

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 06-287V

Filed: October 23, 2008

WILLIAM R. STEWART and LEANOR *
SOTELO, on behalf of WILLIAM *
STEWART-SOTELO, a minor, *

Petitioners, *

Attorneys' Fees and Costs;
applicability of Avera

v. *

SECRETARY OF THE DEPARTMENT *
OF HEALTH AND HUMAN SERVICES, *

Respondent. *

ORDER¹

On April 10, 2006, petitioners filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10 et seq., by their original counsel, Mr. T. Christopher Pinedo. On May 17, 2006, petitioners filed a motion informing the court that the case would be transferred to Mr. Richard Gage of the Gage and Moxley Law Firm. On July 10, 2006, respondent filed a Rule 4(c) report recommending against compensation. An evidentiary hearing was held in Washington, D.C. on December 1, 2006. On February 26, 2007, petitioners filed a motion requesting a Ruling on the Record. On March 19, 2007, the undersigned issued a Ruling on Entitlement in favor of petitioners. On the same date, the undersigned issued a Damages Order, setting forth deadlines for the parties' respective life care plans. On December 5, 2007, Mr. Gage filed a notice of change of address because he had left the partnership with Mr. Robert Moxley and started his own firm. On June 24, 2008, respondent notified the court that a proffer

¹ The undersigned intends to post this order on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, the entire order will be available to the public. Id.

was sent to petitioners. On July 23, 2008, the undersigned issued a Damages Decision.

On August 5, 2008, petitioners filed an Application for Attorney's Fees and Reimbursement of Costs. On August 22, 2008, respondent filed a Response to petitioners' Application. On September 15, 2008, petitioners filed a Reply to respondent's Response. On September 29, 2008, respondent filed a Sur-Reply to petitioners' Reply.

Petitioners' August 5, 2008 Application for Attorney's Fees and Costs contains a request for reimbursement of attorney's fees and costs in the amount of **\$287,948.06**. Petr's Fee App. at 2. Petitioners delineated the request as follows:

Richard Gage, P.C., requests **\$47,361.00 in fees**
Richard Gage, P.C., requests **\$20,406.47 in costs**
T. Christopher Pinedo requests **\$169,400.00 in fees**
T. Christopher Pinedo requests **\$29,747.93 in costs**
R. Louis Branton requests **\$522.92 in costs**

Id. at 5. Petitioners' current attorney, Mr. Richard Gage, agreed to advance the claim of T. Christopher Pinedo, an attorney who previously represented petitioners in this case and in a prior civil suit against the Merck Pharmaceutical Company. Petr's Fee App. at Tab F. Additionally, Mr. Gage agreed to advance the fees and cost requests of two additional law firms, the Watts Law Firm, LLP with which Mr. Pinedo had been associated, and the Bratton Firm, P.C., that represented petitioners in their civil case against Merck. Id.

On August 22, 2008, respondent filed a Response to Petitioners' Petition for Fees and Costs. ("Resp't Resp.") Respondent objected to the amounts of petitioners' request that were incurred for their prior civil suit against Merck as expenses "not compensable under the [Vaccine] Act." Resp't Resp. at 2-4. Respondent objected to the number of hours claimed by Mr. Pinedo for work spent preparing petitioners' Vaccine Act claim, as well as the \$500 hourly rate charged by Mr. Pinedo. Id. at 5-6. Mr. Pinedo initially worked in Corpus Christi but left the Watts Law Firm to co-found a law practice in Houston. Id. Respondent objected to the \$295.00, \$310.00, and \$325.00 hourly rates claimed by petitioners' current attorney, Mr. Gage, as being "unreasonably high," for where Mr. Gage's practice is located. Id. at 9, 12. Respondent also objected to the fees requested by Mr. Gage as being "inflated" and inaccurate in calculating the time he spent on this case. Id. at 13-14. Respondent concluded his objections by rejecting the items billed by petitioners' life care planner for future dates, and also requested an itemized billing statement for Dr. T. Walter Harrell, who performed a neuropsychological evaluation of William Stewart-Sotelo. Id. at 14.

