

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

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PETER BROEKELSCHEN, M.D., \*

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Petitioner, \*

No. 07-137V

Special Master Christian J. Moran

v. \*

Filed: June 3, 2011

SECRETARY OF HEALTH \*

AND HUMAN SERVICES, \*

Respondent. \*

Attorneys' fees and costs, reasonable  
number of hours for appellate  
litigation

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Lisa A. Roquemore, Broker & Assoc., P.C., Irvine CA, for petitioner,  
Voris E. Johnson, Jr., United States Dep't of Justice, Washington, DC, for  
respondent.

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

Peter Broekelschen, a doctor, filed a petition seeking compensation under  
the National Vaccine Injury Compensation Program ("the Program"), 42 U.S.C. §§

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

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

300aa-10 et seq. (2006). Dr. Broekelschen was found not to be entitled to compensation and the decision denying compensation was reviewed by three appellate authorities --- a judge of the United States Court of Federal Claims, a panel of the United States Court of Appeals for the Federal Circuit, and the full United States Court of Appeals for the Federal Circuit, which denied a request for a rehearing en banc. Although Dr. Broekelschen was not awarded compensation, he requests an award of his attorneys' fees and costs pursuant to 42 U.S.C. § 300aa—15(e).

Dr. Broekelschen has already received an interim award of attorneys' fees and costs for activities associated with almost all the work performed before the special master. Thus, his pending request for additional attorneys' fees and costs is almost exclusively for work performed in appellate proceedings. Dr. Broekelschen's amended request totals \$165,716.58. The parties dispute the reasonableness of the amount requested. Dr. Broekelschen is awarded \$124,711.51.

## **I. Background**

When Dr. Broekelschen was 65 years old, he received a dose of the flu vaccine. Approximately six weeks later, Dr. Broekelschen experienced a severe crushing pain in his chest from the clavicle to his lower ribs. He also was having pain in both his arms, his fingers, his neck, and left scapula. He was hospitalized for several weeks and during his hospitalization, his doctors considered that he might suffer from transverse myelitis and that he might suffer from anterior spinal artery syndrome.

On March 1, 2007, Dr. Broekelschen filed his petition seeking compensation. Dr. Broekelschen's attorney throughout these proceedings has been Lisa Roquemore. Dr. Broekelschen supported his petition for compensation by filing four volumes of medical records and an opinion of Lawrence Steinman, a specialist in immunology and neurology retained by Dr. Broekelschen. Respondent maintained that Dr. Broekelschen was not entitled to compensation and relied upon opinions presented by Benjamin Greenberg, a neurologist whom respondent had retained. The case proceeded to a hearing.

After the hearing but before the merits of Dr. Broekelschen's claim were resolved, Dr. Broekelschen requested an interim award of his attorneys' fees and

costs. Dr. Broekelschen was awarded \$134,371.01 in attorneys' fees and costs. Interim Fees Decision, 2008 WL 5456319 (Fed. Cl. Spec. Mstr. Dec. 17, 2008).

A decision denying compensation to Dr. Broekelschen was issued. The primary reason for not awarding Dr. Broekelschen compensation was that Dr. Broekelschen had failed to establish that he suffered from transverse myelitis, a condition that has, in some instances, been associated with vaccines. A preponderance of the evidence showed that he suffered from anterior spinal artery syndrome, a condition that is not typically associated with vaccines. Decision, 2009 WL 440624 (Fed. Cl. Spec. Mstr. Feb. 4, 2009).

Dr. Broekelschen filed a motion for review with the Court of Federal Claims. For proceedings at this stage, Dr. Broekelschen seeks \$31,035 in attorneys' fees. Dr. Broekelschen's efforts were not successful as the Court denied the motion for review. 89 Fed. Cl. 336 (2009).

Dr. Broekelschen sought relief from the Federal Circuit. For work in this phase, Dr. Broekelschen seeks \$83,040 in attorneys' fees. A divided panel of the Federal Circuit affirmed the Court of Federal Claims' affirmance of the special master's decision to deny compensation. 618 F.3d 1339 (Fed. Cir. 2010). One member of the panel dissented and would have remanded the case.

Dr. Broekelschen filed a petition for rehearing and a petition for rehearing en banc. The Federal Circuit denied this request without any published decision. For work in this phase of the case, Dr. Broekelschen seeks \$18,525 in attorneys' fees.

After the decision denying entitlement became final, Dr. Broekelschen filed the pending request for attorneys' fees and costs. The parties have filed briefs and during the briefing process Dr. Broekelschen reduced the amount requested in an attempt to compromise with respondent. Respondent maintains that even at the reduced amount, the time spent was excessive.

## **II. Analysis**

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

The first question is whether Dr. Broekelschen is entitled to any award of his attorneys' fees and costs. If Dr. Broekelschen had been awarded compensation, then he would be entitled to his attorneys' fees and costs as a matter of right.

However, he was not awarded compensation. In this circumstance, “the special master or court may award . . . reasonable attorneys’ fees and other costs . . . if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim.” 42 U.S.C. § 300aa—15(e).<sup>1</sup>

Dr. Broekelschen’s case was found to be supported by a reasonable basis when the Interim Fees Decision was issued on December 17, 2008. This finding is not necessarily dispositive for the final fee application because a case that is initially supported by a reasonable basis may lose that support as the case progresses. This is demonstrated by Perreira v. Sec’y of Health & Human Servs., 33 F.3d 1375 (Fed. Cir. 1994).

