

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

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MARILYN DAVIS,	*	No. 07-451V
	*	Special Master Christian J. Moran
Petitioner,	*	
	*	
v.	*	Filed: March 20, 2012
	*	
SECRETARY OF HEALTH	*	attorneys' fees and costs,
AND HUMAN SERVICES,	*	reasonable basis for appellate
	*	litigation, reasonable number
Respondent.	*	of hours for appellate litigation

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Ronald C. Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA, for petitioner;  
Darryl R. Wishard, United States Dep't of Justice, Washington, DC, for respondent.

**PUBLISHED DECISION ON ATTORNEYS' FEES AND COSTS<sup>1</sup>**

Marilyn Davis claimed that the influenza vaccine caused her to suffer neuromyelitis optica, which is sometimes abbreviated NMO. She sought compensation pursuant to the National Childhood Vaccine Injury Act, 42 U.S.C.

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<sup>1</sup> Because this 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 a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

§§ 300aa-10 et seq. (2006). Her claim for compensation was denied and two levels of appellate review upheld this denial of compensation.

When her case was pending, she received an interim award of \$85,000 for her attorneys' fees and costs. Ms. Davis presently seeks an award of attorneys' fees and costs for the motion for review filed at the Court of Federal Claims, an appeal at the Federal Circuit, and for her fee application. The total amount she seeks in additional fees and costs is \$76,189.79. The Secretary opposes. The Secretary argues against awarding any compensation for the Federal Circuit appeal. The Secretary also argues that the number of hours spent on the appellate litigation was excessive.

For the reasons explained below, Ms. Davis is not entitled to attorneys' fees for her Federal Circuit appeal. For the other parts of her case, she is entitled to \$20,679.00 in additional attorneys' fees and costs.

## **I. Procedural History**

Ms. Davis filed her petition on June 28, 2007. To support her claim, Ms. Davis submitted a report from J. Griffith Steel, a neurologist, who expressed an opinion that the flu vaccine caused Ms. Davis's NMO. Dr. Steel testified at a hearing on September 15, 2009, during which Ms. Sylvia Chin-Caplan represented Ms. Davis. The Secretary presented testimony from another neurologist, who disagreed with Dr. Steel's opinion.

Following the hearing, the parties filed briefs. Mr. Kevin Conway, the most senior attorney in Ms. Davis's law firm, prepared Ms. Davis's brief. See Pet'r App'n for Interim Attorneys' Fees, filed Feb. 8, 2010, Tab A (timesheets) at pdf pages 20-22.

While Ms. Davis's claim for entitlement was submitted for adjudication, she filed a motion for an award of attorneys' fees and costs on an interim basis. The interim fee application sought compensation for all work performed through the date of application. Ms. Davis requested an award for approximately 150 hours of attorney time, approximately 50 hours of law clerk time, and approximately 120 hours of paralegal time. The total requested in interim attorneys' fees was \$64,313. Ms. Davis also requested \$25,117.65 in interim attorneys' costs. Ms. Davis, personally, had incurred a cost of \$250.00. The total requested on an interim basis was \$89,740.65. Pet'r Mot., filed Feb. 8, 2010.

On February 18, 2010, Ms. Davis amended her request for interim fees and costs by reducing the amount sought to \$85,000. Ms. Davis represented that the Secretary did not object to an award in this amount. Ms. Davis was awarded the amount (\$85,000) requested in the amended interim fee application. Interim Fees Decision, 2010 WL 1252737 (Fed. Cl. Spec. Mstr. March 10, 2010).

Shortly thereafter, the undersigned special master issued a decision, denying Ms. Davis's claim that the flu vaccine caused her NMO. Entitlement Decision, 2010 WL 1444056 (Fed. Cl. Spec. Mstr. March 16, 2010). The decision denying entitlement quoted Moberly v. Sec'y of Health & Human Servs., 592 F.3d 1315 (Fed. Cir. 2010), for the proposition that a "special master is entitled to require some indicia of reliability to support the assertion of the expert witness." Entitlement Decision, 2010 WL 1444056, at \*6. The decision also quoted Moberly for holding that petitioners do not prevail by presenting a merely "'plausible' or 'possible' causal link." Id. at \*14.

Ms. Davis filed a motion for review with the Court of Federal Claims ("the Court") on April 15, 2010. In accordance with Vaccine Rule 24, the memorandum accompanying the motion for review was 20 pages in length, excluding tables. Mr. Conway and Ms. Chin-Caplan primarily drafted the motion for review brief. See Pet'r App'n for Final Attorneys' Fees, filed Oct. 24, 2011, Tab A ("Timesheets") at 1-2.

Ms. Davis's motion for review did not cite Moberly. Ms. Davis argued that she established "it is biologically plausible that the flu vaccine can cause inflammatory demyelinating injuries." Pet'r Memo. in Support of Mot. for Review, filed Apr. 15, 2010, at 3. Later Ms. Davis argued, "A medical theory . . . is nothing more than biologic plausibility." Id. at 17.

The Secretary responded to the motion for review, specifically noting that Ms. Davis "fails to cite Moberly – recent, controlling precedent that narrowly interprets Andreu and contradicts petitioner's assertions in this appeal." Resp't Resp. to Pet'r Mot. for Review, filed May 17, 2010, at 3 n.4. Foreshadowing the arguments presented in the present motion, the Secretary warned, "Petitioner's failure to cite or distinguish Moberly in this appeal comes close to rendering her appeal frivolous." Id. The Secretary cited Moberly throughout her brief in support of the contention that petitioners do not meet their burden of proof by presenting a "plausible" causal connection. Id. at 10-11.

After the Secretary responded, the Court heard oral argument in Washington, DC, on May 26, 2010. Two attorneys for Ms. Davis attended the oral argument, although only one spoke. The total amount of time spent on the motion for review was approximately 38 hours for attorneys plus approximately seven hours for law clerks.