On September 15, 2008, petitioners filed a Reply to respondent's Response. In their Reply, petitioners characterized the future billing entries of their life care planners as typos, and amended the claims to reflect work performed in 2007. Petr's Rep. at 2. Petitioners also submitted an itemized bill for Dr. Harrell. Id. at Tab B. Petitioners state that at the time that Mr. Gage had entered his notice of appearance, Mr. Pinedo had researched causation, retained an

expert, and filed a report for this case. Id. at 2. Petitioners attached a new affidavit from Mr. Pinedo, which contained an amended request of **\$157,250.00**, which omitted previous requests from Mr. Pinedo for work that petitioners allege was exclusively related to petitioners' previous civil action. Id. at Tab C. Petitioners state that the \$500 hourly rate charged by Mr. Pinedo is reasonable. Id. at 3. Alternatively, petitioners state that "forum" rates for Washington, D.C., are appropriate. Id. Petitioners respond that an attorney of Mr. Gage's experience and reputation, and the complex nature of the program support the rates he requests, while also calling the undersigned's attention to recent awards of \$300 and \$340 per hour recently awarded other established attorneys in the Vaccine Program. Id. at 6. Petitioners state that respondent's objection to petitioners' counsel's bill calculation was without merit, and noted that each of respondent's specific objections to the calculation is based on a tenth of an hour calculation.

Petitioners included in the Reply two additional invoices for additional reimbursement not addressed in the original fee application. The first additional request was an invoice for Mr. Bill Kemp, an attorney petitioners retained to set up a guardianship on behalf of William Stewart-Sotelo. Id. at 3. Petitioners request **\$6,740.00** for Mr. Kemp's services. Id. at Tab D, p. 4. The second additional request includes additional fees and costs that Mr. Gage incurred while working on fee issues post-August 7, 2008, totaling an additional **\$2,665.00 in fees and an additional \$23.81 in costs.** Id. at Tab E.

On September 29, 2008, respondent filed a Sur-Reply to petitioners' Reply. Respondent objects to compensation for the additional guardianship fees requested by petitioners on the grounds that Mr. Kemp's services were not rendered under a Program proceeding, and that guardianship fees are not compensable fees under the Vaccine Act. Resp't Sur-Rep. at 2. In the alternative, respondent objects to the fees requested by Mr. Kemp as unreasonable and excessive. Id. Respondent notes that no evidence was presented to substantiate the \$295.00 hourly rate requested for Mr. Kemp, or its reasonableness. Id. at 3. Respondent concludes the Sur-Reply by objecting to the additional fee request of Mr. Gage for time he spent preparing petitioners' Reply. Id. Respondent alleges that a telephone call would have quickly clarified the outstanding issues, but following petitioners' counsel filing petitioners' position on the record, respondent was obligated to respond in writing to place his own views on the record. Id.

After carefully reviewing all the documents filed by both parties relating to petitioners' fee request, the undersigned hereby orders petitioners' counsel to respond to the following issues arising from petitioners' submitted application.

1. Petitioners' request for work performed by Mr. Pinedo

The Vaccine Act provides for the reasonable recovery of attorney's fees and costs for the following:

- (1) In awarding compensation on a petition filed under section 300aa-11 of this title the special master or court shall also award as part of such compensation an amount to cover—

(A) reasonable attorneys' fees, and

(B) other costs,

incurred in any proceeding **on such petition**. [. . .]

42 U.S.C. § 300aa-15(e)(1)(a)-(b) (**emphasis added**). The statutory language of the Vaccine Act provides for reasonable fees and costs for work done by an attorney during the pendency of a petition before a special master or a judge on the United States Court of Federal Claims, or the United States Court of Appeals for the Federal Circuit. The statute throughout refers to proceedings on a petition as those before a special master, the Court of Federal Claims, and the Court of Appeals for the Federal Circuit. See 42 U.S.C. §§ 300aa-12(d)(3)(A)-(D).

The Court of Federal Claims has previously denied awarding attorneys' fees and costs for civil proceedings on the grounds that such proceedings were not conducted on a Program petition. See Mol v. Sec'y of HHS, 50 Fed. Cl. 588 (Oct. 15, 2001), reversing Mol v. Sec'y of HHS, No. 96-59V, slip. op. (Fed. Cl. Spec. Mstr. Jul. 24, 2001) (J. Futey reversed the special master's award of fees incurred for the creation of a guardianship because such creation was not under a Program proceeding). The "statute is clear that only attorney's fees that are 'incurred in any **proceeding** on [a] **petition**' are compensable." Id. at *591 (emphasis in original). Similar requests for recovering fees for civil proceedings outside the proceedings before the Program have been denied. See Tucker v. Sec'y of HHS, No. 89-44V, 1990 WL 293387 (Fed. Cl. Spec. Mstr. Dec. 7, 1990) (a special master does not have the authority to award fees or costs relating to a prior civil action). "It would be inappropriate for taxpayer funds reserved for the Vaccine Program to be available to fund private civil litigation." Id. at *2; see also Jeffries v. Sec'y of HHS, No. 99-670V, 2006 WL 3903710 (Fed. Cl. Spec. Mstr. Dec. 15, 2006) (where special master denied reimbursement for two civil actions filed in federal court). "Specifically, the Court finds it unreasonable that petitioner requests compensation for hours billed in two civil cases. . . . [P]etitioner is entitled only to reimbursement for attorneys' hours that were billed in the present case. Therefore, the work performed in the civil cases is not compensable under the Vaccine Act." Jeffries, 2006 WL at *9; see Siegfried v. Sec'y of HHS, No. 88-68V, 19 Cl. Ct. 323 (1990) (attorney time spent establishing a guardianship is not compensable under the Program); see also Ceballos v. Sec'y of HHS, No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 2, 2004) (chief special master found petitioners' testimony before Congress to be unrelated to the petition proceeding and denied compensation); Cain v. Sec'y of HHS, No. 91-817V, 1992 WL 379932 (Fed. Cl. Spec. Mstr. Dec. 3, 1992) (services rendered in probate are not compensable under the Vaccine Act because they were unrelated to the petition proceeding); Barnes v. Sec'y of HHS, No. 1510V, 1992 WL 185708 (Fed. Cl. Spec. Mstr. Jul. 16, 1992) (fees spent for the establishment of a conservatorship are not recoverable because it was not a proceeding on a petition).