Here, Dr. Broekelschen sought appellate review three times and seeks his attorneys’ fees and costs for this appellate work. Although the reasonable basis of successive appeals might be questioned, see Phillips v. Sec’y of Health & Human Servs., 988 F.2d 111, 113 (Fed. Cir. 1993) (Plager, J., concurring), respondent “does not contest that there was at least some reasonable basis for petitioner’s appeals.” Resp’t Opp’n, filed March 8, 2011, at 4 n.2. In light of respondent’s lack of argument on this point, each of Dr. Broekelschen’s appeals is accepted as supported by a reasonable basis. Thus, Dr. Broekelschen qualifies for an award of attorneys’ fees and costs.

## **B. What Is A Reasonable Amount of Attorneys’ Fees?**

Like other litigation allowing an award of attorneys’ fees and costs, awards for attorneys’ fees and costs in the Vaccine Program must be “reasonable.” 42 U.S.C. § 300aa–15(e)(1). Reasonable attorneys’ fees are determined using the lodestar method – “multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.” Avera v. Sec’y of Health & Human Servs., 515 F.3d 1343, 1347-48 (Fed. Cir. 2008) (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)).

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<sup>1</sup> There is no doubt that Dr. Broekelschen acted in good faith in pursuing the appeals as he did.

## 1. Hourly Rates<sup>2</sup>

Reasonable hourly rates for attorneys should be “in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.” Blum v. Stenson, 465 U.S. 886, 895 n.11 (1984). The community in which Ms. Roquemore practices, the area surrounding Los Angeles, California, is a relatively expensive area. So, this factor indicates that Ms. Roquemore’s hourly rate should be set at a relatively high level.

Ms. Roquemore’s skill and experience support, to some extent, an hourly rate that is relatively high. In status conferences, she is prepared to discuss the facts of her client’s case. She is both willing to consider settling cases and qualified to try a case at a hearing. She is familiar with general litigation, that is, litigation outside of the Vaccine Program, and this knowledge helps her advocate for her client. On the other hand, as noted below, Ms. Roquemore has relatively less experience with the Vaccine Program and this inexperience tends to be reflected in an excessively high number of hours devoted to certain tasks.

These factors were considered in the Interim Fees Decision. Ms. Roquemore was compensated at a rate of \$340.00 per hour. The hourly rate for a paralegal was set at \$125.00. Interim Fees Decision, 2008WL 5456319 at \*4. The parties have not argued for a different result here. Thus, these rates will continue to be used in the lodestar calculation.

## 2. Number of Hours

The second factor in the lodestar formula is the reasonable number of hours. Quoting a decision by the United States Supreme Court, the Federal Circuit has explained some of the limits of the number of hours for which compensation may be sought.

The [trial forum] also should exclude from this initial fee calculation hours that were not “reasonably expended.” . . . Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private

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<sup>2</sup> Although Avera established that attorneys in the Vaccine Program should be compensated at a rate prevailing in the forum, 515 F.3d at 1349, neither Ms. Roquemore nor the Secretary has requested that forum rates be used in this case.

practice ethically is obligated to exclude such hours from his fee submission. “In 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 v. Sec’y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993) (emphasis in original) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983)).

The reasonable number of hours is the heart of this dispute. For appellate litigation Dr. Broekelschen requests approximately 300 hours at an attorneys’ rate and nearly 200 hours at a paralegal rate. Respondent challenges these requests as “patently excessive and unreasonable.” Resp’t Opp’n at 7.

Resolution of this dispute must take into consideration a number of factors. First, the hourly rate derived from the locale in which Ms. Roquemore practices is among the highest rates used with attorneys in the Vaccine Program. A consequence of this relatively high hourly rate is an expectation that Ms. Roquemore works efficiently. The same skills and abilities that justify Ms. Roquemore’s hourly rate suggest that the amount of time Ms. Roquemore spends on certain tasks will be less than the amount of time a less experienced attorney would spend on the same task. See Ursic v. Bethlehem Mines, 719 F.2d 670, 677 (3d Cir. 1983) (stating “A fee applicant cannot demand a high hourly rate – which is based on his or her experience, reputation, and presumed familiarity with the applicable law – and then run up an inordinate amount of time researching the same law.”); Rupert ex rel. Rupert v. Sec’y of Health & Human Servs., No. 99-0774V, 2002 WL 31441211, at \*5 n.8 (Fed. Cl. Spec. Mstr. Aug. 26, 2002) (stating “a more experienced Program attorney will likely log fewer hours than a less experienced attorney”), aff’d in part, rev’d in part and remanded, Rupert IV, 55 Fed. Cl. 293 (2003). To provide a hypothetical example, for the task of researching a certain question, Ms. Roquemore should have a general idea of where to start research and might take two hours (at a rate of \$345 per hour). Her total charge for this task would be \$690. An attorney who lacks the background may have more false starts and take three hours to come to same result as Ms. Roquemore. This hypothetical attorney could be compensated at a rate of \$250 per hour and the charge for this task would be \$750. Either \$690 or \$750 would be viewed as a reasonable charge. The problem, however, is when Ms. Roquemore combines a relatively high hourly rate with a relatively large amount of time. A

continuation of the hypothetical example demonstrates this point. If Ms. Roquemore spends three hours (the same as the less inefficient attorney), then the total charge is \$1,035.00. In this simplified example, \$1,035 would cross the line between a reasonable expense and an unreasonable one. While the absolute difference may not seem great in this example, when the number of hours is multiplied by 10 or 100, the difference becomes dramatic.

