In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

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LUCY GARCIA,	*	
	*	
Petitioner	*	No. 07-286V
	*	Special Master Christian J. Moran
v.	*	
	*	Filed: December 13, 2011
SECRETARY OF HEALTH AND	*	
HUMAN SERVICES	*	Attorneys' fees, hourly rate
Respondent.	*	
* *		

John F. McHugh, Esq., Law Office of John McHugh, New York, NY, for Petitioner;
Alexis B. Babcock, Esq., U.S. Department of Justice, Washington, DC, for Respondent.

PUBLISHED DECISION AWARDING ATTORNEYS' FEES AND COSTS[1]

[1] 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 a decision 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).

Background

Acting pro se, Ms. Garcia filed her petition with a collection of medical records in May 2007. After her petition was reviewed, Ms. Garcia was given a list of attorneys who were willing to consider representing petitioners in the Vaccine Program.[2] In August 2007, John McHugh entered his appearance and he has represented Ms. Garcia since that time. In October 2007, Ms. Garcia filed an amended petition, alleging that the MMR vaccination, administered to her on March 1, 2006, caused her to suffered acute disseminated encephalomyelitis ("ADEM"). Amended Pet. at 1-2.

In December 13, 2007, the Secretary filed her report pursuant to Vaccine Rule 4. The Secretary conceded that compensation is appropriate and should be awarded in this case. Resp't Rep't at 1. Consequently, the parties began to quantify the amount of compensation to which Ms. Garcia is entitled.

During the first status conference devoted to damages, Ms. Garcia asserted that she was seeking compensation for lost wages, unreimbursed medical expenses, and emotional distress. Ms. Garcia maintained that she did not anticipate any additional medical treatment for her ADEM. Thus, Ms. Garcia declined to retain a life care planner who could assist a petitioner in quantifying her future medical care.

Although the elements of Ms. Garcia's compensation were ostensibly straightforward, resolution of these issues was complicated and prolonged. For example, compensation for unreimbursed expenses is usually based upon a list of items such as co-pays and deductibles. Ms. Garcia's claim was not so simple. She was treated for her ADEM at Bellevue Hospital. Exhibit 2 at 64-66. Because Ms. Garcia had neither medical insurance nor an independent method for paying for her care, Bellevue Hospital categorized her as a charity case. It appeared at least possible that Bellevue Hospital might assert a claim against Ms. Garcia when she received compensation from this litigation. Thus, Mr. McHugh needed to determine whether Bellevue Hospital would assert such a claim, and, if so, how much was the claim. According to Mr. McHugh, Bellevue Hospital was slow in responding to him and he was required to make repeated requests. Ultimately, Ms. Garcia's request for unreimbursed expenses totaled only $3,301.53, an amount that suggests that Bellevue Hospital did not press any claim against Ms. Garcia.

[2] In 2007, the Clerk's Office kept this list. Currently, the list of attorneys is available through the web site for the United States Court of Federal Claims.

Similarly, Ms. Garcia's claim for lost wages was also very complicated, even more complex than the claim for unreimbursed medical expenses. Several factors contributed to the difficulty in resolving lost wages. First, the ADEM caused Ms. Garcia to suffer problems with her memory preventing her from recalling much about her past. The lack of information from his client forced Mr. McHugh to seek information about Ms. Garcia from other sources. Second, to the extent that Ms. Garcia could remember information, her primary language is Spanish, a language that Mr. McHugh does not speak. Third, Ms. Garcia's initial employment occurred in Peru, the country where she was born. At the undersigned's suggestion, Mr. McHugh attempted to obtain documents about Ms. Garcia's Peruvian employment. Fourth, when Ms. Garcia came to this country from Peru, she entered on a tourist's visa. However, after the visa expired, she did not leave the United States.[3] Her status as an alien in this country contributed to her working at a series of jobs where she was paid off the books. Thus, she could not produce any documents, such as W-2 forms, that memorialize her past earnings.

Ms. Garcia's first attempt to calculate the amount of her lost wages was to present a report from Ricardo Estrada on June 17, 2008.[4] Mr. Estrada presents himself as a certified rehabilitation counselor, who worked for Kincaid Vocational & Rehabilitation Services, Inc. He conducted vocational testing to determine what jobs Ms. Garcia could hold. He also calculated her loss of wages by comparing her current employment, which was as a cashier, with a career either as an administrative assistant or as a travel agent. Mr. Estrada's estimate of lost wages was approximately $530,000 to $700,000. These figures do not consider the effects of fringe benefits or income taxes and the figures are not discounted to the present value. Exhibit 11.