The Court denied the April 15, 2010 motion for review, holding that the special master did not abuse his discretion when finding that Ms. Davis had not met her burden in establishing the flu vaccine can cause NMO. 94 Fed. Cl. 53 (2010). The Court quoted Moberly as stating that “the special master is entitled to require some indicia of reliability to support the assertion of the expert witness.” Id. at 63. The Court examined the special master’s decision and concluded that there were “very few indicia that either tend to support, or negate, the persuasiveness of petitioner’s medical theory. . . . [T]he special master weighed the evidence of record and made determinations as to persuasiveness in accord with law.” Id. at 68.

Ms. Davis filed a notice of appeal to the Federal Circuit, which docketed her case as number 2010-5159. Ms. Davis’s initial Federal Circuit brief was approximately 37 pages. Ms. Chin-Caplan reviewed the brief before it was filed. Timesheets at 10 (entry for Dec. 20, 2010). The Federal Circuit brief repeats many arguments made in the motion for review, including an argument regarding biological plausibility. It does not cite Moberly. Appellant’s Br., filed Dec. 27, 2010, No. 2010-5159, 2010 WL 5650496.

The Secretary defended the Court’s rejection of a “plausibility” standard and specifically noted that Ms. Davis had failed to cite Moberly. Appellee’s Br., filed Feb. 9, 2011, No. 2010-5159, 2010 WL 882035, at \*8 n.4. Expanding upon a point made in the Secretary’s response to the motion for review, the Secretary stated that “Petitioner’s failure to cite or distinguish Moberly in this appeal raises a legitimate question about its frivolousness. . . . As such, respondent reserves the right to challenge any request for attorneys’ fees specifically for this appeal as unreasonable.” Id. The Secretary cited Moberly throughout her brief, with one section headed “The statutory standard of preponderance of the evidence for causation-in-fact cases, as interpreted by this Court in Moberly, was correctly applied in this case.” Id. at \*10.

Ms. Davis filed a reply. Ms. Chin-Caplan spent more than 15 hours working on the appeal between the date of the Secretary’s brief and the date when Ms.

Davis's reply brief was filed. See Timesheets at 12-13. The reply brief did not discuss Moberly.

The Federal Circuit heard oral argument on May 5, 2011. At oral argument, three judges asked about Moberly separately. When Ms. Chin-Caplan argued that the special master had impermissibly raised the burden of proof, one judge asked whether the Circuit had answered this question in Moberly. Ms. Chin-Caplan answered that Moberly had not resolved the question. Recording of oral argument, found at <http://www.cafc.uscourts.gov/oral-argument-recordings/2010-5159/all> 5:17 through 6:12. Another judge challenged Ms. Chin-Caplan's discussion of a plausible theory after it was rejected in Moberly. Id. at 6:27 through 7:05. Finally, a third judge asked why Moberly was not discussed in the appellant's reply brief. Id. at 8:25 through 9:28. Ms. Chin-Caplan responded, "I don't know. My partner wrote the brief and I did not question him about that." Id. at 9:29 through 9:36. Including time spent for oral argument, the total time spent on litigation before the Federal Circuit was approximately 150 hours.

On May 12, 2011, the Federal Circuit issued a per curiam opinion pursuant to Fed. Cir. R. 36, affirming the judgment of the Court of Federal Claims that Ms. Davis was not entitled to compensation. 420 Fed. Appx. 973 (Fed. Cir. 2011). A Rule 36 decision indicates that "an opinion would have no precedential value" and either "(a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous, . . . [or] (e) a judgment or decision has been entered without an error of law." (Provisions (b), (c), and (d) are not applicable to Ms. Davis's case.).<sup>2</sup>

On October 24, 2011, Ms. Davis filed the pending motion for attorneys' fees and costs. Ms. Davis primarily seeks compensation for her attorneys' work in pursuing the motion for review at the Court of Federal Claims and for her attorneys' work before the Federal Circuit. A small amount of Ms. Davis's request for attorneys' fees concerns work at the Office of Special Masters in litigating the fee request.

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<sup>2</sup> In conjunction with the Federal Circuit's judgment, the Federal Circuit's Clerk's Office issued a "Notice of Entry of Judgment Without Opinion." This notice provided that "Costs are taxed against the Appellant(s) in favor of the Appellee(s) under Rule 39."

The Secretary presents two types of objections to Ms. Davis's request. One is that Ms. Davis has requested an unreasonable amount of attorneys' fees for each of the three phases at issue (the motion for review, the appeal to the Federal Circuit, and the litigation over fees). The second objection pertains specifically to the appeal to the Federal Circuit. For this aspect of the case, the Secretary's primary argument is that the appeal lacked reasonable basis, and, therefore, Ms. Davis should be awarded no attorneys' fees.

Briefing on Ms. Davis's motion for final fees concluded on January 18, 2012. The matter is ready for adjudication.

## II. Standards for Adjudication

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)). For the hourly rate, Ms. Davis has requested compensation at amounts that the Secretary has not challenged. See Resp't Resp., filed Nov. 3, 2011, at 6 n.3. Thus, the ultimate question is the reasonable number of hours.

Quoting a decision by the United States Supreme Court, the Federal Circuit has explained some of the limits on 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 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)).

Special masters are permitted to reduce the claimed number of hours to a reasonable number and they are not required to assess fee petitions on a line-by-line basis. Saxton, 3 F.3d at 1521 (approving the special master’s elimination of 50 percent of the hours claimed); see also Broekelschen v. Sec’y of Health & Human Servs., No. 07-137V, 2011 WL 5600217, at \*11-13 (Fed. Cl. Oct. 31, 2011) (affirming the special master’s reduction of attorney and paralegal hours); Guy v. Sec’y of Health & Human Servs., 38 Fed. Cl. 403, 406 (1997) (affirming the 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 the special master’s awarding only 58 percent of the numbers of hours for which compensation was sought). This approach is consistent with the Supreme Court’s instruction that when awarding attorneys’ fees, trial courts may use estimates to achieve “rough justice.” Fox v. Vice, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2205, 2216 (2011).

### **III. Analysis**

To organize the evaluation of Ms. Davis’s fee application, her case will be divided into three phases. Each phase corresponds to a different entity within the judicial system. First, the Court of Federal Claims considered her motion for review. Second, the Federal Circuit addressed her appeal. Third, the undersigned evaluated her fee request.