A solution to this problem is to reduce the number of hours to eliminate hours that are, in the Supreme Court's words, "excessive, redundant, or otherwise unnecessary." Any reduction in hours in this particular case must take into consideration the fact that most of the time requested was spent on appeals, which is the third factor. Special masters are mindful that reducing fees for work performed on appellate litigation may be perceived as penalizing an attorney for appealing the same special master's decision. As a consequence, they approach such fees determinations cautiously.

Nonetheless, the statute that authorizes special masters to award attorneys' fees does not differentiate between work performed before the special master and work performed before appellate authorities. See 42 U.S.C. § 300aa—15(e). The Court of Federal Claims, which has issued rules to implement the Vaccine Act (see 42 U.S.C. § 300aa—12(d)(2)), has assigned special masters the responsibility to determine attorneys' fees even after the case has been the subject of a motion for review. Vaccine Rule 34(a).<sup>3</sup> Thus, the undersigned will determine a reasonable number of hours for the different activities performed by Dr. Broekelschen's attorney.

The final general factor to consider is the specificity in the attorneys' timesheets and in the respondent's objections. Respondent argued that "the number of hours expended by petitioner's counsel [is] patently excessive and unreasonable." Resp't Opp'n, filed March 8, 2011, at 7. To support her argument, respondent grouped work into certain phases, an approach followed below. This organization formed the backbone on which respondent placed the argument that the hours requested were excessive. Respondent also provided some examples of activities that took an unreasonable amount of time, such as spending 67 hours preparing for the oral argument at the Federal Circuit. In reply, Dr. Broekelschen contended that respondent failed to inform his attorney or the special master "what

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<sup>3</sup> Vaccine Rule 34(b) addresses a situation not present here. When there is a challenge to a special master's decision on attorneys' fees, the judge may award attorneys' fees for that motion for review.

specific line item work performed was excessive under the circumstances of this particular case. This type of generalized objection, without more specificity[,] cannot be acceptable.” Pet’r Reply, filed March 11, 2011, at 7.

Respondent has fairly apprised Dr. Broekelschen of the objections to the fee request. It seems difficult to see how respondent could draw the fine distinctions that Dr. Broekelschen is requesting. To develop the example of preparing for oral argument, the task of preparing for oral argument is a worthwhile effort. This finding leads to other questions. What is a reasonable amount of time to spend? In Dr. Broekelschen’s case, is 67 hours reasonable? If not, how much is reasonable? Almost by definition, an inquiry into the reasonableness of an activity is likely to produce a range of acceptable answers, not one bright-line test.

Even if there were some support for burdening respondent with producing a line-by-line analysis (and Dr. Broekelschen has not cited any authority), special masters are not required to be this specific. Special masters are permitted to reduce the claimed number of hours to a reasonable number of hours and they are not required to assess fee petitions on a line-by-line basis. Saxton, 3 F.3d at 1521 (approving special master’s elimination of 50 percent of the hours claimed); see also Guy v. Sec’y of Health & Human Servs., 38 Fed. Cl. 403, 406 (1997) (affirming special master’s reduction in the number of hours from 515.3 hours to 240 hours); Edgar v. Sec’y of Health & Human Servs., 32 Fed. Cl. 505 (1994) (affirming special master’s awarding only 58 percent of the numbers of hours for which compensation was sought). When the trial court uses a percentage reduction, the trial court should provide a “‘concise but clear’ explanation of its fee reduction.” Internat’l Rectifier Corp. v. Samsung Electronics, Co., 424 F.3d 1235, 1239 (Fed. Cir. 2005) (quoting Gates v. Deukmejian, 987 F.2d 1392, 1400 (9th Cir. 1993) and following Ninth Circuit law). In reducing the number of hours allowed, a trial court is not required to explain how many hours are appropriate for any given task. Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1259 (10th Cir. 2005); Mares v. Credit Bureau of Raton, 801 F.2d 1197, 1202-03 (10th Cir. 1986) (affirming district court’s reduction in the number of hours claimed for pre-trial preparation by 77 percent). In other contexts, judges at the Court of Federal Claims have reduced the number of hours in requests for attorneys’ fees by percentages. See, e.g., Town of Grantwood Village v. United States, 55 Fed. Cl. 481, 489 (2003) (reduction of 30 percent for supplemental fee petition); Presault v. United States, 52 Fed. Cl. 667, 681 (2002) (reduction of 20 percent of the total requested fee). The approach endorsed in Saxton is followed in this case.

Consistent with the approach taken by the parties, this decision divides Dr. Broekelschen's fee request into five different periods. This separation aids the analysis in determining whether the total number of hours was reasonable. The five periods reflect changes in the entity deciding the case. They are: first, activities performed before the special master until the entitlement decision was issued; second, activities relating to the motion for review by the Court of Federal Claims; third, activities before the panel of the Federal Circuit; fourth, activities before the entire Federal Circuit on a request for a rehearing en banc; and fifth, coming full circle, activities before the special master in resolving the fee dispute.

**a) Work before the Office of Special Masters**

Almost all the attorneys' work performed before the special master was compensated in the December 17, 2008 decision. This decision awarded Dr. Broekelschen \$107,035.75 in attorneys' fees for activities such as preparing the petition, gathering medical records, obtaining an expert's opinion, conducting a two-day hearing, and drafting an initial brief after the hearing. Events that were not encompassed by the December 17, 2008 decision include additional activities on entitlement for which Dr. Broekelschen seeks \$13,035 in attorneys' fees and activities regarding interim fees for which Dr. Broekelschen seeks \$9,693.