Ms. Garcia's second attempt to calculate lost wages was to file a report from Thomas Fitzgerald on April 6, 2009. Dr. Fitzgerald has earned a Ph.D in economics. He opined that Ms. Garcia's lost wages amount to approximately

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[3] Ms. Garcia's immigration status changed in September 2007 when she married a man serving in the United States Navy. For reasons not important to describe here, Ms. Garcia was attempting to separate from her husband and had retained an attorney to attempt to preserve her legal immigration status.

[4] When Mr. McHugh filed Mr. Estrada's report, he assigned it exhibit number 3. However, there already was an exhibit 3. Therefore, Mr. McHugh refiled Mr. Estrada's report on September 25, 2009, as exhibit 11.

$470,000. A primary difference between Dr. Fitzgerald and Mr. Estrada is that Dr. Fitzgerald assumed that Ms. Garcia would graduate from college. (Dr. Fitzgerald, however, did not deduct any expenses with attending college.) Although it would seem reasonable to expect that graduating from college would lead to higher income, the reports of Dr. Fitzgerald and Mr. Estrada suggest otherwise. Dr. Fitzgerald's estimate of lost earnings, which assumes that Ms. Garcia attended college, is less than Mr. Estrada's estimate, which does not credit Ms. Garcia with going to college, probably because Dr. Fitzgerald accounted for income taxes and Dr. Fitzgerald discounted the lost wages to the net present value. Exhibit 10.

Both Mr. Estrada and Dr. Fitzgerald assumed that but for Ms. Garcia's vaccine-induced injury, she would have stopped working as a cashier and started working in a more lucrative job. In informal status conferences, the Secretary continually questioned the validity of this assumption, arguing that little (if any) persuasive evidence justified this change. The Secretary seemed to advance the argument that because Ms. Garcia worked as a cashier after her injury, she did not suffer a significant amount of lost wages.

How Ms. Garcia's career would have progressed in the absence of her ADEM was the topic of a hearing held on September 9, 2010. At this hearing, Ms. Garcia, her father, her sister, and a friend testified about Ms. Garcia's employment history and her pre-vaccination plans for future employment.[5] Immediately following this hearing, the undersigned offered some impressions about the persuasiveness of the testimony and suggested that the parties attempt to compromise their positions.

The parties presented their proffer on compensation on January 5, 2011. This proffer included $230,000 in lost wages. A decision adopting the proffer was issued on January 7, 2011.

The award of compensation made Ms. Garcia entitled to an award for her attorneys' fees and costs. 42 U.S.C. § 300aa—15(e). Ms. Garcia filed her motion requesting such compensation on May 16, 2011. The briefing process concluded on October 5, 2011.

[5] Ms. Garcia spoke English during her testimony, although Spanish-English interpreters occasionally assisted her.

Analysis

I. Attorneys' Fees

A. Background

The long-established practice for finding a reasonable amount of attorneys' fees is to use the lodestar approach in which a reasonable number of hours is multiplied by a reasonable hourly rate. See Perdue v. Kenny A. ex rel. Winn, 130 S.Ct. 1662, 1672 (2010); Saxton v. Sec'y of Health & Human Servs., 3 F.3d 1517 (Fed. Cir. 1993). The process for determining the reasonable hourly rate was explained in Avera. In that case, the Federal Circuit held that attorneys in the Vaccine Program were to be compensated at the rate prevailing in the forum, which is Washington, D.C. The Federal Circuit, also, added an important exception to the forum rate rule, stating that an attorney should not be compensated at the rate prevailing in the forum for cases in which "the bulk of the work is done outside the jurisdiction of the court and where there is a very significant difference in compensation favoring D.C." Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343, 1349 (Fed. Cir. 2008), quoting Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. EPA, 169 F.3d 755, 758 (D.C. Cir. 1999). Hence, Avera established a three-step process for determining an attorney's reasonable hourly rate for cases in which the bulk of the work was done outside of Washington, D.C.[6] See id. at 1353 (Rader, J., concurring in part and dissenting in relevant part). The three steps are first, find the hourly rate prevailing in the forum; second, find the hourly rate prevailing in the locale where the attorney practices; and third, determine whether there is a "very significant difference" between the two rates.

After Avera, a special master followed this sequence in determining a reasonably hourly rate for Ms. Garcia's attorney, Mr. McHugh. In that case, Gabriel Rodriguez requested that Mr. McHugh be compensated at rates of $598, $614, and $645 per hour, depending upon the time in which Mr. McHugh worked. Rodriguez v. Sec'y of Health & Human Servs., No. 06-559V, 2009 WL 2568468, at *1 (Fed. Cl. Spec. Mstr. July 27, 2009).

[6] In the Vaccine Program, almost all of the tasks performed by counsel for petitioner are done outside of Washington, D.C.