#### **A. Motion for Review before the Court of Federal Claims**

Unlike the appeal before the Federal Circuit (discussed in part B below), the Secretary has not questioned Ms. Davis’s eligibility for attorneys’ fees for filing a motion for review. Despite not succeeding on her motion for review, Ms. Davis has satisfied the two prerequisites for being eligible for an award of attorneys’ fees and costs, good faith and reasonable basis. Thus, the only issue pertaining to the motion for review is determining a reasonable amount of attorneys’ fees.

Respondent has objected to several items of Ms. Davis’s request. These objections are resolved in the context of examining the sequence of steps for the motion for review.

## 1. Drafting the Motion for Review

Between April 2, 2010, and April 15, 2010, four attorneys spent approximately 38 hours working on the motion for review. Mr. Conway and Ms. Chin-Caplan both spent substantial amounts of time drafting the motion for review. Mr. Homer spent only one-half hour editing the final memorandum and Ms. Ciampolillo assisted with preparing tables. Additionally, an unnamed law clerk (or law clerks) spent seven hours checking the citations in the motion for review and preparing a table of authorities. The Secretary argues that this time was “excessive and unreasonable” because “a great deal of the work in the motion for review was very similar to . . . [the] post-hearing brief filed before the special master.” Resp’t Resp., filed Nov. 3, 2011, at 10. Ms. Davis does not directly answer this argument.<sup>3</sup>

The undersigned has compared Ms. Davis’s October 29, 2009 post-hearing brief with her April 15, 2010 motion for review. There is substantial overlap. For example, pages 2-9 and 9-11 of the motion for review largely repeat pages 7-16 and 29-31 of the post-hearing brief. Pages 11-13 from the motion for review are similar to pages 31-33 of the post-hearing brief.

Thus, the new work for the motion for review is essentially contained within pages 13-20. How much time is reasonable for seven pages? The answer must consider that these seven pages are the critical portion of the motion for review because in these pages, Mr. Conway and Ms. Chin-Caplan argued why the Court should rule that the special master erred.

A reasonable amount of time for experienced attorneys to draft seven pages is 15 hours. Fifteen hours is approximately two full days and may actually overestimate the amount of time needed. An additional five hours is a reasonable (and possibly generous) amount of time for the process of creating (copying, pasting, and slightly revising) the first 13 pages. These five hours also include some time for another attorney, such as Mr. Homer, to review the final draft. An additional five hours is appropriate for tasks that can be done by a paralegal or law clerk, such as creating tables and cite-checking the new portion of the brief.

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<sup>3</sup> Ms. Davis mentions the Secretary’s objection in her reply under the heading “Excessive Time.” However, most of this portion of her reply brief argues that Ms. Davis’s appeal to the Federal Circuit was reasonable. See Pet’r Reply, filed Nov. 17, 2011, at 5-10.

Consequently, a reasonable amount of time for drafting a motion for review in this case is:

Activity	Hourly Rate <sup>4</sup>	Number of Hours	Subtotal
Presenting 13 pages by revising post-hearing brief	\$315.00	5	\$1575.00
Drafting 7 substantive pages	\$315.00	15	\$4725.00
Preparing tables	\$134.00	5	\$670.00
TOTAL			\$6970.00

## 2. Ms. Chin-Caplan's Preparing for Oral Argument

After the parties completed briefing the motion for review, the Court scheduled an oral argument in Washington, DC. Between May 21 and May 26, 2010, Ms. Chin-Caplan billed 17.2 hours preparing for oral argument. This figure includes 4.7 hours spent traveling to Washington, DC for oral argument during which Ms. Chin-Caplan was also preparing for oral argument, but not time spent returning from the oral argument. The Secretary "object[ed] to the time claimed as excessive and unreasonable." Resp't Resp. at 11. Again, Ms. Davis did not specifically counter the Secretary's argument with respect to Ms. Chin-Caplan's preparation time except to say that "her counsel, not the respondent, is in the best position to determine how to prosecute the case." Pet'r Reply, filed Nov. 17, 2011, at 6.

Considering that Ms. Chin-Caplan was already very familiar with Ms. Davis's case from her work as the trial attorney and as one of the two primary drafters of the motion for review, the amount of time is slightly unreasonable. The time spent preparing for the oral argument while traveling (4.7 hours) is reasonable because the attorney should be as productive as possible. The time spent the morning of the oral argument (1.5 hours) is also reasonable for the same reason. In addition, one full day (8.0 hours) is also reasonable. Thus, Ms. Chin-Caplan reasonably spent 14.2 hours on preparing for oral argument. See Infiniti Info. Sys. v. United States, 94 Fed. Cl. 740, 752 (2010) (reducing time for oral argument

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<sup>4</sup> The hourly rate for attorney work is the average of the hourly rates from Mr. Conway and Ms. Chin-Caplan. The hourly rate for preparing the tables is the hourly rate requested for a law clerk.

preparation). In addition, the 4.7 hours Ms. Chin-Caplan billed at half-time for returning to her office after oral argument is also reasonable.

	Hourly Rate	Number of Hours	Subtotal
Oral Argument Preparation	\$300	14.2	\$4,260.00
Return Travel	\$150	4.7	\$705.00
<b>TOTAL</b>			<b>\$4,965.00</b>

### **3. Attendance of a Second Attorney at Oral Argument**

For the oral argument, Ms. Chin-Caplan was accompanied by another attorney, Christine Ciampolillo, who graduated from law school relatively recently. Ms. Davis seeks an award to pay for Ms. Ciampolillo’s travel and attendance at the oral argument. Timesheets at 4. The Secretary objects to this item as “redundant, duplicative, and unreasonable.” Resp’t Resp. at 8.

Ms. Davis has failed to demonstrate the reasonableness of including Ms. Ciampolillo’s work in her fee petition. Ms. Davis asserts that Ms. Ciampolillo “assist[ed] Ms. Chin-Caplan . . . before and during this important argument.” Pet’r Reply at 3. However, as noted in the Secretary’s Sur-Reply at 1-2, Ms. Davis has not substantiated this assertion by explaining how Ms. Ciampolillo assisted Ms. Chin-Caplan.