The \$13,035 requested for additional activities on entitlement represents 35 hours of attorney time and 8 hours of paralegal time. The most important activities were drafting a reply brief and responding to a November 21, 2008 order, which indicated that a third-party neuroradiologist should interpret certain MRIs. The reply brief is 12 pages and is truly a reply brief in the sense that Dr. Broekelschen addresses the respondent's arguments. The reply brief does not merely repeat the arguments made in the opening brief. The November 21, 2008 order prompted Dr. Broekelschen's attorney to research whether special masters may initiate discovery. See entries for 11/21/08 through 12/9/08. Although some attorneys who charge an hourly rate similar to Ms. Roquemore's hourly rate may not have conducted this research, Ms. Roquemore's work did not exceed the bounds of reasonableness. The ensuing memorandum persuaded the undersigned not to exercise his discretion to obtain a third-party neuroradiologist. Dr. Broekelschen has demonstrated the reasonableness of his attorney's work. Therefore, Dr. Broekelschen is awarded \$13,035 for activities relating to entitlement.

In this same period, Dr. Broekelschen was requesting (and eventually received) an award of attorneys' fees and costs on an interim basis. The work for

assembling the initial fee petition was compensated in the December 17, 2008 decision See 2008 WL 5456319, at \*7. For additional work relating to Dr. Broekelschen's request for an interim award of attorneys' fees and costs, Dr. Broekelschen seeks \$9,693 (25 hours of attorney's time plus 8.9 hours of paralegal time).

The amount of time spent on the request for attorneys' fees reflects two special circumstances. This request for fees appears to be the first request submitted for Ms. Roquemore. As an attorney new to the Vaccine Program, Ms. Roquemore developed evidence to support the fee application more extensively than attorneys who have had many fee requests adjudicated in the past. With these veteran attorneys, previous decisions are a foundation for any current fee application. Because Dr. Broekelschen's case was the foundation for Ms. Roquemore, additional time was reasonable.

The second unique aspect of Dr. Broekelschen's request for interim fees was that it was the first time a special master awarded interim fees. At this point, the Office of Special Masters, attorneys who represent petitioners, and attorneys from the Department of Justice were attempting to establish procedures for requests for interim fees. Dr. Broekelschen's case, therefore, required some efforts that would not be needed after procedures became more routine.<sup>4</sup>

Some of the work performed during this phase of the case could have been performed by a paralegal. Examples include requesting bills for an expert's travel expenses from the expert and researching paralegal rates. Ms. Roquemore performed these tasks and the initial fee petition requested compensation at an attorney's hourly rate for these activities. After respondent objected and noted the lack of delegation to a paralegal, Dr. Broekelschen's revised fee request allocated some of these hours to a paralegal and decreased the number of hours requested by Ms. Roquemore.

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<sup>4</sup> For example, a review of the docket sheet and Ms. Roquemore's time sheet shows that the Clerk's Office did not enter a judgment on the December 17, 2008 decision immediately after the 30-day time for filing a motion for review expired. Instead, Ms. Roquemore's attention and intervention appears to have prompted the entry of judgment on January 23, 2009.

The revised fee request is reasonable under the circumstances present in Dr. Broekelschen's case. Dr. Broekelschen is awarded \$9,693 for his attorneys' work in litigating the interim fee request.<sup>5</sup>

**b) Work before the Court of Federal Claims**

After the decision denying Dr. Broekelschen compensation was issued, he filed a motion for review at the Court of Federal Claims. For this stage of the case, in the amended fee application, Dr. Broekelschen requests compensation for 75 hours of his attorney's time and 43 hours for paralegal time. The requested amount is \$31,035.<sup>6</sup>

Of the 118 hours of time, the vast majority was spent drafting the motion for review. Approximately 100 hours was devoted to work associated with the motion. See entries from Feb. 2, 2009 through March 26, 2009. The balance of Ms. Roquemore's time (18 hours) was spent preparing a supplemental brief addressing Andreu v. Sec'y of Health & Human Servs., monitoring the case file, reading other decisions, and communicating with her client. See entries from April 2, 2009 through July 24, 2009.

Because the motion for review is the product of most of the work performed during this period, the motion has been reviewed in detail. The motion for review is approximately 50 pages in length with additional pages for a table of contents and table of authorities. This 50 pages, however, is not fresh work. Instead, the vast majority of the motion for review is very similar to the June 26, 2008 brief on entitlement filed with the special master after the hearing. For example, the recitation of facts in the motion for review repeats large portions of the presentation of facts in the post-hearing brief. (Although there is a large degree of

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<sup>5</sup> It should be noted that the amount awarded in litigating attorneys' fees (an amount that exceeds more than \$10,000 after some amount is added from the interim fee award) is a relatively high amount. It is expected that litigation over fees in Ms. Roquemore's cases will decrease and less time will reasonably be spent on attorneys' fees because baseline rates for Ms. Roquemore and her support staff have been established, paying interim attorneys' fees is no longer a novel issue, and Ms. Roquemore will delegate some routine tasks associated with fee applications to her support staff.

<sup>6</sup> The original fee application requested 118.2 hours of attorney's time and no hours of paralegal time, resulting in a total of \$40,770.

overlap, the motion for review contains some additional information and some editorial comments about errors made by the special master). Ms. Roquemore is not entitled to compensation for copying and pasting words from one brief to another brief.