The special master's analysis began with a review of the evidence relating to rates prevailing in Washington, D.C. "'for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" Rodriguez, 2009 WL 2568468, at *2, quoting Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984). The only evidence that Mr. Rodriguez submitted appears to be the Laffey matrix. Id. at *4-5 and *10-11. The special master rejected the Laffey matrix because the attorneys who receive compensation pursuant to the Laffey matrix are not performing services comparable to attorneys practicing in the Vaccine Program. Id. at *12. Without any persuasive evidence from Mr. Rodriguez, the special master turned to other evidence about compensation for attorneys in Washington, D.C. The special master relied upon (1) an hourly rate from one attorney who regularly practiced in Washington, D.C., (2) an hourly rate from a law school professor who supervises a clinic that permits law school students to participate in the Vaccine Program, and (3) the hourly rate for attorneys who routinely practice in the Vaccine Program and whose practices are located in a Washington, D.C. suburb and Boston, Massachusetts. Ultimately, the special master found that the forum rate of compensation for an attorney of Mr. McHugh's experience practicing in the Vaccine Program was $275-$360 per hour. Id. at *13-15

The special master's second step was to find a reasonable hourly rate in the location where the work was performed. Here, the special master accepted Mr. McHugh's assertion that he receives $450 per hour. Id. at *15.

The third step was to compare the two rates. The Rodriguez case (and, as discussed below, Ms. Garcia's case) presents an unusual circumstance in that the forum (Washington, D.C.) rate is lower than the local rate. For various reasons, the special master held that in such circumstances, the attorney was entitled to only the lower rate of compensation. Consequently, the special master awarded compensation for Mr. McHugh's work at an hourly rate of $310 for work in 2006, $320 for work in 2007, $330 for work in 2008, and $335 for work in 2009. Id. at *23.

Mr. Rodriguez filed a motion for review of the special master's decision. The Court denied the motion for review and affirmed the special master's decision. In particular, the Court held that the special master did not commit a legal error in rejecting the Laffey matrix. Rodriguez v. Sec'y of Health & Human Servs., 91 Fed. Cl. 453, 468-76 (2010). The Court held that the special master considered relevant evidence in setting the hourly rate for Washington, D.C. Id. at 476-78. The Court also held that the special master did not err in compensating Mr.

McHugh at the rate prevailing in Washington, D.C., even though this rate of compensation was less than his usual rate of compensation. Id. at 478-79.

Mr. Rodriguez appealed this decision to the Federal Circuit. The only issue was whether the special master erred in rejecting the Laffey matrix as prima facie evidence of the rate prevailing in Washington, D.C. The Federal Circuit held that "[t]he special master did not apply an incorrect legal standard nor was her rejection of the limited evidence petitioner filed arbitrary, capricious, or an abuse of discretion." Rodriguez v. Sec'y of Health & Human Servs., 632 F.3d 1381, 1386 (Fed. Cir. 2011). Mr. Rodriguez's petition for certiorari was denied. Rodriguez v. Sebelius, __ S.Ct. __, 2011 WL 3236180 (2011).

Against this backdrop, Ms. Garcia filed her motion for attorneys' fees and costs, requesting compensation for Mr. McHugh. Like Mr. Rodriguez, Ms. Garcia requests that Mr. McHugh be compensated at relatively high hourly rates, rates that exceed those used in Rodriguez. The Secretary opposes the proposed hourly rate.

B. Reasonable Hourly Rate

The lodestar formula, as mentioned, contains two factors -- the reasonable hourly rate is multiplied by a reasonable number of hours. This first factor, the reasonable hourly rate, is found after a three-step process.

1. Step One: Reasonable Rate Prevailing in the Forum

Ms. Garcia starts her argument with an assertion that no attorneys who practice in Washington, D.C. regularly represent petitioners in the Vaccine Program. See Pet'r Br. at 6; Pet'r Reply at 3. Without exactly similarly situated attorneys, Ms. Garcia presents essentially two bases for finding a reasonable rate for attorneys in Washington, D.C. First, Ms. Garcia maintains that the Laffey matrix constitutes one factor to consider. Pet'r Br. at 7-8. Second, Ms. Garcia argues that work before the National Surface Transportation Board is comparable to work in the Vaccine Program. Pet'r Reply at 4-5.