There are several important chronological dates relevant to the fees and costs request submitted by petitioners. The hepatitis A vaccine, for which petitioners were compensated, was added to the Vaccine Injury Table on December 1, 2004. Petitioners' counsel, Mr. Pinedo, was

admitted to practice in the United States Court of Federal Claims on February 9, 2006. According to petitioners' Exhibit 28, the civil suit against Merck was dismissed on March 20, 2006. Petitioners filed a petition on April 10, 2006.

In light of the statutory language of the Vaccine Act, case law interpreting it, and the time line established above, it appears that a substantial majority of petitioners' fee request, particularly the significant amount of the request incurred by petitioners' former counsel, Mr. Pinedo, is not compensable under the Act. Under § 300aa-11(b) of the Vaccine Act, plaintiffs involved in pending civil litigation for damages or death resulting from a vaccine-related injury may not file a petition in the Program. By statute, a special master may only award the fees related to activities under the petition proceeding. See 42 U.S.C. § 300aa-15(e)(1)(b). The work Mr. Pinedo performed for petitioners before December 1, 2004 could not have been in contemplation of filing a Vaccine Program petition since hepatitis A vaccine was not until that date a listed vaccine. More than 16 months passed between the addition of hepatitis A vaccine to the Vaccine Table and the filing date of petitioners' petition in the Vaccine Program. Further, a review of the submitted fees and costs during this period reveals that the vast majority of expenses for which petitioners seek reimbursement were incurred during petitioners' civil action against Merck, in the form of depositions, correspondence, and preparation for civil litigation. Petitioners' civil action was dismissed only 21 days prior to petitioners filing their petition in the Vaccine Program.

In light of the chronology and facts noted above, the undersigned intends to base her award for compensation to petitioners starting from March 20, 2006, the date petitioners' civil suit against Merck was dismissed. Petr's Rep. at Tab C, p. 29. Petitioners have until **Tuesday, November 25, 2008** to respond to the undersigned's discussion of this issue with supporting case law, if any, to justify their claim for fees and costs incurred during the Merck litigation. If there is no supporting case law, petitioners shall explain why the undersigned should rule in opposition to the case law and the terms of the Vaccine Act, section 300aa-15(e)(1).

2. Mr. Pinedo's admittance to practice in the U.S. Court of Federal Claims

In advancing the invoice of the Watts Law Firm, petitioners seek compensation in the sum of **\$255.00**, for the cost of admission of their previous counsel, Mr. Pinedo, to practice before the U.S. Court of Federal Claims. Petr's Fee App. at Tab F, p. 15. Respondent objects to the request. Resp't Resp. at 4. In light of the statutory language of the Vaccine Act and the case law denying reimbursement for costs associated with admission to practice before the U.S. Court of Federal Claims, the cost sought by petitioners for Mr. Pinedo's admission to the Federal Claims bar is not compensable under the Act.

In addition to the statutory language of 42 U.S.C. § 300aa-15(e)(1)(b) barring compensation for work done outside the proceeding, it has consistently been held that the cost of admission to practice before the United States Court of Federal Claims is not a compensable expense under the Program because "the admission to practice before this court is of continuing benefit to counsel, and not reasonably charged to petitioners in this case." Long v. Sec'y of HHS,

No. 91-0326V, 1995 WL 445600, at *8 (Fed. Cl. Spec. Mstr. Dec. 21, 1995), quoting Borger v. Sec'y of HHS, No. 90-1066V, 1993 WL 540817, at *1 (Fed. Cl. Spec. Mstr. Dec. 16, 1993); see also Guy v. Sec'y of HHS, 38 Fed. Cl. 403, 407 (1997); Ceballos v. Sec'y of HHS, No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 25, 2004); Velting v. Sec'y of HHS, No. 90-1432V, 1996 WL 937626 (Fed. Cl. Spec. Mstr. Sept. 24, 1996); Winters v. Sec'y of HHS, No. 91-4V, 1993 WL 114646 (Fed. Cl. Spec. Mstr. Apr. 1, 1993); Gonzalez v. Sec'y of HHS, No. 91-905V, 1992 WL 92200, at *4 (Fed. Cl. Spec. Mstr. Apr. 10, 1992).