After the largely repetitious material is eliminated from the motion for review, much less material can be the basis for compensating Ms. Roquemore. New sections in the motion for review are predominantly the standard of review, which runs from pages 11-13; an argument that the special master used credibility as a pretense, which runs from pages 20-28; and an argument that Dr. Broekelschen suffered from transverse myelitis, not anterior spinal artery syndrome, which runs from pages 42-49. These sections total approximately 20 pages.

It is difficult to imagine how an experienced attorney can use nearly 100 hours to produce a legal product in which 30 pages have essentially (but not entirely) been copied from an earlier brief and in which 20 pages contain truly new work. Although Dr. Broekelschen's amended fee request voluntarily reduced the 118 hours of attorney time to 75 hours of attorney time plus 43 hours of paralegal time, the reformed requested is still unreasonable. See Greenhill v. United States, 96 Fed. Cl. 771, 782 (2011) (reducing time spent on post-trial brief from 39.5 hours to 15 hours).

A reasonable amount of work, performed by an attorney and a paralegal, is \$15,600. This represents 40 hours of attorney time and 15 hours of paralegal time.

**c) Work at the Federal Circuit (Panel)**

The next stage of Dr. Broekelschen's case was his appeal to the Federal Circuit. The original time sheets provide details about the work at the Federal Circuit. A summary shows the following phases<sup>7</sup>:

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<sup>7</sup> The table presents a summary. The activity column presents a broad description of the tasks and omits a detailed recitation of every task. The numbers of hours and the requested amounts have been rounded off.

Dates	Hours	Cost	Activities
8/4/09 to 9/30/09	30	\$10,000	Figuring out appeal procedure, ordering transcript
10/1/09 to 12/1/09	140	\$43,000	Drafting first brief, consulting other attorneys
1/1/10 to 1/31/10	41	\$13,500	Reply brief (25 hours), appendix
2/2/10 to 2/28/10	12	\$4,000	Moberly, invoicing, prepare for oral argument
3/1/10 to 3/31/10	48	\$16,000	Oral argument preparation, travel arrangements
4/1/10	46	\$15,000	Oral argument preparation + practice, participation, return, follow-up
<b>TOTAL</b>	<b>317</b>	<b>\$101,500</b>	

It is readily apparent that 317 hours are an unreasonable amount of time. Although Dr. Broekelschen specifically did not concede that any hours were unreasonable, Pet'r Reply, filed Apr. 7, 2011, at 1-3, Dr. Broekelschen amended his request to total \$83,040, which derives from 200 hours of attorney time and 117 hours of paralegal time.<sup>8</sup> Respondent maintained her objection that even at the reduced amounts, the amount sought was unreasonable. Resp't Sur-reply, filed Apr. 7, 2011, at 1-2.

Respondent's objection is sound. The amount of hours spent exceeds what reasonable attorneys who hold themselves out as highly qualified attorneys in the Vaccine Program would spend. For example, attorneys who have experience with appeals at the Federal Circuit are unlikely to spend approximately 30 hours doing work that is preliminary to writing the appellate brief.

Spending approximately 140 hours on the initial brief is also an unreasonable amount of time. Of the 58 substantive pages of the Federal Circuit

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<sup>8</sup> Respondent represented that the original application contained 310.2 hours of attorney time and 10.4 hours of paralegal time for a total request of \$107,851. The difference (7 hours) between the amount given in the table and the amount listed in the text is probably due to whether activities associated with reviewing the decision of the Court of Federal Claims are categorized with either the motion for review phase or the Federal Circuit appeal stage.

brief, approximately 17 pages are the product of new work. The remainder of the brief largely repeats material submitted to the Court of Federal Claims in either the motion for review or the June 19, 2008 supplemental brief. Moreover, the 17 pages of new material include some sections, such as the statement of the issues and the course of proceedings below, that are relatively routine and more easily drafted.

Similarly, the amount of time spent preparing for oral argument exceeds the bounds of reasonableness. Although it is difficult to identify which hours are unreasonable (and there is no obligation for a special master to do so), one series of entries may serve as an example. On March 16, 2010, Ms. Roquemore recorded six hours for “start review of file in preparation for oral argument. Make notes.” Entries for the remainder of March list “file review” (or similar notation) and the time recorded includes the following number of hours 3, 4.5, 5.9, 2.1, 3.5, 3, 3, 4.4 (including time spent in revision of notes), 3, 5 and 1.5. Similar file review extends into April. It is difficult to understand how the file could require so much review. By this point, Ms. Roquemore had reviewed the file several times: before the hearing, for the post-hearing brief, for the motion for review, and for the brief to the Federal Circuit. The number of hours devoted to file review seems to ignore the previous work. See Greenhill, 96 Fed. Cl. at 780 (reducing time spent for preparing for closing argument from 37.7 hours to 10 hours).

Further examples of hours that are duplicative, excessive or unnecessary could be given but a line-by-line analysis is not needed. A review of the record suggests that \$56,415.00 for time spent before a panel of the Federal Circuit is a reasonable amount of compensation. This figure is derived from 143 hours of attorney time plus 59 hours of paralegal time.

**d) Work at the Federal Circuit (en banc)**

Additional work was performed when Dr. Broekelschen sought review of the panel’s decision by seeking a rehearing en banc. The original fee application sought compensation for 69 hours of attorney time plus 2 hours of paralegal time, for a total amount of compensation of \$23,965. The amended fee application reduced the number of hours to 45 for an attorney and 25 for a paralegal. The revised request seeks \$18,525 in attorneys’ fees.