Ms. Garcia's argument that the Laffey matrix can be the basis of compensation for attorneys in the Vaccine Program is untenable. Attorneys who are compensated pursuant to fee-shifting statutes are compensated based upon rates paid to attorneys with "reasonably comparable skill, experience, and reputation" performing "similar services." Blum, 465 U.S. at 896 n.11. The special master

found that attorneys in the Vaccine Program do not provide services similar to the work performed by attorneys who are compensated with the Laffey matrix. Rodriguez, 2009 WL 2568468, at *12. The Federal Circuit affirmed this analysis. Rodriguez, 632 F.3d at 1385 (describing differences between litigation in the Vaccine Program and litigation in complex federal litigation).[7]

In addition to the Laffey matrix, Ms. Garcia also states that "practice before the Surface Transportation Board has similarities procedurally to the workings of the vaccine program, but that vaccine litigation is markedly more complex." Pet'r Reply at 5.[8] This argument is made for the first time in the reply brief, which, ordinarily, is not the appropriate time to raise a new argument. SmithKline Beecham, Corp. v. Apotex Corp., 439 F.3d 1312, 1320 (Fed. Cir. 2006). More problematically, to support the assertion that the practice before the Surface Transportation Board is comparable to practice in the Vaccine Program, Ms. Garcia's reply brief relies upon Mr. McHugh's declaration. However, a close reading of Mr. McHugh's declaration shows that Mr. McHugh did not make this assertion. See exhibit 88 (Mr. McHugh's declaration, filed Aug. 30, 2011).[9] Instead, Mr. McHugh asserted that his charging $450 per hour for work before the Surface Transportation Board is reasonable because other attorneys, who happen to practice in Washington, D.C., also charge approximately $450 per hour for work before the Surface Transportation Board. Exhibit 88 at ¶¶ 23-25; see also footnote 8, supra.

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[7] In another case, the Federal Circuit also affirmed the special master's decision not to rely upon the Laffey matrix in determining the rate prevailing in the forum. Masias v. Sec'y of Health & Human Servs., 634 F.3d 1283, 1290 (Fed. Cir. 2011) (following Rodriguez).

[8] Ms. Garcia's initial brief discusses hourly rates for attorneys who practice before the Surface Transportation Board in the context of establishing the reasonableness of Mr. McHugh's rates. Pet'r Br. at 10 (stating "The evidence herein also establishes that [Mr.] McHugh's fees are in the mid-range of attorneys who, as does he, practice before the Surface Transportation Board."). This evidence about the reasonableness of Mr. McHugh's own rates is part of the second step. See Rodriguez, 2009 WL 2568468, at *15.

[9] Although Ms. Garcia's initial brief and reply brief refer to a declaration signed by Mr. McHugh, this declaration was not actually filed until after the special master requested it.

Even if the statement "[the] practice before the Surface Transportation Board has similarities procedurally to the workings of the vaccine program, but that vaccine litigation is markedly more complex" appeared in Ms. Garcia's initial brief, this bare statement would not be persuasive. Ms. Garcia provided no details about how the Surface Transportation Board operates. Although Ms. Garcia did not cite to the pertinent portions of the Code of Federal Regulations, which are found in Title 49, Subtitle B, Chapter X, a quick review of those rules suggests that the practice requires some specialized knowledge. Ms. Garcia has not met her burden of providing evidence to determine whether the attorneys with whom Mr. McHugh compares himself actually have "reasonably comparable skill, experience, and reputation." See Blum, 465 U.S. at 896 n.11.

Consequently, Ms. Garcia has not offered any persuasive evidence regarding the hourly rate for Washington, D.C. attorneys who perform work comparable to work in the Vaccine Program. Without persuasive evidence from Ms. Garcia, an alternative source of information must be located. The Secretary argues for adoption of the forum rate found by the special master in Rodriguez. Resp't Opp'n, filed June 7, 2011, at 7.

The undersigned will follow the special master's decision in Rodriguez. That decision was well reasoned and the Federal Circuit held its findings regarding the forum rate were not arbitrary. Reasonable forum hourly rates for attorneys of Mr. McHugh's experience practicing in the Vaccine Program are $320 for 2007, $330 for 2008, and $335 in 2009. For 2010 and 2011, which were not discussed in Rodriguez, a reasonable hourly rate is $340 for both years based on the relatively low rate of inflation.

2. Step Two: Reasonable Rate Where the Work was Performed

Mr. McHugh avers that "[a]t all time during the pendency of this matter, which commenced in 2007, this office has charged all new clients at the hourly rate of $450 for Mr. McHugh." Exhibit 88 ¶ 2. Ms. Garcia submitted evidence to support a finding that this hourly rate is reasonable for Mr. McHugh. See exhibit 72 (affidavit of Anthony Gentile, indicating that junior members of his New York City firm charge an hourly rate of $450, while senior members of the firm charge rates of $750 per hour) and exhibit 74 (affidavit of Sharon Bittner Kean, suggesting an hourly rate of $385 is appropriate for work performed in the Wall Street area of New York City). The Secretary did not submit any evidence relevant

to determining a reasonable hourly rate for a New York City attorney with Mr. McHugh's skills, reputation and experience.[10]

A reasonable hourly rate for Mr. McHugh's work from 2007 to 2011 is $450. The special master in Rodriguez also used this rate. Rodriguez, 2009 WL 2568468, at *15.