Petitioners have until **Tuesday, November 25, 2008** to respond to the undersigned's discussion of this issue with supporting case law, if any. If there is no supporting case law, petitioners shall explain why the undersigned should rule in opposition to the case law and the terms of the Vaccine Act, section 300aa-15(e)(1).

3. Petitioners' request for travel expenses incurred by Mr. Pinedo

Travel expenses incurred by counsel must first meet the statutory threshold as being necessary for the prosecution of a petition under the Vaccine Act. 42 U.S.C. § 300aa-15(e)(1)(b); see also discussion at 3-4. It is customary in the Vaccine Program for attorneys to bill at half their hourly rate for the time spent for such travel. See Cain v. Sec'y of HHS, No. 91-817V, 1992 WL 379932 (Fed. Cl. Spec. Mstr. Dec. 3, 1992) (holding that hours spent traveling in the Program should be billed at fifty percent (50%) of the attorney's hourly rate); see also Ceballos v. Sec'y of HHS, No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 25, 2004) (chief special master denied reimbursement for counsel's airfare in visiting petitioners nine times during the proceeding because no showing of necessity was made); Scoutto v. Sec'y of HHS, No. 90-3576V, 1997 WL 588954, at *5 (Fed. Cl. Spec. Mstr. Sept. 5, 1997) (awarding counsel half his ordinary billing rate for travel time); Mains v. Sec'y of HHS, No. 90-992V, 1993 WL 69724, at *4 (Fed. Cl. Spec. Mstr. Feb. 26, 1993) (holding that travel time is to be reimbursed at fifty percent of the established billing rate of the attorney).

Respondent objects to the reimbursement sought by petitioners for Mr. Pinedo's travel on October 1, 2003, December 2, 2003, and January 8, 2004, during petitioners' civil case against Merck. Resp't Resp. at 8.

Since hepatitis A vaccine was not added to the Vaccine Injury Table until December 1, 2004, and petitioners did not file their petition until April 10, 2006, it is evident by the dates of Mr. Pinedo's travel that petitioners are requesting reimbursement for expenses that Mr. Pinedo incurred exclusively in furtherance of petitioners' civil case against Merck. Accordingly, because the expenses claimed are not in furtherance of their petition before the Program, they are not compensable under 42 U.S.C. § 300aa-15(e)(1)(b).

Petitioners have until **Tuesday, November 25, 2008**, to respond to the undersigned's discussion of this issue with supporting case law, if any. If there is no supporting case law, petitioners shall explain why the undersigned should rule in opposition to the case law and the terms of the Vaccine Act, section 300aa-15(e)(1).

4. The fees claimed by petitioners for guardianship proceedings

Petitioners are seeking compensation for **\$6,740.00** incurred by the retention of William F. Kemp, Esq., for guardianship proceedings from July 7, 2008, to September 12, 2008. Petr's Rep. at Tab D. Respondent contends that Mr. Kemp's services did not occur under a Program proceeding under 42 U.S.C. § 300aa-15(e)(1). Respt's Sur-Rep. at 2.

In addition to the statutory language of 42 U.S.C. § 300aa-15(e)(1)(b) barring compensation for work done outside the petition proceeding, this guardianship matter is not compensable under the Vaccine Act. **In particular, Judge Futey held that attorneys' fees and costs associated with a state court guardianship proceeding were not compensable under the Act, even when guardianship was established pursuant to a settlement provision.** See Mol v. Sec'y of HHS, 50 Fed. Cl. 588, 591 (2001), rev'g Mol v. Sec'y of HHS, No. 96-549V, 2001 WL 914444 (Fed. Cl. Spec. Mstr. Jul. 24, 2001). "The [Vaccine] Act does not provide attorney fee awards to cover the myriad legal implications of establishing or administering an estate." Id. at *591, citing Siegfried v. Sec'y of HHS, 19 Cl. Ct. 323, 325 (1990) (state court proceedings were not part of the prosecution of a vaccine petition); see also Lemon v. Sec'y of HHS, No. 89-33V, 19 Cl. Ct. 621 (Fed. Cl. Spec. Mstr. Mar. 2, 1990) (fees incurred in the execution of a state court estate proceeding are not compensable under the Act); see also Zeman v. Sec'y of HHS, No. 92-240V, 1994 WL 325425 (Fed. Cl. Spec. Mstr. June 20, 1994); Cain v. Sec'y of HHS, No. 91-817V, 1992 WL 379932 (Fed. Cl. Spec. Mstr. Dec. 3, 1992); Barnes v. Sec'y of HHS, No. 90-1510V, 1992 WL 185708 (Fed. Cl. Spec. Mstr. Jul. 16, 1992); compare Ceballos v. Sec'y of HHS, No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 25, 2004) (awarding attorney's fees for a guardianship established pursuant to an order from the special master).