The substantive portion of the petition for rehearing en banc is 15 pages. Its primary basis is the opinion dissenting from the majority’s decision to affirm the denial of compensation. Additional authorities cited in support include Walther v.

Sec'y of Health & Human Servs., 485 F.3d 1146 (Fed. Cir. 2007); Capizzano v. Sec'y of Health & Human Servs., 440 F.3d 1367 (Fed. Cir. 2006); and Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274 (Fed. Cir. 2005).

Again, the amount of time requested is unreasonable. It appears that time was spent on activities, such as researching Federal Circuit cases on burden shifting, that essentially repeat work done in conjunction with earlier briefs. The primary case on which Dr. Broekelschen relied, Walther, was not a newly decided case. Dr. Broekelschen's briefs in earlier stages of the case had cited to Walther. Thus, there was little need to "research" the topic and the amount of time spent refreshing counsel's recollection about Walther should have been relatively brief.

A reasonable amount of time for filing a petition for rehearing en banc in this case is \$13,275.00. This amount comes from 35 hours of attorney time and 10 hours of paralegal time.

**e) Work before the Special Master (Fees)**

The final phase is work that was recently performed in support of the pending motion for attorneys' fees and costs, sometimes known as "fees for fees." Originally, Dr. Broekelschen requested \$5,399, which represents 15 hours by an attorney plus 2.8 hours from a paralegal. Dr. Broekelschen subsequently reduced the amount of time to 10 hours for an attorney and 7.8 hours for a paralegal. This lowered the amount requested to \$4,386. The continued litigation over the fees has prompted Dr. Broekelschen to seek an additional \$5,209.08 for the reply brief and \$793.50 for the sur-reply brief. Thus, the total requested as fees for fees is \$10,388.58.

Ms. Roquemore defends the amount of fees requested for preparing the fee application by arguing she was previously compensated for 20 hours of work in conjunction with preparing the application for interim fees. Pet'r Supplemental Declaration, filed March 31, 2011, at 14. This is not exactly correct. It is accurate to report that Dr. Broekelschen requested compensation for approximately 20 hours of Ms. Roquemore's time for preparing the fee application. See Pet'r Mot., filed June 27, 2008, exhibit B at 51-52 (entries total 19.12 hours). However, the resulting fee decision did not compensate Ms. Roquemore for all the hours requested. The total number of hours was found to be unreasonable. Thus, the hours spent preparing the fee application were reduced by 20 percent, meaning that the Ms. Roquemore was actually compensated for only 16 hours of work. Interim Fee Decision, 2008 WL 5456319, at \*8.

In any event, there is an important difference between the interim fee request and the pending fee request. The interim fee request was the first time that Ms. Roquemore's reasonable hourly rate was being set in the Vaccine Program. One special master's determination of an hourly rate influences how other special masters look at hourly rates, although one special master is not bound by another special master. Thus, extra effort devoted to establishing a "landmark" hourly rate is worthwhile. The conclusion in the Interim Fee Decision implicitly considered this factor.

The pending fee application is different. There has been no dispute about the hourly rates because the hourly rates had been established in the earlier decision. Because the hourly rates were set, the only part of the lodestar formula that is disputed is the number of hours that are reasonable. The source of this information is Ms. Roquemore's timesheets that appear to be created contemporaneously. Thus, very little time is needed to produce the initial invoice supporting the fee application that was eventually filed on February 17, 2011. Ms. Roquemore indicates that she reviewed the invoices. See entry for Feb. 16, 2011. Such an activity is consistent with – if not actually required by – the Supreme Court's instruction that attorneys who submit requests for fees pursuant to fee-shifting statutes exercise "billing judgment." Hensley, 461 U.S. at 433-34. Yet, Ms. Roquemore appears to have reviewed invoices for much longer than reasonable.

In addition to the invoices, the February 17, 2011 fee application included a 14-page memorandum explaining the basis for the request. The necessity of this memorandum could be questioned. Typically, fee applications are not supported by such a lengthy memorandum. One reason may be that special masters routinely adjudicate fee applications and, therefore, already are familiar with the legal basis for an award.

However, in this case, the time spent drafting the memorandum is reasonable. Ms. Roquemore is still becoming acquainted with typical procedures in the Vaccine Program. Thus, she may have reasonably believed that a memorandum was required. Additionally, almost all the work for which Dr. Broekelschen seeks attorneys' fees took place before tribunals other than the Office of Special Master. The memorandum supporting the February 17, 2011 fee application provides a context for the work performed by Ms. Roquemore. See Torday v. Sec'y of Health & Human Servs., No. 07-372, 2007 WL 1979596, at \*7 (Fed. Cl. Spec. Mstr. April 7, 2011).

After the February 17, 2011 fee application was filed, the Secretary objected to the amount requested. Dr. Broekelschen filed a reply and sur-reply and sought compensation for each of those activities.

A reasonable amount of work in litigating fees for fees as part of a final application for fees is \$7,500. This figure is a de minimis adjustment from a calculation of 19 hours of attorney time plus 7.8 hours of paralegal time, which totals \$7,491.

### **3. Additional Considerations**

The analysis performed in the previous section was derived by examining the record developed in this case as informed by the undersigned's experience in litigation, including litigation at the Federal Circuit. One way to check the reasonableness of these estimates is to compare the result reached in this case with results in cases involving either Ms. Roquemore or a lengthy procedural history.