3. Step Three: Comparing the Two Rates

The third step in the Avera process is to compare the rate prevailing in the forum with the rate where the work was performed. An attorney should receive the forum rate except when "'there is a very significant difference in compensation favoring D.C.'" Avera, 515 F.3d at 1349, quoting Davis County, 169 F.3d at 758.

Here, the forum rate ($320 - $340 per hour) is actually lower than the rate where the work was performed ($450 per hour). The special master in Rodriguez confronted this problem and held that Mr. McHugh should be compensated at the forum rate. Rodriguez, 2009 WL 2568468, at *16-19. The Court of Federal Claims reviewed this holding and found no error. Rodriguez, 91 Fed. Cl. at 478-79. This issue was not presented to the Federal Circuit.

Ms. Garcia does very little to distinguish Rodriguez. At best, she argues that too few attorneys are willing to represent petitioners in the Vaccine Program and, therefore, special masters should remedy this problem by paying higher hourly rates. Pet'r Br. at 13-15; see also exhibit 88 (Mr. McHugh's declaration) ¶ 42-43, 45-47 (presenting statistical information); exhibit 75 (affidavit of Clifford Shoemaker). This argument seems to suggest that the forum rate and the local rate should not be compared as a way to raise the hourly rate of compensation.

To the extent that Ms. Garcia is making an argument not to follow Avera, the argument must be rejected. The Federal Circuit has already instructed special masters how to determine the hourly rates for attorneys in the Vaccine Program. Unquestionably, part of this process is to compare the hourly rates. Avera, 515 F.3d at 1349; Hall v. Sec'y of Health & Human Servs., 640 F.3d 1351, 1357 (Fed.

[10] The Secretary challenged the relevance of other information describing the hourly rates at very large international law firms (e.g. exhibit 67 and exhibit 71). These law firms are not a useful starting point for determining Mr. McHugh's hourly rate because he works in a much different setting.

Cir. 2011). A special master may not deviate from what the Federal Circuit has held. Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274, 1280 (Fed. Cir. 2005) (stating "The special master's role is to apply the law.").

In addition, the suggestion that the Vaccine Program "needs" higher rates to attract more attorneys has been considered previously. Mr. McHugh on behalf of Mr. Rodriguez presented a similar argument with affidavits from the Avera litigation. The special master rejected that argument in part because data from the Clerk's Office show that the number of attorneys participating in the Vaccine Program has been increasing. Rodriguez, 2009 WL 2568468, at *17. Additionally, Mr. Robert Moxley, the attorney who represented the petitioners in Avera, has frequently urged reform. See Avera v. Sec'y of Health & Human Servs., 75 Fed. Cl. 400, 403 (2007) (quoting special master's decision). When Mr. Moxley asserted that low hourly rates were forcing attorneys to refrain from representing petitioners in the Vaccine Program, the undersigned special master rejected this argument, again, based upon information from the Clerk's Office. Masias v. Sec'y of Health & Human Servs., No. 99-697, 2009 WL 1838979, at *29 (Fed. Cl. Spec. Mstr. June 12, 2009), aff'd 634 F.3d 1283 (Fed. Cir. 2011), cert. denied, __ U.S. ___, 2011 WL 3841689 (Dec. 5, 2011). Another special master found that a group of attorneys frequently represent petitioners in the Vaccine Program. Stewart v. Sec'y of Health & Human Servs., No. 06-287V, 2011 WL 5330388, at *8 (Fed. Cl. Spec. Mstr. Oct. 17, 2011).

In light of these precedents, an argument that Vaccine Program attorneys should be compensated at a higher rate to attract more attorneys to the Vaccine Program cannot be accepted. Two special masters have found that the Vaccine Program is not lacking for attorneys. Moreover, even if it were true, the Supreme Court has stated that fee-shifting statutes should not be interpreted in a way to improve "the financial lot of attorneys." Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986), quoted in Rodriguez, 632 F.3d at 1386.

4. Summary

Reasonable hourly rates for Mr. McHugh's work in the Vaccine Program are $320 for 2007, $330 for 2008, $335 in 2009, $340 in 2010, and $340 in 2011.

C. Reasonable Number of Hours

After the reasonable hourly rate is found, the next part of the process for determining the lodestar value is to determine 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 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 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.