It appears that Ms. Chin-Caplan was capable of arguing her client’s case without the assistance of another attorney, just as Ms. Chin-Caplan has done with other motions for review. See, e.g., Hibbard v. Sec’y of Health & Human Servs., 100 Fed. Cl. 742 (2011); Hennessey v. Sec’y of Health & Human Servs., 91 Fed. Cl. 126 (2010). Similarly, other attorneys in the vaccine program have argued motions for review without the assistance of another attorney. See, e.g., Stone v. Sec’y of Health & Human Servs., 99 Fed. Cl. 187 (2011), appeal docketed, No. 2011-5109 (Fed. Cir. July 13, 2011); Hammitt ex rel. Hammitt v. Sec’y of Health & Human Servs., 98 Fed. Cl. 719 (2011), appeal docketed, No. 2011-5117 (Fed. Cir. Aug. 10, 2011). When one attorney is capable, the special master may reasonably deny compensation for a second attorney. See Sabella v. Sec’y of Health & Human Servs., 86 Fed. Cl. 201, 214-15 (2009) (finding that the special master did not abuse his discretion in reducing attorneys’ fees when three attorneys from two law firms were duplicatively working on the case.); see also Impresa Construzioni Geom. Demenico Garufi v. United States, 100 Fed. Cl. 750, 772

(2011) (stating “56 hours spent by three attorneys on preparation for the oral argument and travel – when plaintiff’s argument was presented by one attorney – are also duplicative or unnecessary. . . As a result, the court finds it reasonable to discount these and similarly excessive, duplicative or unnecessary time entries by one-half.”) (citation and footnote omitted).

In unusual cases, the presence of an additional attorney at oral argument may be reasonable. In these cases, the fee applicant must show why a second attorney is needed. See Sabella, 86 Fed. Cl. at 215 (stating “The burden is on petitioner to explain why the attorneys’ fees claimed are reasonable.”). In this context, for example, the requesting party may show that the record on appeal is unusually extensive and complex, such that another attorney would assist the attorney speaking during oral arguments.

Here, although Ms. Davis characterizes her case as complex, involving “complicated medical and legal issues and an extensive evidentiary record,” Ms. Davis fails to offer any specific example to support this determination. See Pet’r Reply at 3. Her case included only two experts (one for each side) who completed their testimony during a single day. The parties submitted fewer than 50 articles and the special master’s decision on entitlement discussed fewer than ten articles. By way of contrast, Hennessey was the lead case for a group of cases in which more than 15 petitioners claimed that the hepatitis B vaccine caused them to suffer from type I diabetes. The record included oral “testimony of four expert witnesses and the written report of a fifth expert,” as well as more than 200 medical and scientific journal articles. Hennessey v. Sec’y of Health & Human Servs., No. 01-190V, 2009 WL 1709053, at \*8 (Fed. Cl. Spec. Mstr. May 29, 2009). Yet, it appears that Ms. Chin-Caplan argued the motion for review in Hennessey without assistance. 91 Fed. Cl. at 128 (listing only Ms. Chin-Caplan as the attorney for petitioner).

Further evidence to suggest that Ms. Davis’s case was routine is the fact that, according to the transcript created from the May 26, 2010 oral argument, the Secretary had only one attorney present for the oral arguments. While this factor is not dispositive, it does suggest that Ms. Davis’s case was not unusually difficult in nature. See Sabella, 86 Fed. Cl. at 216 (noting that special master considered the number of attorneys used by respondent in evaluating whether petitioner could reasonably use two attorneys). Thus, Ms. Davis has not met her burden of showing that her case was an unusual case requiring two attorneys at oral argument.

In addition to arguing that Ms. Ciampolillo helped Ms. Chin-Caplan, Ms. Davis presents a second argument, which seems to be a more likely explanation for Ms. Ciampolillo's attendance. Ms. Davis states, "Ms. Ciampolillo's attendance also gave her experience before a U.S. Court of Federal Claims Judge, so that she can argue future cases before this Court. . . . The Program will benefit from this experience." Pet'r Reply at 3.

Even if it is assumed that Ms. Ciampolillo's attendance at the oral argument will improve her abilities, Ms. Davis has not established that the Vaccine Program should pay for this improvement. Developing the legal skills of junior attorneys seems to be a responsibility of the law firm and senior attorneys who employ those associate attorneys. As Ms. Ciampolillo gains experience, her reasonable hourly rate will increase, generating more revenue for the law firm.

Ms. Davis has not presented any persuasive reason that she (as Ms. Ciampolillo's client) would have paid for sending two attorneys to argue her case when only one attorney was necessary. In this situation, Ms. Davis's attorneys should have exercised their billing judgment to refrain from including Ms. Ciampolillo's time and associated costs in the request for fees and costs. Consequently, compensation for Ms. Ciampolillo's activities (\$1,460 in attorneys' fees and \$935.38 in costs) will not be awarded.

#### **4. Miscellaneous Tasks Associated with Motion for Review**

Although the activities listed above encompass the substantive work for the motion for review, Ms. Davis's attorneys performed other tasks too. For example, they discussed the oral argument, reviewed the Court's decision, conferred regarding a possible appeal to the Federal Circuit, and consulted their client. The Secretary objected to billing for multiple attorneys, rather than just the senior attorney. Resp't Resp. at 9-10. Ms. Davis is awarded \$3,000 for activities after the motion for review.

#### **5. Summary for Time Spent on the Motion for Review**

A reasonable cost for a motion for review in Ms. Davis's case is \$14,935 (\$6,970 + \$4,965 + \$3,000). Ms. Davis is awarded this much in attorneys' fees.

## **B. Appeal at the Federal Circuit**

As mentioned above, Ms. Davis appealed the Court's judgment to the Federal Circuit. The Federal Circuit affirmed the Court's judgment in an opinion issued pursuant to Fed. Cir. R. 36. Ms. Davis now seeks attorneys' fees and costs for this stage of the case.