Petitioners have until **Tuesday, November 25, 2008** to respond to the undersigned's discussion of this issue with supporting case law, if any. If there is no supporting case law, petitioners shall explain why the undersigned should rule in opposition to the case law and the terms of the Vaccine Act, section 300aa-15(e)(1).

5. Petitioners' reimbursement claims for the rates and fees by Mr. Gage and Mr. Pinedo

The Vaccine Act provides that a special master "shall also award as part of such compensation [for a petitioner's vaccine-related injury] an amount to cover . . . reasonable attorneys' fees." 42 U.S.C. § 300aa-15(e)(1). A special master may "award an amount of compensation to cover petitioner's reasonable attorneys' fees . . . if the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought." Id. In its recent decision, Avera v. Sec'y of HHS, 515 F.3d 1343 (Fed. Cir. 2008), the Federal Circuit held that to determine the reasonable amount of attorney's fees, a court should apply a forum rate. Id. at 1349. A court in general should use the forum rate in the lodestar calculation previously employed. Id. Here, the forum for cases brought pursuant to the Vaccine Act is the District of Columbia, the location of the U.S. Court of Federal Claims, which has exclusive jurisdiction over cases arising under the Vaccine Act. Id. at 1348; see 42 U.S.C. § 300aa-12(a).

Using the lodestar approach, the reasonable hourly rate is derived from the market rate “prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” Avera, 515 F.3d at 1348, quoting Blum v. Stenson, 465 U.S. 886, 895-96 n. 11 (1984). The burden is on the fee applicant to establish the reasonable market rate. Wilcox v. Sec’y of HHS, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr. Feb. 14, 1997). However, in Avera, the Federal Circuit recognized the Davis exception when setting the reasonable rate of attorney’s fees in Vaccine Act cases where the bulk of the work was done outside of the District of Columbia in a legal market where the prevailing attorney’s rates are substantially lower. Avera, 515 F.3d at 1349; see Davis County Solid Waste Management and Energy Recovery Special Service District v. United States Environmental Protection Agency, 169 F.3d 755 (D.C. Cir. 1999) (recognized a limited exception to the forum rule where the bulk of an attorney’s work is done outside the jurisdiction of the court and where there is a **very significant** difference in compensation favoring D.C.). The D.C. Circuit held that an attorney, practicing in a location where the hourly rates were lower, would be limited to the lower rate, rather than receiving the rates in Washington, D.C. Davis, 169 F.3d. at 759-60.

The application of the Davis exception does not eliminate the reasonableness standard for attorney’s fee awards under the Vaccine Act, which encompasses a reasonable hourly rate multiplied by a reasonable number of hours. Guy v. Sec’y of HHS, 38 Fed. Cl. 403, 406 (1997). In assessing the reasonableness of hours expended in the prosecution of a case, the court must exclude those “hours that are excessive, redundant, or otherwise unnecessary.” Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). Furthermore, a special master has the authority to reduce a requested amount that she deems unreasonable. Guy, 38 Fed. Cl. at 406; see also Wasson v. Sec’y of HHS, No. 90-208V, 24 Cl. Ct. 482, 486 (1991), aff’d, 988 F.2d 131 (Fed. Cir. 1993) (special masters may rely on their experience with the Vaccine Act in order to determine if the hours expended are reasonable). The rates requested by counsel must be in line with those prevailing in the community for similar services. Blum, 465 U.S. at 895, n. 11. The nature of the of the services provided is also a factor when determining the reasonable rate of compensation. Id.