Here, different submissions from Mr. McHugh request compensation for a different number of hours. The undersigned chooses to use the timesheets submitted electronically and uses the number of hours displayed by the Excel spreadsheet program. This shows the following summary:

Year	Activities	Number of Hours
2007	Consulting with Ms. Garcia initially, drafting amended petition, review Rule 4 report	32.25
2008	Gathering information relating to damages, especially lost wages	21.25
2009	Developing information relating to damages, gathering medical records, discussions with Dr. Fitzgerald, preparing legal memoranda	60.00
2010	Developing information relating to lost wages, especially factual basis; preparing and attending hearing; negotiating a resolution	58.00
2011	Fee application	53.55
TOTAL		225.05

The Secretary maintains that the number of hours spent was excessive. Resp't Opp'n at 9.[11] For each year, reasonable number of hours is set forth below.

1. 2007

In this first year of the case, Mr. McHugh's primary functions were to review the medical records that Ms. Garcia had already filed and to draft an

[11] Ms. Garcia contends that the Secretary's objection to the amount of time requested was "unsupported [and] conclusory." Pet'r Reply, filed July 21, 2011, at 7. This characterization is not correct. The Secretary's opposition included specific examples of tasks that took longer that reasonable. Resp't Opp'n at 9-11.

amended petition. The medical records are approximately 250 pages and the amended petition is approximately five and one-half pages. He seeks compensation for 32.25 hours.

In 2007, Mr. McHugh has included activities that are not commensurate with an attorney who charges $450 per hour. For example, the entry for October 19, 2007 indicates that Mr. McHugh's activity was "notice of filing, file" and he charged 1.5 hours. A paralegal or secretary probably could have drafted the one-sentence notice of filing and filed the associated documents in approximately 15 minutes. Overall, a reasonably efficient and experienced attorney could accomplish the attorney, rather than secretarial, work performed by Mr. McHugh in approximately 20 hours.

2. 2008

Mr. McHugh's entries for 2008 show that he spent 21.25 hours working on this case. The docket confirms that relatively little was accomplished, although the Secretary had just conceded that Ms. Garcia was entitled to compensation.

Mr. McHugh's activities appear reasonable for someone to perform. The problem, however, is that Mr. McHugh did things such as send "Letters to MD's re: current status of treatment" (entry for Jan. 20, 2008). Requesting medical records is typically done by paralegals and is compensated at paralegal rates. Valdes v. Sec'y of Health & Human Servs., 89 Fed.Cl. 415, 425 (2009).

A rough approximation between the time spent on tasks for an attorney and the time spent on tasks for a paralegal is 15 hours for an attorney and 6.25 for paralegal. Mr. McHugh will be compensated accordingly.

3. 2009

Sixty hours of Mr. McHugh's time was spent on Ms. Garcia's case in 2009. Mr. McHugh spent some time gathering medical records, presenting information about Ms. Garcia's work history and plans for future employment by obtaining affidavits from Ms. Garcia and a friend, and reviewing an article from American Law Reports. The tasks can be roughly grouped into three categories: activities that require an attorney's knowledge, skill and abilities, activities that may competently be performed by a paralegal, and activities that were not reasonably performed.

Mr. McHugh's training as an attorney makes him the appropriate person to perform certain tasks. It is reasonable for Mr. McHugh to be engaged in the process of getting a report from Dr. Fitzgerald, to determine whether Bellevue Hospital intended to place a lien against any recovery, and to interview witnesses and to assist them with an affidavit. Mr. McHugh also spent 10 hours reviewing an ALR article.[12]

There is a second category, which is comprised of activities that a paralegal could have performed. Examples include "file medical records" on February 6, 2009; "file tax return" on July 10, 2009; prepare letters requesting routine medical records on various dates, and "resend releases" on December 8, 2009. Paralegals typically do these tasks. Thus, compensation will be awarded based upon a rate reasonable for paralegals.

A final group of activities are tasks that appear unnecessary. A prominent example is spending 2.25 hours on an exhibit list in September 2009. Work on an exhibit list was necessitated by Mr. McHugh's problems in filing documents correctly. Mr. McHugh will not be compensated for solving a problem that he created.

For 2009, Mr. McHugh will be compensated for 50 hours of attorney time and 7.5 hours of paralegal time.

4. 2010

For 2010, Mr. McHugh seeks compensation for 58 hours of work. The most prominent activities were preparing for and participating in a hearing held on September 9, 2010. Before the hearing, Mr. McHugh spent seven more hours regarding the ALR article and developed evidence regarding Ms. Garcia's work history. After the hearing, Mr. McHugh spent approximately 11 hours in settling the case.