#### **a) Cases with Federal Circuit Appeals**

In the Secretary's opposition to Dr. Broekelschen's request for attorneys' fees, she cited four cases that involved an appeal to the Federal Circuit on the issue of whether the petitioner is entitled to compensation. These are Andreu, Moberly, Capizzano, and Althen.<sup>9</sup> Respondent presented decisions showing the amounts awarded, arguing that Dr. Broekelschen has requested amounts that far exceed amounts awarded in roughly comparable cases.

A basic outline of the five cases is presented in the appendix.<sup>10</sup> The cases are sufficiently similar to Dr. Broekelschen's case that they serve as a worthwhile backdrop to the above analysis. All five cases, like Dr. Broekelschen's case,

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<sup>9</sup> After respondent filed her opposition, a fifth case, Doe 11, became available.

<sup>10</sup> Dr. Broekelschen has had a fair opportunity to comment upon respondent's citation to these cases. Ms. Roquemore solicited information about "reasonable fees regarding Federal Circuit appeals" from the attorneys involved. See entry for March 8, 2011. The decisions and docket sheets are publicly available. In addition, all information presented in this decision about these cases came from publicly available sources of information.

reached the Federal Circuit. Although these other cases did not involve a petition for rehearing en banc before the Federal Circuit, the other cases had added stages. For example, Andreu involved three hearings (a fact hearing, an entitlement hearing, and a hearing on remand), two motions for review, and a resolution of damages. Moberly also had two motions for review with remand proceedings before the special master in between. Capizzano and Althen went through the damages stage.

Although none of the cases is exactly the same as Dr. Broekelschen's case, the cases can still serve as a way to see whether any award of attorneys' fees in Dr. Broekelschen's case was within the ballpark. The awards of attorneys' fees and costs ranged from \$127,443.58 in Capizzano in 2007, to \$238,786.05 in Moberly.<sup>11</sup> The award in this case, even though it has been reduced from the lowered request, exceeds the highest amount awarded in those cases.

#### **b) Ms. Roquemore's Cases**

In addition to the Interim Fees Decision in this case, one special master has adjudicated fee petitions submitted by Ms. Roquemore in two other cases, Torday v. Sec'y of Health & Human Servs., No. 07-372, 2007 WL 1979596 (Fed. Cl. Spec. Mstr. April 7, 2011), and Mueller v. Sec'y of the Dept. of Health & Human Servs., No. 06-775V, slip op. (Fed. Cl. Spec. Mstr. May 27, 2010). That special master reached similar conclusions: "Ms. Roquemore is an excellent counsel who represents her clients zealously. She is always well-prepared, organized and knowledgeable about the issues at hand. The results of her efforts are apparent. That said, Ms. Roquemore spends far greater hours than her contemporaries handling her cases." Torday, 2011 WL 1979596, at \*3.

Although a sample of three published decisions is not particularly robust, a generalization might be made that Ms. Roquemore tends to view all work she performs as reasonable, and, therefore, compensable. See Supplemental Declaration, filed March 11, 2011, at 8-9. This view seems to lead to requests for fees for Ms. Roquemore that are not in line with requests made from other skilled attorneys in comparable cases. This request, in turn, prompts an opposition from respondent. The result is litigation over attorneys' fees.

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<sup>11</sup> In Moberly, decisions awarding attorneys' fees were issued on September 15, 2008 (\$132,034.85 in interim fees) and on June 11, 2010 (\$106,751.20 in final fees).

Special masters may resolve these disputes, 42 U.S.C. § 300aa—15(e), but a better course would be to avoid “a second major litigation” as recommended in Hensley, 461 U.S. at 437. Less extensive litigation is likely to follow an initial submission that recognizes that “[i]t does not follow the amount of time actually expended is the amount of time reasonably expended.” Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc); accord Sabella v. Sec’y of Health & Human Servs., 86 Fed. Cl. 201, 211 (2009) (in relevant part affirming special master’s reduction of the number hours requested). Regardless of whether the final result is produced by litigation or by compromise, the amount of attorneys’ fees that special masters are authorized to award is limited to a “reasonable” amount. 42 U.S.C. § 300aa—15(e); accord Riggins v. Sec’y of Health & Human Servs., No. 99-382V, 2009 WL 3319818, at \*3 (Fed. Cl. Spec. Mstr. 2009), aff’d in an unpublished decision (Fed. Cl. Dec. 10, 2009), aff’d, 406 F. App’x 479 (Fed. Cir. 2011).

#### 4. Summary Of Attorneys’ Fees

A reasonable amount of attorneys’ fees is:

Phase	Amount
Special Master (additional entitlement)	\$22,728.00
Court of Federal Claims	\$15,600.00
Federal Circuit (panel)	\$56,415.00
Federal Circuit (en banc)	\$13,275.00
Special Master (attorneys’ fees)	\$7,500.00
TOTAL	\$115,518.00

This amount is in addition to the amount (\$134,371.01) previously awarded.

#### C. Costs

The finding that Dr. Broekelschen had a reasonable basis for this litigation makes him eligible for an award of costs. 42 U.S.C. § 300aa–15(e)(1). Dr. Broekelschen has requested \$5,932.08 in costs for his attorney and \$3,879.00 in costs that he bore personally. Pet’r Fee App’n, filed Feb. 17, 2011, at 2. All costs relate to Dr. Broekelschen’s appeals.<sup>12</sup>

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<sup>12</sup> Dr. Broekelschen was previously awarded costs for expenditures during the trial phase. Interim Fee Decision, 2008 WL 5456319, at \*7-8.