Mr. Gage’s former partner, Robert Moxley,² also based in Cheyenne, WY., the same geographic area as Mr. Gage, was the counsel of record in Avera. In Avera, Mr. Moxley was awarded the originally-requested hourly rate of \$200.00 under the Vaccine Act for work Mr. Moxley performed between July 2004 through March 2006, a reduction from \$574.00 hourly and \$598.00 hourly that petitioners later requested in their amended application for fees. Avera, 515 F.3d at 1349-1350, aff’g Avera v. Sec’y of HHS, 75 Fed. Cl. 400 (Fed. Cl. Feb. 22, 2007), aff’g Avera v. Sec’y of HHS, No. 04-1385V, 2006 WL 5618158, at *1-3 (Fed. Cl. Spec. Mstr. Aug. 29, 2006). In Avera, the Court stated that “because the attorneys in this case performed the entirety of their work in Cheyenne, WY, and the District of Columbia rates that [the petitioner’s attorneys] requested are significantly higher than the rates prevailing in Cheyenne, following

² Mr. Moxley was admitted to the United States Court of Federal Claims on July 27, 1989, and has been active in representing petitioners in the Program since 1989. Petitioners’ previous counsel, Mr. Pinedo, was admitted to practice before the U.S. Court of Federal Claims on February 9, 2006, and the above-captioned case is his only case thus far in the Program.

Davis we hold that the special master did not err in awarding attorneys' fees at the lower [\$200.00] Cheyenne rate." Id. at 1350.

A. Mr. Pinedo's hourly rate

Petitioners seek reimbursement for Mr. Pinedo's fees for which he billed at \$500 per hour. Accompanying Mr. Pinedo's invoice characterizing the work performed at the \$500 hourly rate, petitioners have submitted the affidavits of Shelly A. Sanford, the co-founding partner with Mr. Pinedo of the latter's current law firm, which specializes in complex pharmaceutical mass tort litigation, and the affidavit of Zoe Littlepage, another Houston attorney practicing complex pharmaceutical cases. Both affiants state that the \$500 hourly rate claimed by Mr. Pinedo is reasonable in Houston for litigating pharmaceutical and mass tort cases. Respondent objects to the rate as unreasonably high. Resp't Resp. at 8.

Petitioners assume in seeking a \$500 hourly fee for Mr. Pinedo based on the fees charged in complex pharmaceutical and mass tort litigation that work in the Vaccine Program is analogous. They are mistaken. The \$500.00 hourly rate petitioners have requested for Mr. Pinedo, if awarded, would far exceed the highest rates of compensation awarded in the Program to date. See Kantor v. Sec'y of HHS, No. 01-679V, 2007 WL 1032378 (Fed. Cl. Spec. Mstr. Mar. 21, 2007) (awarding compensation for a New York City-based solo practitioner at an hourly rate of \$350 per hour); Barber v. Sec'y of HHS, No. 99-434V, 2008 WL 4145653 (Fed. Cl. Spec. Mstr. Aug. 21, 2008) (awarding compensation for a Richmond, VA-based vaccine attorney at an hourly rate of \$340 per hour); Ray v. Sec'y of HHS, No. 04-184V, 2006 WL 1006587 (Fed. Cl. Spec. Mstr. Mar. 30, 2006) (awarding an experienced Program attorney based in Vienna, VA., \$225 per hour for 2003-2004, \$235 per hour for 2004-2005, and \$245 per hour for 2005-2006); Carr v. Sec'y of HHS, No. 00-778V, 2006 WL 1073032 (Fed. Cl. Spec. Mstr. Mar. 29, 2006) (awarding an experienced Program attorney based in Boston, MA., a \$210 per hour rate for calendar years up to and including 2004, \$250 per hour for 2005, and \$260 per hour for 2006, while envisioning a \$10 hourly increase annually should the attorney continue to litigate cases in the Program).

The burden is on petitioners to establish the geographic rate. Though petitioners have submitted two affidavits of attorneys who are practicing members of Mr. Pinedo's pharmaceutical litigation community in Houston, they do not address the rate of Vaccine Act cases litigated in Houston. There is no evidence that the firms employing the affiants are involved in litigation in the Program, or, if so, whether the billed rate of Mr. Pinedo is the rate awarded for such litigation. The reasonableness of a rate requested by counsel depends on the elements of expertise and the resources counsel must reasonably expend to prosecute successfully a case in the Vaccine Program. See Kantor et al. v. Sec'y of HHS, No.01-679V, 2007 WL1032378, at *9, fn. 7 (Fed. Cl. Spec. Mstr. Mar. 21, 2007) (noting that while a \$350 hourly award for a New York City-based attorney with significant experience in the Program was reasonable, the special master deferred ruling on whether an increased rate would have been reasonable, noting, however, that the premiums often charged by large firms are based on their size, prestige, and number of attorneys employed, **a premium not typically charged by smaller firms and solo practitioners, such as petitioner's attorney**).

