigned does not look favorably upon Mr. Gage's failure to respond to respondent's attempt to contact him regarding a proposed resolution of this case. As a result, Mr. Gage is compensated for 5 hours in 2010.

In sum, Mr. Gage is entitled to $13,000.00 for 65 hours expended in 2006 at a rate of $200.00 an hour, $15,615.00 for 69.4 hours expended in 2007 at a rate of $225.00 an hour, $12,025.00 for 48.1 hours expended in 2008 at a rate of $250.00 an hour, $6,324.00 for 24.8 hours expended in 2009 at a rate of $255.00 an hour, and $1,300.00 for 5 hours expended in 2010 at a rate of $260.00 an hour. The total in fees due to Mr. Gage for the entirety of this case is **$48,264.00**. Mr. Gage was previously awarded **$29,300.00** for his fees in the "interim" decision, leaving $**18,964.00** to be awarded in this final decision for his fees.

c. Costs

Previously, Mr. Gage submitted and petitioners were awarded $20,406.47 for Mr. Gage's costs. Subsequently, Mr. Gage submitted $23.81 in costs. The costs for Mr. Kemp's services in the guardianship proceedings were submitted as a part of Petitioners' Response to Respondent's Objections to Petitioners' Application, but were not awarded in the interim decision. Petitioners are entitled to receive the $6,740.00 in costs for the work performed by Mr. Kemp as guardianship authorization was required for settlement and payment of the award the undersigned issued in the damages decision. Petitioners are awarded **$6,763.81** for Mr. Gage's and Mr. Kemp's costs in this final decision.

Petitioners are awarded **$18,964.00 in attorneys' fees** and **$6,763.81 in attorneys' costs** for a total of **$25,747.81** in this final decision.

2. Mr. Pinedo

a. Hourly Rate

Mr. Pinedo seeks reimbursement stemming from his representation of petitioners from August 25, 2003 to May 9, 2006 which he billed at $500.00 per hour. In addition to disputing the hours billed, respondent disputes the rate as unusually high.

As stated above, the controlling case for determining the hourly rate of compensation for Mr. Pinedo's work under the Program is *Avera*. Looking to provide the hourly rate that is "prevailing in the community for similar services by a lawyer," Mr. Pinedo included affidavits of two attorneys who practice in complex litigation and who supported his billing rate of $500.00 per hour. The affidavit of one attorney states, "In my opinion, it is reasonable and appropriate for Chris Pinedo to receive $500.00 an hour for his work litigating *pharmaceutical cases*." Pet. Resp. to R. Resp., Tab C (emphasis added). Such may be the case for Mr. Pinedo's pharmaceutical cases, but this affiant's opinion of the reasonable and appropriate rate in pharmaceutical cases does not transfer to Vaccine Program cases.

For this court to approve Mr. Pinedo's billed rate, Mr. Pinedo would receive far more than the rates of the most experienced attorneys who have practiced in this Program and in far more expensive fora. *See Barber v. Sec'y of HHS*, No. 99-434V, 2008 WL 4145653 (Fed. Cl. Spec. Mstr. Aug. 21, 2008) (awarding compensation for a Richmond, VA vaccine attorney at an hourly rate of $340.00); *Kantor v. Sec'y of HHS*, No. 01-679V, 2007 WL 1032378 (Fed. Cl. Spec. Mstr. Mar. 21, 2007) (awarding compensation for a New York City solo practitioner at an hourly rate of $350.00); *Ray v. Sec'y of HHS*, No. 04-184V, 2006 WL 1006587 (Fed. Cl. Spec. Mstr. Mar. 30, 2006) (awarding an experienced Program attorney in Vienna, VA an hourly rate of $225.00 for 2003-04, $235.00 for 2004-05, and $245.00 for 2005-06).

Although the hourly rate that Mr. Pinedo charges his clients to pursue civil litigation in pharmaceutical matters and mass tort cases is $500.00, such rationale will not suffice for such an award in this court. Like Mr. Gage, Mr. Pinedo has failed to demonstrate that his services for the proceedings under the Vaccine Program are comparable to the services performed by attorneys who have been compensated under the Laffey Matrix, which the Federal Circuit has recently stated in *Masias* and *Rodriguez* does not apply in this Program. Mr. Pinedo was not admitted to practice in the U.S. Court of Federal Claims before he applied for admission solely to pursue this petition. His skill, experience, and reputation do not warrant the fees requested. Instead, applying the *Davis County* exception to *Avera*, the undersigned awards Mr. Pinedo a rate consistent with his location, Corpus Christi, TX, not the rates for practitioners in the forum. None of Mr. Pinedo's work under the Program occurred in the forum.