[12] The ALR article that Mr. McHugh reviewed discussed when a plaintiff (or petitioner) may receive compensation for lost earnings in a field in which the person had not previously worked. The undersigned encountered this article and alerted the parties to it by issuing an order on December 17, 2009.

Except for work on the ALR article, these activities are reasonable for an attorney to perform. Thus, Mr. McHugh will be compensated as requested.

Mr. McHugh's work on the ALR article is excessive. Although Mr. McHugh eventually filed a memorandum about the ALR article, this brief was not requested. The undersigned did not request a brief in part because the undersigned had read the article before alerting the parties to it. Furthermore, Mr. McHugh's brief was misdirected in that it focused on the law in New York, which is where Ms. Garcia lived. New York law has little influence on the amount of compensation to which Ms. Garcia is entitled because the Vaccine Program follows national (as opposed to state) law. See Shyface v. Sec'y of Health & Human Servs., 165 F.3d 1344, 1351 (Fed. Cir. 1999). Therefore, Mr. McHugh will not be compensated for the seven hours of work performed in 2010.

Mr. McHugh will be compensated for 51 hours of attorney work in 2010.

5. 2011

For the current year, Mr. McHugh's timesheet shows that he worked 53.55 hours. All the time, except for one hour, was devoted to the application for attorneys' fees. This means that slightly more than one-fifth (53.55 hours / 225.05 hours = 23.8 percent) of the hours claimed by Mr. McHugh were spent seeking fees.[13] On June 7, 2011 when Mr. McHugh had charged only 17.5 hours for the fee application, the Secretary argued that this much time was excessive. Resp't Opp'n at 11.

Although the Secretary suggests that Ms. Garcia's decision to seek to increase Mr. McHugh's hourly rate after Rodriguez is "contrary to law," Resp't Opp'n at 4, the reasonable rate for Mr. McHugh's work is really a question of fact, not a question of law. McKenna v. City of Philadelphia, 582 F.3d 447, 456-57 (3d Cir. 2009). In Rodriguez, the petitioner presented little evidence about the rate prevailing in Washington, D.C. for attorneys with skills, experience, and abilities comparable to Mr. McHugh. Thus, the special master relied upon other evidence to find a reasonable hourly rate. Rodriguez, 2009 WL 2568468, at *13. When the

[13] The number of Vaccine Program cases in which attorneys' fees are disputed has increased in recent years. As discussed in the text, Mr. McHugh has participated in some of these cases.

case reached the Federal Circuit, the appellate court ruled that the special master reasonably evaluated the evidence.

Here, Ms. Garcia has submitted evidence that was not in Rodriguez, primarily the evidence about hourly rates for attorneys who practice before the Surface Transportation Board. The introduction of new evidence means that a new result is possible. On the other hand, this potential argument was not developed well for the reasons explained in section I.B.1 above. Because Ms. Garcia did not present any evidence that persuasively showed that the result in Rodriguez should not be followed, Mr. McHugh is being compensated at the same rates as in Rodriguez. Thus, the question becomes how reasonable were the efforts to seek a result different from Rodriguez when the efforts did not change the outcome?

Given Mr. McHugh's litigation over his rate of compensation, Mr. McHugh should prepare fee applications and present legal memoranda in support of those applications efficiently. Consequently, a reasonable amount of time for litigation over the fee application (both the initial submission and the subsequent filings) is 30 hours.

D. Support Staff

Ms. Garcia also seeks compensation for work performed by Ms. Sylvia Cruz, a person who supported Mr. McHugh.[14] Ms. Cruz frequently communicated with Ms. Garcia because Ms. Cruz, unlike Mr. McHugh, speaks Spanish, which is Ms. Garcia's native language. Ms. Garcia requested that Ms. Cruz be compensated at a rate of $95.00 per hour because that is a reasonable rate for interpreters. Exhibit 88 (Mr. McHugh's declaration) ¶ 3. The Secretary did not interpose an objection to this hourly rate.

Ms. Garcia has requested compensation for 22.75 hours of Ms. Cruz's work. Exhibit 94. This request is reasonable and Ms. Garcia is compensated in full ($2,161.25).

[14] The initial invoice for Ms. Cruz did not include the number of hours spent on particular tasks. After a review of Ms. Garcia's application, she was given an additional opportunity to submit information into the record. She did so on September 14, 2011. Exhibit 94.