The Secretary opposes any award of attorneys' fees and costs on the ground that Ms. Davis does not meet the criteria to be eligible. Additionally, the Secretary also argues that if Ms. Davis is awarded any attorneys' fees, her request should be reduced to a reasonable amount.

These two issues are discussed separately. Section 1 explains that Ms. Davis is not entitled to any award of attorneys' fees and costs for the Federal Circuit appeal. Notwithstanding this finding, section 2 determines the reasonable amount of attorneys' fees to promote adjudication if Ms. Davis appeals further.

### **1. Entitlement for Attorneys' Fees for the Federal Circuit Appeal**

Ms. Davis did not receive compensation on her claim that the flu vaccine caused her NMO. Therefore, she is not entitled to attorneys' fees and costs as a matter of right. This lack of compensation for Ms. Davis does not disqualify her from being awarded her attorneys' fees. The Vaccine Act provides that

the special master or court may award an amount of compensation to cover petitioner's 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 for which the petition was brought.

42 U.S.C. § 300aa—15(e). The critical portion of the statute is the term "reasonable basis."<sup>5</sup>

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<sup>5</sup> The Secretary has not challenged Ms. Davis's "good faith" in filing her Federal Circuit appeal.

**a) Reasonable Basis**

The definition of reasonable basis has not been set forth authoritatively. The Vaccine Act does not define “reasonable basis.” The rules governing proceedings before the special masters in the Vaccine Program do not discuss “reasonable basis.”

Without definitive instructions, special masters and one judge have looked to the totality of the circumstances in determining whether a reasonable basis existed. E.g., McKellar v. Sec’y of Health & Human Servs., 101 Fed. Cl. 297, 303 (2011); Franklin v. Sec’y of Health & Human Servs., No. 99-0855V, 2009 WL 2524492, at \*5 (Fed. Cl. Spec. Mstr. July 28, 2009); Hamrick v. Sec’y of Health & Human Servs., No. 99-683V, 2007 WL 4793152, at \*4 (Fed. Cl. Spec. Mstr. Jan. 9, 2008). One important factor that special masters have considered is whether the party’s claim is feasible. An early case linking reasonable basis to feasibility is Di Roma v. Sec’y of Health & Human Servs., No. 90-3277V, 1993 WL 496981 (Fed. Cl. Spec. Mstr. Nov. 18, 1993), and since then special masters have cited Di Roma or cases that relied on Di Roma. E.g., Browning v. Sec’y of Health & Human Servs., No. 07-453V, 2010 WL 4359237, at \*8 (Fed. Cl. Spec. Mstr. Nov. 1, 2010) (quoting Turner); Turner v. Sec’y of Health & Human Servs., No. 99-544V, 2007 WL 4410030, at \*6 (Fed. Cl. Spec. Mstr. Nov. 30, 2007) (quoting Di Roma).

Reasonable basis is needed at each stage of the case. This requirement is demonstrated by Perreira, in which the Federal Circuit concluded the special master did not abuse his discretion in finding that the petitioner lacked a reasonable basis to proceed to a hearing. The Federal Circuit held that “when the reasonable basis that may have been sufficient to bring the claim ceases to exist, it cannot be said that the claim is maintained in good faith.” Perreira v. Sec’y of Health & Human Servs., 33 F.3d 1375, 1377 (Fed. Cir. 1994).

Here, the specific phase for which Ms. Davis seeks an award of attorneys’ fees is the activities incident to her Federal Circuit appeal. The previous findings that she had a reasonable basis for earlier actions do not automatically carry over to her appeal. McKellar v. Sec’y of Health & Human Servs., No. 09-841V, 2012 WL 362030, at \*7 (Fed. Cl. Spec. Mstr. Jan. 13, 2012) (stating “reasonable basis must exist at every phase of the litigation” and discussing Perreira), motion for review filed Feb. 2, 2012.

Due to the lack of definition for the phrase “reasonable basis,” the legislative history may be consulted. See W.C. v. Sec’y of Health & Human Servs., 100 Fed.

Cl. 440, 457 (2011), appeal docketed, No. 2012-5058 (Fed. Cir. Jan. 27, 2012). The legislative history of the Vaccine Act indicates that appeals should be rare. “The conference agreement provides for an appeal of the master’s decision to the U.S. Claims Court under very limited circumstances. . . . The Conferees have provided for a limited standard for appeal from the master’s decision and do not intend that this procedure be used frequently but rather in those cases in which a truly arbitrary decision has been made.” H.R. Rep. No. 101-386, at 516-17 (1989) (Conf. Rep.), reprinted in 1989 U.S.C.C.A.N. 3018, 3120.<sup>6</sup> It follows that if Congress intended to limit appeals to the Court of Federal Claims to “very limited circumstances,” then further appeals to the Federal Circuit would be rarer still.

The escalating levels of appellate review affect the reasonable basis because as the case progresses, reasonable basis also changes. See Phillips v. Sec’y of Health & Human Servs., 988 F.2d 111, 113 (Fed. Cir. 1993) (Plager, J., concurring) (stating “the appropriateness of an award of fees related to the initial proceedings before the special master is an issue quite separate from the appropriateness of fees attributable to an appeal to this court.”).

#### **b) Standards for Finding Entitlement and Standards of Review of Those Decisions**

The Vaccine Act mandates that special masters initially determine whether a petitioner is entitled to compensation. In interpreting the relevant statutory provisions, the Federal Circuit has further defined the elements of a petitioner’s case. E.g., Althen v. Sec’y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005) (establishing three-pronged test by which petitioners in off-Table cases can establish causation). The Federal Circuit has also explained that “the special master is entitled to require some indicia of reliability to support the assertion of the expert witness.” Moberly, 592 F.3d at 1324. The Court summarized the petitioner’s burden in its Opinion and Order. 94 Fed. Cl. at 62-63.