Respondent has largely not objected to the request for costs. Respondent did not oppose any aspect of the costs incurred by Dr. Broekelschen personally. For costs incurred by Ms. Roquemore, respondent opposed only some items. See Resp't Opp'n, filed March 8, 2011, at 11-12.

Respondent's objections primarily relate to costs incurred when Ms. Roquemore traveled to Washington, DC, to participate in an oral argument at the Federal Circuit on Thursday, April 8, 2010. Ms. Roquemore flew from California on Tuesday, April 6, 2010, and returned on Friday, April 9, 2010. Respondent argues that the duration of this trip is unreasonable.

Traveling to Washington, DC the day before the argument (Wednesday) is practically required. Ms. Roquemore's choice to fly one day earlier still (Tuesday) seems to be for her convenience. It seems unfair to ask a client paying for an attorneys' travel to pay for an extra day's expenses to accommodate time zone changes. Thus, expenses associated with Tuesday's travel (\$452.30) will be deleted.

The day of return is a point on which reasonable minds can differ. Given that arguments at the Federal Circuit last less than one hour, it seems possible that an attorney could return to the west coast on the day of the argument. Due to changes in time zone, traveling westward permits a traveler to depart in the afternoon and land in the afternoon. However, the record in this case does not contain information about when the argument was scheduled at the Federal Circuit (morning or afternoon) and does not contain information about flights that could have been taken the day of the argument. Without this information, no deduction will be made for costs incurred for staying in Washington, DC until Friday, April 9, 2010. On the other hand, the charge of \$109.57 for a single dinner is removed because it was not supported. See Resp't Opp'n at 12.

Respondent also objected to the use of Federal Express and certain copying charges. With the advent of electronic case filing at the Court of Federal Claims, overnight mailings are largely unnecessary. However, the Federal Circuit does not accept electronic filings. Thus, Dr. Broekelschen's use of Federal Express was reasonable. For the copying charges, Dr. Broekelschen has agreed to reduce the request by \$56.00. Other amounts are reasonable.

In sum, Dr. Broekelschen is awarded \$5,314.51 (\$5,932.08 - \$452.30 - \$109.27 - \$56.00) as costs for his attorney. He is also awarded \$3,879.00 as costs that he advanced personally. The total costs are \$9,193.51.

### **III. Conclusion**

While Dr. Broekelschen was litigating his claim that a flu vaccine injured him, he received an interim award for his attorneys' fees and costs, totaling \$134,371.01. After Dr. Broekelschen's claim was denied, he sought review through three levels of appeals and did not succeed at any level. This lack of success does not preclude Dr. Broekelschen from seeking his attorneys' fees and costs for this work.

He has requested approximately \$165,000 in additional attorneys' fees and costs. This request is reduced to a reasonable amount, which is \$124,711.51 (\$115,518.00 in fees plus \$9,198.51 in costs). The Clerk's Office is instructed to issue judgment in accord with this decision. A check shall be made payable to Dr. Broekelschen and his law firm in the amount of \$120,832.51. Another check in the amount of \$3,879.00 shall be made payable to Dr. Broekelschen alone.

IT IS SO ORDERED.

s/ Christian J. Moran  
Christian J. Moran  
Special Master

Appendix: Attorneys' Fees and Costs in Cases with Appellate Litigation in Vaccine Program

Name + Docket	Pet'r Attorney	SM Hearing Dates	Result of Motion for Review	Federal Circuit	Rehearing at Federal Circuit?	Damages	Date of SM's Fee Award	Amount
Doe 11, redacted <sup>13</sup>	Mr. Gage		Remanding 7/31/08; Affirming 4/22/09	2009-5096	Supreme Court denied certiorari . 11/8/11	No.	Various interim decisions; 4/1/11	\$102,017.28 (total interim); \$76,609.56 (final). <b>\$178,626.84</b> (total)
Andreu 98-817	Mr. Shoemaker	Fact hearing 8/27/99; Entitlement 11/3/06; Remand 4/28/08	Remanded 3/3/08; Sustained 7/3/08	08-5154	No	Yes. Decision issued 9/24/10	1/25/2011	\$200,000 in atty fees and costs + \$1,000 in costs. <b>\$201,000</b> (total)
Moberly 98-910	Mr. Homer	Entitlement 7/7/03; Remand 2/28/06	Remanded 12/27/05; Affirmed Spec. Mstr. 1/22/09	2009-5057	No	No.	9/15/08 (interim), 6/11/10 (final)	\$132,034.85 (interim), \$106,751.20 (final). <b>\$238,478.43</b>

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<sup>13</sup> The procedural history in Doe 11 is more complicated than presented on the chart because there was appellate litigation involving attorneys' fees and costs. Those events are not recorded in the chart. However, the amount of fees and costs takes into account the additional appellate work.

Name + Docket	Pet'r Attorney	SM Hearing Dates	Result of Motion for Review	Federal Circuit	Rehearing at Federal Circuit?	Damages	Date of SM's Fee Award	Amount
								(total)
Capizzano, 00-759	Mr. Homer	Entitlement 6/11/03; Remand 11/8/06	Affirmed Spec. Mstr. 12/7/04	05-5049	No	Yes. Decision issued 10/15/07	10/15/07	<b>\$127,443.58</b>
Althen, 00-170	Mr. Homer	Entitlement 6/14/02	Vacating and reversing 9/30/03	04-5146	No	Yes. Decision issued 6/1/04	12/15/05	\$126,432.92 (fees) plus \$33,575.76 (costs). <b>160,008.68</b> (total)