E. Conclusion for Attorneys' Fees

The attached appendix calculates the attorneys' fees by multiplying a reasonable hourly rate by a reasonable number of hours as found. A reasonable amount of compensation for Mr. McHugh is $56,946.25. To this amount, compensation for Ms. Cruz's work is added. **The total amount for attorneys' fees is $59,107.50.**

II. Costs

Ms. Garcia also seeks an award of costs for both her attorney and herself. She, personally, incurred a cost of $422.00, which was adequately explained. Exhibit 84. Mr. McHugh's costs fall into four categories of expenses: first, work performed by Mr. Estrada at Kincaid Vocational ($4,956.25); second, the work performed by Dr. Fitzgerald ($2,240.00); third, costs of using Westlaw ($850.00); and fourth, miscellaneous expenses ($923.85).

The Secretary's primary objections concern the amounts requested by Mr. Estrada and Dr. Fitzgerald.[15] The Secretary questions Mr. Estrada's qualifications, the justification for his hourly rate, and why two people (rather than one person) were used to present information regarding Ms. Garcia's lost wages. The last point is dispositive.

In essence, two people presented information about Ms. Garcia's lost wages because Mr. Estrada did not fulfill all his responsibilities. Acting through Mr. McHugh, Ms. Garcia apparently retained Mr. Estrada from Kincaid Vocational & Rehabilitation Services, Inc. to evaluate her ability to be employed and to calculate her lost income. Exhibit 11. The term "apparently" is used because Ms. Garcia has not provided the retainer with Kincaid Vocational even though Ms. Garcia was specifically ordered to provide this document. Order, filed Sept. 1, 2011. Regardless, it appears clear enough that Kincaid Vocational and/or Mr. Estrada did not fulfill their obligations because the report Mr. Estrada presented was

[15] The Secretary also objected to the charge for Westlaw because Ms. Garcia did not submit a receipt. In reply, Ms. Garcia explained how the estimate was made. Ms. Garcia will be reimbursed for this expense. However, Mr. McHugh is alerted that Westlaw can link an expense to a client. The failure to provide some documentation of Westlaw research will preclude an award of costs in the future. See Presault, 52 Fed. Cl. at 680-81.

inadequate. For example, Mr. Estrada's report does not account for two basic parts of a lost wage analysis, income taxes and discounting to net present value.[16] Ms. Garcia has not offered any persuasive explanation as to why she stopped relying upon the services of Kincaid Vocational and/or Mr. Estrada and retained Dr. Fitzgerald as a replacement.

As counsel for Ms. Garcia, Mr. McHugh bears the responsibility of supervising the people retained for litigation. A sensible approach is to pay when the work is finished. Because Mr. Estrada did not complete his work for Ms. Garcia, compensating him is not reasonable. Thus, Ms. Garcia is not awarded any compensation for Mr. Estrada's work.[17] When one professional may competently perform a task, retaining a second professional is not always reasonable. See Sabella v. Sec'y of Health & Human Servs., 86 Fed. Cl. 201, 209-10 (2009) (discussing whether retaining two attorneys is reasonable). Ms. Garcia is awarded the full amount requested for Dr. Fitzgerald's work.

Other than the deduction for Mr. Estrada's work, Ms. Garcia's costs are reasonable. **Ms. Garcia is personally awarded costs of $422.00. Mr. McHugh's reasonable costs are $4,013.85** ($2,240.00 for Dr. Fitzgerald + $850.00 for Westlaw + $923.85 for miscellaneous expenses).

III. Conclusion

Ms. Garcia has established that a reasonable amount of attorneys' fees is $59,107.50. A reasonable amount of costs is $4,435.85. The total amount awarded is $63,543.35. A check in the amount of $422.00 shall be made payable to Ms. Garcia alone. A check in the amount of $63,121.35 shall be made payable to Ms. Garcia and her attorney.

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[16] Additionally, given the vigorous dispute about the amount of lost wages, a hearing at which vocational experts testified was foreseeable. Given Ms. Garcia's inability to find Mr. Estrada to prepare a supplemental report, Ms. Garcia would have experienced more problems in calling Mr. Estrada to testify on her behalf.

[17] Ms. Garcia may not be separately charged for the cost of Mr. Estrada's work. Beck v. Sec'y of Health & Human Servs., 924 F.2d 1029, 1039 (Fed. Cir. 1991) (stating "§ 300aa-15(e) prevents an attorney from charging or collecting additional fees (including 'costs') from the compensation awarded to a successful Vaccine Act claimant.").

IT IS SO ORDERED.

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

Appendix: Calculation of Attorneys' Fees

Mr. McHugh

	Attorney Hourly Rate	Attorney Hours	Paralegal Rate	Hours as Paralegal	Subtotal
2007	320	20			6,400.00
2008	330	15	95	6.25	5,543.75
2009	335	50	95	7.5	17,462.50
2010	340	51			17,340.00
2011	340	30			10,200.00
TOTAL					**56,946.25**

Ms. Cruz	2,161.25
TOTAL	59,107.50