Notable differences exist between litigation under the Program and complex

pharmaceutical litigation, including lack of discovery by right in Vaccine Act cases, as well as the inapplicability of the Federal Rules of Evidence in Vaccine Act cases. 42 U.S.C. § 300aa-12(d)(1)(B), (E). The Vaccine Act provides an alternative to traditional litigation for those claiming vaccine injury or death. See 42 U.S.C. § 300aa-10(a). Through the Vaccine Injury Table, the Act drastically reduces the burden of causation that faces attorneys in civil actions in state or federal court. Accordingly, cases brought under the Act are far less complex than the complex pharmaceutical and mass tort litigation practiced by Mr. Pinedo. While the affidavits submitted by Mr. Pinedo and his colleagues may establish an appropriate rate in traditional tort forums, they do not address the concerns unique to cases brought under the Act.

The undersigned acknowledges Mr. Pinedo's role as petitioners' counsel of record during the initial pendency of their petition in the instant proceeding. Taking into consideration Mr. Pinedo's February 9, 2006 admission to practice before the U.S. Court of Federal Claims, Mr. Pinedo's invoice entry dated February 17, 2006, noting his preparation of the instant petition for filing petitioners' petition, and the April 10, 2006 filing date of the instant petition, the undersigned will award petitioners for the work Mr. Pinedo performed from petitioners' dismissal of the Merck suit on March 20, 2006 until he transferred petitioners' case to Mr. Gage on May 17, 2006.

However, Mr. Pinedo will not be awarded Washington, D.C. rates under Avera, because evidence indicates that he never left Texas during the short period he represented petitioners on their petition and it seems probable that Corpus Christi rates are significantly less than Washington, D.C. rates. Mr. Pinedo was in Corpus Christi, not Houston, when he represented petitioners. Under Avera's Davis exception, Mr. Pinedo's geographic location will not support an award based on the \$500 hourly rate claimed. According to the line item request for compensation in petitioners' Application for Attorney's Fees and Reimbursement of Costs, Mr. Pinedo was still a member of the Watts Law Firm, in Corpus Christi, Texas, as late as April 30, 2006. Petr's Fee App. at Tab F. The last date invoiced for which petitioners' are seeking compensation for Mr. Pinedo occurred on May 9, 2006. Petr's Rep. at Tab C, at p. 32. Mr. Pinedo states that after Mr. Gage took over the file, he left the Watts Law Firm to join a new law firm. Id. at 3. Mr. Gage filed a notice of appearance substituting for Mr. Pinedo on June 19, 2006.

The undersigned does not have evidence for Corpus Christi, TX rates upon which to base petitioners' award for the fees incurred by Mr. Pinedo. However, relying on her prior experience and the documentation submitted by petitioners, the undersigned suggests compensating petitioners for the work performed by Mr. Pinedo at an hourly rate of **\$250.00**. The undersigned intends to award petitioners a total sum of **\$8,525.00** for the fees incurred by Mr. Pinedo while prosecuting their case (34.1 hours at \$250.00 per hour).

Petitioners have until **Tuesday, November 25, 2008** to respond to the undersigned's discussion of this issue with supporting case law, if any. If there is no supporting case law, petitioners shall explain why the undersigned should rule in opposition to the case law and the terms of the Vaccine Act, section 300aa-15(e)(1)(A).

B. Mr. Gage's hourly rate

Petitioners' current counsel, Mr. Gage, has requested compensation at a \$295.00 hourly

rate for work performed during 2006; \$310.00 hourly for work performed during 2007, and \$325.00 hourly for work performed after January 1, 2008. Petr's Fee App. Tab E at 2. While recognizing Mr. Gage's experience in the Program, respondent nonetheless objects to the reasonableness of these hourly rates. Resp't Resp. at 9. Alternatively, respondent asserts that the affidavits that Mr. Gage has provided are insufficient to support the rates requested because: (1) one affiant is personally unfamiliar with the Program; (2) one affiant has not practiced in the Program or the U.S. Court of Federal Claims; and (3) the third affiant's geographic location does not qualify him to comment on the rates claimed by Mr. Gage in Cheyenne, WY. Resp't Resp. at 10, 12.

According to the Federal Circuit in Avera, the first principle for awarding attorney's fees under the Vaccine Program is to use the forum rate, i.e., the District of Columbia:

Here, the forum for cases brought pursuant to the Vaccine Act is the District of Columbia, where the Court of Federal Claims, which has exclusive jurisdiction over cases arising under the Vaccine Act, is located. See 42 U.S.C. § 300aa-12(a).