Petitioners did not file evidence of Corpus Christi, TX rates upon which to base Mr. Pinedo's rate, but case law states that a special master may rely on her past experience to determine fee awards. *Wasson*, 24 Cl. Ct. at 483 ("[In calculating attorneys' fees and costs,] the special master may rely upon both her own general experience and her understanding of the issues raised."). Relying on her prior experience, the documentation submitted, and the rate awarded to similar attorneys new to the Program in 2006, the undersigned determines that Mr. Pinedo's rate in 2006 is $200.00 an hour. The undersigned notes that Mr. Pinedo has requested rates that he avers are commensurate with his practice in Houston, TX; however, at the time that he was engaged in his representation in the civil matter and as well as the filing of the petition under the Vaccine Program, Mr. Pinedo was practicing in Corpus Christi, TX. Mr. Pinedo states that he was considering leaving his firm (Watts Law Firm) around the time that he was working on the petition and, during that same time, he became familiar with Mr. Gage. Pet. Resp. to R. Resp., Tab C, p. 3. Mr. Pinedo says that he joined a new firm shortly after Mr. Gage became the attorney of record. Therefore, it is not necessary to consider the Houston, TX rates as Mr. Pinedo's work in this case was not performed in that location.

Petitioners originally requested $169,400.00 in fees for Mr. Pinedo compared to the $47,361.00 petitioners originally requested for Mr. Gage. This is three and one-half times the fees for Mr. Gage even though Mr. Gage is the attorney who represented petitioners through hearing and settlement of damages. Mr. Pinedo never participated in a status conference or the hearing, and never filed anything other than the petition in this case. To award Mr. Pinedo the amount petitioners originally requested for the 37 days of work he spent from the filing of the petition to when he transferred the case to Mr. Gage, or even for the reasonable hours related to activities stemming from his previous work on the civil action against Merck, would contravene

the purpose of the Vaccine Program and would create the windfall awards that the Federal Circuit stated in *Avera* are not permitted in this Program.

Mr. Pinedo is compensated at an hourly rate of $200.00 for his work in the Program. This is the same rate used to determine his interim fees award.

b. Compensable Hours

Part of the enormous amount of fees petitioners requested for Mr. Pinedo arise from his activities in their civil suit against Merck. The Vaccine Act allows petitioners to recover for reasonable attorneys' fees and costs incurred during the course of the proceedings. The relevant language from the statute is:

> (1) In awarding compensation on a petition filed under section 300aa-11 of this title the special master or court shall also award as part of such compensation an amount to cover—
>
> **(A)** reasonable attorneys' fees, and
>
> **(B)** other costs, incurred in any proceeding **on such petition**. [. . .]

42 U.S.C. § 300aa-15(e)(1)(a)-(b) (emphasis added).

Mr. Pinedo may receive fees for work on the petition, but not for work on the civil suit against Merck. A detailed review of Mr. Pinedo's billed hours and costs follows.

Despite the addition of Hepatitis A to the Vaccine Injury Table on December 1, 2004, Mr. Pinedo continued to pursue petitioners' civil case in 2005. In the beginning of 2006, Mr. Pinedo continued petitioners' civil case. He submitted a total of 76 hours to the Program for his billed hours in 2006. Mr. Pinedo engaged in trial preparation (11.9 hours) and interacted with Merck employees by taking additional depositions (3.6 hours). Pet. Resp. to R. Resp., Tab C, p. 28. Mr. Pinedo began activities related to filing a petition in this forum before he sought the dismissal of the civil case. *Id.* at 29-30. Mr. Pinedo states, "I began to prepare the materials to file the Petition Program [sic] long before I dismissed the civil suit." *Id.* at 3. Under § 300aa-11(a)(5)(B) of the Vaccine Act, plaintiffs involved in pending civil litigation for damages or death resulting from a vaccine-related injury may not file a petition in the Program. By statute, a special master may award only the fees related to activities under the pending petition. *See* 42 U.S.C. § 300aa-15(e)(1)(b). According to petitioners' Exhibit 28, the civil suit against Merck was dismissed on March 20, 2006. Petitioners filed a vaccine petition on April 10, 2006.

The amount of time that Mr. Pinedo spent to file a petition in this court, 54 hours between February 17, 2006 and April 7, 2006, exceeds that which is reasonable and necessary, even for an attorney practicing in this forum for the first time. While Mr. Pinedo provided comments to supplement his billing entry descriptions, the same comment notably appears for several entries. For instance, for his 2006 entries for February 17 and 27, March 1 and 31, April 3, 6, and 7, Mr. Pinedo includes the following in his comment section to justify the 48.2 hours billed: "This time is reasonable for preparing the Petition which contained over 18 sets of medical records

comprising several hundred pages and a total of 43 exhibits comprising more than a total 1760 pages of documents supporting the Petitioners' claim." *Id.* at 29-31. Because Mr. Pinedo had accumulated that information in the past for the prior civil litigation, and likely provided more materials than necessary to be filed with the petition since a suit against Merck would require exhibits that a vaccine petition would not, Mr. Pinedo will not be compensated for all of the time billed for these activities.