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<sup>6</sup> After Congress created the Vaccine Program in 1986 (see Pub. L. 99-660, 100 Stat. 3743), Congress revised it in 1988. The amendments were incorporated into the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106. A robust discussion of the legislative history of the Vaccine Act can be found in Snyder v. Sec’y of Health & Human Servs., 88 Fed. Cl. 706, 712-17 (2009).

The Federal Circuit has explained its role in reviewing decisions of special masters. “We apply the same standard the Court of Federal Claims applied to the special master’s decision: Factual findings are reviewed under the arbitrary and capricious standard; legal rulings are reviewed for whether they are in accord with the law.” Doe 11 v. Sec’y of Health & Human Servs., 601 F.3d 1349, 1354 (Fed. Cir. 2010). The Federal Circuit has also stated it “may not second-guess the special master’s fact-intensive conclusions, particularly where the medical evidence of causation is in dispute.” Hazlehurst v. Sec’y of Health & Human Servs., 604 F.3d 1343, 1349 (Fed. Cir. 2010) (citing Hodges v. Sec’y of Health & Human Servs., 9 F.3d 958, 961 (Fed. Cir. 1993)).

### c) Ms. Davis’s Federal Circuit Appeal

As framed by Doe 11, Ms. Davis could argue that the judgment of the Court of Federal Claims was mistaken because of an error of law or an error of fact. An argument based upon a legal error has a greater likelihood of succeeding because the Federal Circuit reviews legal matters “de novo.” See Althen, 418 F.3d at 1278 (stating “we owe no deference to either the special master or the trial court on questions of law.”).

Ms. Davis, however, did not put forth any tenable argument that the judgment of the Court of Federal Claims was the result of an error of law. Ms. Davis argued that the Court erred in upholding the special master’s decision that wrongly imposed a burden above the standard of biologic plausibility. Although an argument regarding the burden of proof implicates a de novo standard of review, see Cromer v. Nicholson, 455 F.3d 1346 (Fed. Cir. 2006); Burning v. Hirose, 161 F.3d 681, 684 (Fed. Cir. 1998), Ms. Davis did not present a tenable argument in her appeal because she did not discuss Moberly. Moberly addressed the argument that Ms. Davis was advancing. Moberly stated that the appellants advocated for “something closer to proof of a ‘plausible’ or ‘possible’ causal link between the vaccine and the injury, which is not the statutory standard.” 592 F.3d at 1322. Until reviewed by the Supreme Court or the Federal Circuit acting en banc, Moberly is binding on future panels of the Federal Circuit. Masias v. Sec’y of Health & Human Servs., 634 F.3d 1283, 1288 (Fed. Cir. 2011). Thus, any reasonable argument in favor of “biologic plausibility” would need to address Moberly. However, Ms. Davis’s briefs did not cite the case at all.

The failure to discuss Moberly is significant because Moberly was cited throughout the preceding litigation. As discussed in the procedural history, Moberly was an important basis for the special master’s decision denying Ms.

Davis compensation. The Court, in denying the motion for review, cited Moberly. Three judges from the Federal Circuit asked about Moberly. In a brief before the Court and in a brief before the Federal Circuit, the Secretary noted that the absence of Moberly might make the appeal unreasonable.

Now, in support of her request for attorneys' fees, Ms. Davis addressed Moberly in a footnote. Ms. Davis argued that "Moberly involved different facts, different experts, different literature, and a totally different injury (seizures and encephalopathy)." Pet'r Reply, at 8 n.3. This argument is both a day late and a dollar short.

An attempt to distinguish Moberly now is untimely. The proper time to argue about Moberly was before the Federal Circuit.

In addition to being late, Ms. Davis's argument is not persuasive. Moberly instructed special masters how to consider the evidence, such as "the special master is entitled to require some indicia of reliability to support the assertion of the expert witness." 592 F.3d at 1324. Moberly also interpreted the Vaccine Act's burden of proof as preponderance of the evidence and rejected the argument based upon "plausibility." *Id.* at 1322-23. These statements do not depend upon the nature of petitioner's injury or the expert who testified. The legal principles from Moberly should have been addressed in Ms. Davis's briefs before the Federal Circuit.

Because Ms. Davis effectively surrendered any argument based upon a legal error by not citing Moberly, Ms. Davis's Federal Circuit appeal could succeed only if it presented a persuasive argument that the Court's judgment was caused by an error in fact. This route, however, is difficult. As the Court stated in denying Ms. Davis's motion for review, "reversible error is extremely difficult to demonstrate if the special master has considered the relevant evidence of record, drawn plausible inferences and articulated a rational basis for the decision." 94 Fed. Cl. at 61 (quoting Lampe v. Sec'y of Health & Human Servs., 219 F.3d 1357, 1360 (Fed. Cir. 2000)).

Although Ms. Davis articulated an argument regarding the facts, this argument was not persuasive to the Federal Circuit. The Federal Circuit affirmed the judgment pursuant to Fed. Cir. R. 36. By definition, this type of disposition indicates that the findings in the underlying decision were "not clearly erroneous." An affirmance pursuant to Fed. Cir. R. 36 also means that the judgment was not entered with an error of law. In an opinion elaborating upon the use of Rule 36

decisions, the Federal Circuit explained that the appeal in that case “was an easy one to decide.” Sparks v. Eastman Kodak Co., 230 F.3d 1344, 1345 (Fed. Cir. 2000) (denying appellee’s request for sanctions). In this case, the use of Rule 36 also suggests that the Federal Circuit found Ms. Davis’s appeal “an easy one.”

The Federal Circuit’s Rule 36 disposition is an important factor in finding that Ms. Davis’s Federal Circuit appeal lacked a reasonable basis.<sup>7</sup> However, this decision’s discussion about Fed. Cir. R. 36 is not intended to establish a bright line test equating a Rule 36 affirmance with a lack of reasonable basis. There are cases in which special masters have awarded attorneys’ fees for appeals that were denied pursuant to Fed. Cir. R. 36. E.g., Hocraffer v. Sec’y of Health & Human Servs., No. 99-533V, 2011 WL 3705153, at \*32 (Fed. Cl. Spec. Mstr. July 25, 2011) (awarding attorneys’ fees for a Federal Circuit appeal that was decided against petitioner via Fed. Cir. R. 36).<sup>8</sup>

Here, Ms. Davis’s motion for review gave her one level of appellate review, and she is being awarded attorneys’ fees for that stage of the case. The Court’s opinion and order ruled that the special master’s underlying entitlement decision was in accord with the law. This result should have made Ms. Davis and her attorneys pause before initiating her appeal.