515 F.3d 1348. The Federal Circuit recognized an exception to this general rule in Davis "in Vaccine Act cases in which the bulk of the work is done outside of the District of Columbia in a legal market where the prevailing attorneys' rates are substantially lower." 515 F.3d at 1349. The Federal Circuit applied the Davis exception to Robert Moxley, Mr. Gage's former partner, in Avera because Mr. Moxley performed the bulk of his work outside of D.C. (in fact, he performed all of his work outside of D.C.) because no hearing was held, and it is also clear that the D.C. market rate is significantly higher than that of Cheyenne, WY. Note that the Federal Circuit analyzed both factors (where the attorney did the bulk of his work and how the D.C. rate compared with the attorney's geographic rate) by use of the conjunctive "and" and not the disjunctive "or." Both factors are required in deciding which market to use to determine the attorney's hourly rate.

In the instant action, the same conclusion about a significant disparity between D.C. and Cheyenne rates applies since Mr. Gage works in Cheyenne. One of the two Davis factors applies in the instant action. Since the undersigned has to analyze both factors--a comparison of the rates and where the attorney did the bulk of his work--the crucial question is where did Mr. Gage do the bulk of his work? The Federal Circuit in Avera did not define what "the bulk of the work" means. If "the bulk of the work" means comparing the hours an attorney spent in D.C. at hearing with the hours he spent in his normal geographic location, then the Federal Circuit's holding in Avera that the general rule is to apply the D.C. (forum) rate makes no sense. Vaccine cases usually last years. A trial usually lasts a day or two. No attorney who practices outside D.C. would ever qualify for the D.C. forum rate because he or she would never have done the bulk of his work in D.C. using that definition. The only sensible interpretation of "the bulk of his work" is a comparison of the importance of the work that the attorney has done in whichever location he has done it. Thus, it makes sense to say that the importance of Mr. Gage's work in participating in a hearing, doing direct examination of his two witnesses (one of whom was an expert witness), and cross-examining respondent's expert witness, far outweighs the importance of the work he performed in Cheyenne. Using that definition of "the bulk of his work," the undersigned

considers Mr. Gage to have performed the bulk of his work in D.C. Therefore, the Davis exception to the general rule about using the D.C. forum rate does not apply in the instant action because, although one prong of the exception (the disparity between D.C. and Cheyenne rates) applies, the second prong (where the bulk of the work was performed) does not. Mr. Gage will receive D.C. rates under the Federal Circuit's holding in Avera. The rates he has requested seem reasonable in that light. The undersigned intends to award petitioners compensation for Mr. Gage at a **\$295.00** hourly rate for work performed in 2006; a **\$310.00** hourly rate for work performed in 2007; and a **\$325.00** hourly rate for work performed in 2008, totaling a sum of **\$50,026.00** in compensation for the fees incurred by Mr. Gage in petitioners' case.³

If respondent would like to file a contrary interpretation of the above discussion of Avera, respondent shall do so by **Tuesday, November 25, 2008**.

It appears that the major issues dividing the parties are the compensation for fees incurred by petitioners' former counsel, Mr. T. Christopher Pinedo, for petitioners' civil action against the Merck Pharmaceutical Company, the guardianship cost requested, and the hourly rates claimed by petitioners' attorneys, Mr. Gage and Mr. Pinedo. The undersigned encourages the parties to settle attorneys' fees and costs in this case. If they do not settle, petitioners and respondent shall file their responses to this Order by **Tuesday, November 25, 2008**.

³Included in the sum are the additional fees incurred by Mr. Gage's work in responding to respondent's objections (**\$47,361.00 originally requested plus \$2,665.00 incurred in response**). Respondent maintains that petitioners' counsel should not be compensated for the time spent responding to respondent's initial response to petitioners' Application for Attorney's Fees and Reimbursement of Costs because, as respondent asserts, petitioners' counsel "should not receive additional compensation for corrections made to his prior bill." Respt's Sur-Rep. at 3. Petitioners' Reply to respondent's response, however, involved more than simply corrections, as respondent asserts. It includes the itemized billing statement from Dr. Harrell, which respondent requested, further affidavits, billing statements, and a lengthy written response to respondent's objections. The undersigned views such fees as having been incurred under the petition and sees no reason why they should not be included in an award for reasonably compensable expenses under the petition proceedings. Additionally, respondent's objections to the accuracy of Mr. Gage's billing statements are clarified by the updated method of calculation evidenced in Tab E of petitioners' Response to Respondent's Objections. Although petitioners' original Application for Attorneys' Fees and Reimbursement of Costs lists the fees incurred based upon a minute-by-minute log of time spent, rather than on the 1/10th of an hour scale, petitioners' counsel's billing methods have calculated the rate totals by recalculating the time spent based on a 1/10th of an hour scale. While this method appears unclear initially, it is an accurate and acceptable method of tabulating attorneys' fees and widely used and accepted in this Program. Petitioners' counsel has clarified the methods when submitting his invoice for work done in response, which the parties may reference at Tab E of petitioners' Response to Respondent's Objections.

IT IS SO ORDERED.

Date: October 23, 2008

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