The 24.4 hours Mr. Pinedo spent in preparation of the petition while the civil case had yet to be dismissed are not compensable. Mr. Pinedo billed 34.1 hours preparing the vaccine petition after the civil case was dismissed. The undersigned has already paid Mr. Pinedo for 34.1 hours of work at $200.00 in the interim decision, amounting to $6,820.00. The undersigned will not award any further attorneys' fees to Mr. Pinedo for his work on the petition.

c. Costs

The costs Mr. Pinedo incurred that are associated with petitioners' filing in this forum that are reasonable and necessary can be compensated, but not all costs incurred during the previous, civil litigation should be compensated under the Vaccine Program. As stated in the March 2, 2009 filing, Mr. Pinedo describes all of the work done and the expenses incurred in the civil lawsuit as "germane and necessary to the proceedings under the Vaccine Act." Pet. Br. in Support of Recovery of Fees and Costs, Tab B, p. 10. He notes that in compliance with Vaccine Act § 300aa-11(c)(2), all relevant records are required to be provided. *Id.* This is certainly true, and the cost of the medical records filed is compensable as is the time to gather those records (at a paralegal hourly rate). Mr. Pinedo states, "[I]t is presumed that these records, in addition to being gathered, must be read and thoroughly analyzed prior to filing any petition in the Program so that the attorney could establish the step-by-step logical sequence and prove causation as it is necessary to prevail in the Program for an off-Table injury." *Id.* This is not entirely true or necessary, as Mr. Pinedo should have forwarded the records to a medical doctor to determine causation. Essentially, some of the costs Mr. Pinedo submitted from the previous, civil litigation are reimbursable in this forum because they are reasonable.

The undersigned regards some of Mr. Pinedo's costs stemming from the previous, civil litigation as not compensable. His $29,747.93 submitted costs reveal that some of those expenses are not reimbursable through the Vaccine Program. Pet. Fee App., Tab F, pp. 7-14. His airfare ($1,953.90), car rental ($21.63), lodging ($461.35), parking and cab fare ($187.25), and meals ($37.94) are not germane to the vaccine proceedings. The court costs related to the civil proceedings ($255), the cost for the depositions ($3,020.10), express delivery ($584.35), overtime ($336.43), and postage ($105.29) are not compensable here. Before the vaccine petition was filed, Mr. Pinedo spent $1,141.00 on photocopying, $899.36 on document reproduction, $213.15 on long distance calls, and $1,300.00 on photographs, film, and tapes. A $2,000.00 retainer fee was paid to Nancy Nussbaum, Ph.D. These items are not reimbursable under the Vaccine Program.

Two payments were made to Extant Medical Legal Consulting for the review of records and medical documents in the amounts of $4,350.00 (for services rendered on March 3, 2005) and $4,800.00 (for services rendered on January 19, 2006). Dr. Marks's services as petitioners' expert are billed under Extant Medical Legal Consulting. The work done by Extant Medical

Legal Consulting at the request of Mr. Pinedo was used in the final preparation of Dr. Marks's expert report and, therefore, is reimbursable by this court.

Petitioners will be reimbursed for the sum of Mr. Pinedo's two payments to Extant Medical Legal Consulting for Dr. Marks's services ($9,150.00), the cost of the medical records ($3,512.64), the cost of additional records ($2,529.30), the filing fee in the U.S. Court of Federal Claims ($250.00), copies he made after the petition was filed in this forum at the rate of 10 cents per copy ($128.70), and postage ($0.78) for a total of $15,571.42.

Petitioners are awarded **$15,571.42 for Mr. Pinedo's costs** in this final decision.

3. Mr. Bratton

Mr. Bratton's expenses arose from the filing fee for his clients' civil suit against Merck in 2003 and for half an hour of investigation. As with Mr. Pinedo, matters that were wholly unrelated and unnecessary to the vaccine petition are not compensable.

Mr. Bratton is not awarded anything in the final decision.

III. Conclusion

As discussed in the sections above, this decision shall constitute the final award of attorneys' fees and costs in this case. For the most part, the costs associated with previous, civil litigation unrelated to this matter are not compensable. Additionally, relying on the undersigned's experience and discretion, the number of hours submitted, and the rate requested, the undersigned has revised them in accordance with prior awards in the Program.

Accordingly, the undersigned awards petitioners a total of **$25,747.81** for Mr. Gage's attorneys' fees and costs, comprised of $18,964.00 in attorneys' fees and $6,763.81 in costs, and **$15,571.42** for Mr. Pinedo's costs. Petitioners were fully reimbursed for their out-of-pocket costs in the "interim" award. Mr. Pinedo was fully compensated for his attorney's fees in the "interim" award. Mr. Bratton is not awarded anything in this case. The total amount of the final award in this final decision is **$41,319.23**.

Payment shall be made in the form of one check jointly payable to petitioners and Mr. Gage in the amount of **$25,747.81**, and in another check jointly payable to petitioners and Mr. Pinedo in the amount of **$15,571.42**. The Clerk's Office is ordered to enter judgment in accordance with this decision unless a motion for review is filed.[17]

IT IS SO ORDERED.

Dated: October 17, 2011

/s/ Laura D. Millman
Laura D. Millman
Special Master

[17] Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.