Contrary to Ms. Davis’s arguments, her attorneys did not have an absolute ethical obligation to appeal to the Federal Circuit. Although Ms. Davis alludes to her attorneys’ ethical and professional responsibilities, she does not cite any specific requirement. See Pet’r Reply at 8, 10.<sup>9</sup> In any event, the ethical duties of

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<sup>7</sup> Other important factors include the failure to cite the Federal Circuit decision most directly on point, the Secretary’s warning that the appeal could be construed as frivolous, and the Federal Circuit’s taxation of costs to the appellee.

<sup>8</sup> Quoting Finch v. Hughes Aircraft Co., 926 F.2d 1574, 1578 (Fed. Cir. 1991), Ms. Davis argues that “[a]n appeal having a small chance for success is not for that reason alone frivolous.” Pet’r Reply at 8. This statement is true, but also beside the point. Ms. Davis’s Federal Circuit appeal lacked a reasonable basis for several reasons, not just because she was unlikely to prevail.

<sup>9</sup> To the extent that Ms. Davis is referring to attorneys’ obligation to carry out their client’s decision, the law firm could have concluded its representation without appealing to the Federal Circuit. Cf. Burns v. Sec’y of Health & Human Servs., 3 F.3d 415 (Fed. Cir. 1993) (appellant was pro se at the Federal Circuit but

attorneys are not boundless as demonstrated in Perreira. There, the petitioners, too, argued that they should receive attorneys' fees because their attorney had an ethical obligation to press the case forward. In rejecting this argument, the Federal Circuit stated, "counsel's duty to zealously represent their client does not relieve them of their duty to the court to avoid frivolous litigation." Perreira, 33 F.3d at 1377.

Apart from her argument about the inherent reasonableness of her appeal, Ms. Davis crafts an argument based upon legislative history to support an award of attorneys' fees. At page 7 of her reply brief, Ms. Davis quotes a committee report stating: "[T]he Committee does not intend that the limitation of fees to those included in the award act to limit petitioners' ability to obtain qualified assistance and intends that the court make adequate provision for attorneys' time." H.R. Rep. No. 99-908, at 22 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6363. There are two reasons why this portion of legislative history does not require a finding of reasonable basis for Ms. Davis's Federal Circuit appeal.

First, this portion of the legislative history is not quite on point. The question at hand is whether a reasonable basis supports Ms. Davis's Federal Circuit appeal. On the appropriateness of appeals, the more instructive legislative history is, as noted above, that appeals should be made in "very limited circumstances."

Second, the portion of legislative history that Ms. Davis quotes must be placed in context. In the paragraph immediately preceding the portion of H.R. Rep. No. 99-908 quoted by Ms. Davis, the report states, "Because of the straightforward nature of the petition and the proceedings, the Committee does not anticipate that reasonable attorneys' fees will be large. (For example, attorneys' fees in a similar compensation program for black lung disease have proven to be well below those that might be expected in litigation and have, in almost all cases, been less than \$15,000 in total.)" H.R. Rep. No. 99-908, at 22.

Although the House Committee did not limit the amount of attorneys' fees, the Committee's assessment shows that it viewed \$15,000 as a reasonable amount. This amount, \$15,000, is worth \$30,962.14 in 2011. See Order, filed Dec. 19, 2011 (informing the parties that judicial notice was to be taken and providing an opportunity for comment).

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an attorney represented her at the Office of Special Master, No. 90-953V, 1992 WL 365410).

Whether today's Vaccine Program remains similar to the program for black lung disease may be fairly questioned. Ms. Davis has highlighted many differences, including a distinction between claims based on the Vaccine Injury Table, which are "straightforward," and off-Table claims. See Pet'r Resp. to Court Order, filed Jan. 18, 2012. Ms. Davis claimed compensation for an injury not listed on the Vaccine Injury Table and these cases are not simple. The amount of time needed to present a causation-in-fact case, such as Ms. Davis's case, is reflected in the interim award of attorneys' fees and costs (\$85,000). Considering that this decision awards Ms. Davis approximately \$20,000 additionally, the total amount is approximately three and a half times as much money as the Committee contemplated (after inflation).

Ultimately, Ms. Davis's Federal Circuit appeal did not present any tenable argument that the special master's decision was "truly arbitrary." The appeal could not reasonably argue that the Court of Federal Claims erred in allowing the special master to use an elevated burden of proof without discussing Moberly. At its essence, Ms. Davis's Federal Circuit appeal argued that the special master reached the wrong factual conclusion, but the Federal Circuit has said it "may not second-guess the special master's fact-intensive conclusions, particularly where the medical evidence of causation is in dispute." Hazlehurst, 604 F.3d at 1349.

For these reasons, Ms. Davis's Federal Circuit appeal was not supported by a reasonable basis. Her arguments did not show that her case falls within "the very limited circumstances" discussed in the Conference Report for the 1989 amendments to the Vaccine Act. When Ms. Davis's appeal lacks a reasonable basis, she is not eligible for an award of attorneys' fees.

## **2. Amount of Attorneys' Fees and Costs for the Federal Circuit Appeal**

For the reasons just explained, Ms. Davis is not entitled to any attorneys' fees for her unsuccessful appeal to the Federal Circuit. However, to promote judicial efficiency if there is subsequent review of this finding, a reasonable amount of attorneys' fees will be determined in the alternative.

The two tasks requiring the most amount of attorney time at the Federal Circuit were writing the initial brief and writing the reply brief. For the first brief, four attorneys participated and they spent approximately 55 hours. For the second brief, four attorneys spent approximately 50 hours. Timesheets 7-14.

The Secretary argues that the amount of time was excessive because, according to the Secretary, Ms. Davis's initial brief largely repeats briefs previously filed by Ms. Davis's attorneys with the motion for review before the Court of Federal Claims and the Federal Circuit briefs filed in Moberly, Fed. Cir. No. 2009-5057, 2009 WL 1572909 (May 18, 2009). Resp't Resp., filed Nov. 3, 2011, at 13-14. An independent review of those briefs confirms that much of Ms. Davis's brief is very close to what her attorneys had written previously. For example, Ms. Davis argues that she established Althen prong 2 on pages 32-33 of her Federal Circuit brief. This section repeats pages 9-10 of her motion for review in which she also argued she met Althen prong 2. Throughout the brief, there are some minor differences, such as substituting Ms. Davis's name and her condition (NMO), in appropriate places, but these changes could not take an attorney much time.

The most significant new section of Ms. Davis's initial brief is Section VII.B.ii., headed "The Evidentiary Standard Imposed by [the Court] Was Not in Accordance with Law." That section spans pages 19-22. The attorneys' entries do not provide sufficient detail to determine precisely how much time was spent on this aspect of the brief. A typical entry on the attorneys' timesheets states "PREPARATION Federal Circuit memo 4 hours." A greater amount of specificity plus a division of large blocks of time (such as four hours) into smaller units would communicate more clearly how time was being spent. See Savin v. Sec'y of Health & Human Servs., 85 Fed. Cl. 313, 316-17 (2008) (discussing Guidelines issued by the Office of Special Masters); cf. Avgoustis v. Shinseki, 639 F.3d 1340 (Fed. Cir. 2011) (affirming, under EAJA, a court's denial of attorneys' fees for "draft[ing] client correspondence" because the entries were too vague). In light of the fact that substantial portions of Ms. Davis's initial Federal Circuit brief were either copied from or based upon previously written briefs, the limited amount of information provided in the attorneys' timesheets hinders the process of determining how much time is reasonable.

The same analysis applies to Ms. Davis's reply brief at the Federal Circuit. Much of the reply brief came from the motion for review or the initial Federal Circuit brief. Two sections that reflect new work are a section entitled, "Satisfaction of Althen prong 1 requires proof of biologic plausibility, not proof of the precise mechanism of injury," and a section entitled, "By requiring medical literature to prove that the flu vaccine inflammation can cause damage to the endothelium, the Special Master and Court of Federal Claims elevated the standard

of proof required by the statute.” These two sections are pages 9-11 and 13-17, respectively.

Without being informed exactly how much time was spent on the new work, the undersigned has studied the attorneys’ timesheets and attempted to achieve “rough justice” as the Supreme Court permitted in Fox. A reasonable amount of compensation for the work at the Federal Circuit is \$27,606.65.<sup>10</sup> If Ms. Davis had a reasonable basis for the Federal Circuit appeal, she would be entitled to this additional compensation.

### **C. Fees for Fees**

The final phase of Ms. Davis’s case is her request for fees to prepare her request for fees. The Federal Circuit has recognized that “fees for fees” is an appropriate item of compensation. Schuenemeyer v. United States, 776 F.2d 329, 333 (Fed. Cir. 1985) (addressing Equal Access to Justice Act).

Her initial application for attorneys’ fees requested compensation for approximately six hours of professional time, divided among a senior attorney, a junior attorney, and a paralegal. The value of this time totaled \$858.10. Ms. Davis’s request for fees increased with each additional brief Ms. Davis submitted. Ms. Davis twice supplemented her fee application (once by \$2,245.20 and once by \$1,827.30). The total request is \$4,930.60.

The Secretary has opposed awarding fees for work performed after the initial application on the ground that the fee application should have been complete when filed. Resp’t Sur-Reply, filed Nov. 21, 2011.

The Secretary’s objection is overruled. Ms. Davis did not need to defend the reasonableness of her requests until the Secretary challenged items. After the Secretary contested the reasonableness of fees, Ms. Davis was entitled to respond. Ms. Davis’s supplemental briefs were prepared by one senior attorney and one junior attorney primarily. The amount of time spent on the briefs is reasonable. Thus, Ms. Davis is awarded the entire amount requested in fees for fees.

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<sup>10</sup> The award includes activities in addition to writing the two briefs. Ms. Davis’s attorneys spent time on matters preliminary to writing the initial brief, on developing the joint appendix with the Secretary, on presenting supplemental authority, on preparing for oral argument, and on concluding the case after the Federal Circuit’s opinion.

#### D. Costs

Ms. Davis has also requested an award for her costs for the appellate stages of the case.<sup>11</sup> The total amount requested in costs is \$6,893.94. Ms. Davis has not requested any costs associated with seeking attorneys' fees.

The result follows the analysis for the attorneys' fees. Ms. Davis is awarded the costs for the motion for review, except the costs associated with Ms. Ciampolillo's travel (\$935.38).

Ms. Davis is not awarded the costs for the Federal Circuit appeal (\$5,145.16). In addition to the lack of reasonable basis for the appeal, the Federal Circuit stated that costs were awarded to the appellee.<sup>12</sup> It would appear that an award of costs to Ms. Davis (the appellant) would undermine (if not directly contradict) the Federal Circuit's order.

Therefore, the total amount awarded in costs is **\$813.40** (\$6,893.94 - \$935.38 - \$5,145.16).

#### IV. Conclusion

Ms. Davis has established that she had a reasonable basis for her motion for review and is awarded \$14,935.00 in attorneys' fees. She has also established that she reasonably incurred \$4,930.60 in attorneys' fees when seeking fees. **She is awarded \$19,865.60 in total fees and \$813.40 in costs.** She is not awarded any attorneys' fees for the Federal Circuit appeal. A check shall be made jointly payable to Ms. Davis and her law firm in the amount of \$20,679.00. The Clerk's Office is instructed to enter judgment in accord with this decision unless a motion for review is filed.

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<sup>11</sup> The Interim Fees Decision awarded Ms. Davis costs incurred while her entitlement claim was pending at the Office of Special Masters.

<sup>12</sup> See footnote 2, above.

IT IS SO ORDERED.

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