IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS
No. 00-749V
Filed: June 24, 2009

CATHERINE A. GRUBER, a minor, by her parents and natural guardian, GUSTAVO and TERESA GRUBER, Petitioners, v. SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent.	*	Fees; Allowable Costs; Block Billing; Guardianship Costs; Hepatitis B; Duplicate Billing; Ghostwriting Expert Reports; Travel Time; Documentation of Costs

DECISION AWARDING ATTORNEY FEES AND COSTS[1]

Vowell, Special Master:

On December 11, 2000, Teresa and Gustavo Gruber ["petitioners"] timely filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, *et seq*.[2] [the "Vaccine Act" or "Program"], on behalf of their minor daughter, Catherine Gruber ["Catherine"], alleging that the hepatitis B vaccine caused her juvenile dermatomyositis. The case was settled without need for an evidentiary hearing and on December 3, 2008, I issued a decision awarding compensation. Petitioners accepted the judgment on December 15, 2008.

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[1] Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims's website, in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). Petitioners are reminded that, pursuant to 42 U.S.C. §300aa-12(d)(4) and Vaccine Rule 18, they have 14 days to request redaction of material in this decision that "would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b)(2). If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

[2] Part 2, National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa.

On December 19, 2008, petitioners filed an application for attorney fees and costs, followed on April 2, 2009, by a supplemental application. Respondent raised a number of objections, including: (1) the number of hours billed by each of the attorneys who represented petitioner; (2) the nature of the work performed and billed at attorney rates, because some tasks were paralegal in nature; (3) hours claimed to be "excessive, redundant or unexplained"; (4) costs that included unreimbursable administrative overhead, were insufficiently explained, or were excessive; (5) some expert costs characterized as unreasonable; and (6) the costs of establishing a guardianship to administer the damage award for Catherine's benefit. *See* Respondent's Response to Motion for Attorney Fees ["Response"], filed on February 2, 2009.

Petitioner requested a total of **$93,137.77**. The requested amount represents **$2,977.69** for litigation costs incurred by petitioner, **$23,096.45** for litigation costs incurred by counsel, Anne C. Toale, **$54,227.00** for attorney fees for Ms. Toale, **$8,567.13** for attorney fees and costs for petitioner's previous counsel, Clifford J. Shoemaker (representing **$8,276.17** in attorney fees and **$290.96** in litigation costs), and **$42,69.50** in probate attorney fees and costs (representing **$3042.50** in probate attorney fees paid for by Ms. Toale's law firm, Maglio, Christopher, and Toale ["MCT"], and **$1,227.00** in probate costs paid by petitioner).

On February 10, 2009, petitioners filed a reply to respondent's objections to their application for attorney fees and costs. In the reply, petitioners amended the requested amounts for petitioners' counsel to **$59,567.50** in attorney fees (representing **$5,340.50** in additional fees incurred after the original fees and costs application), **$20,348.95** in costs for the MCT law firm (representing a downward adjustment of **$2,747.50**), and a reduction of **$120.00** from the costs claimed by Shoemaker & Associates bringing that amount to **$8,447.13**. This brings the attorney fee request to **$79,916.45**[3] and petitioners' total request to **$95,610.77**.

After reviewing the file, I find that the petition was brought in good faith and that there existed a reasonable basis for the claim. Therefore, an award for fees and costs is appropriate, pursuant to 42 U.S.C. § 300aa-15(b) and (e)(1). However, many of respondent's objections are valid and, therefore, the requested amounts in fees and costs are reduced in the amounts and for the reasons detailed below.

[3] However, in Petitioners' General Order 9 statement, filed on May 15, 2009, petitioners referenced the original amounts for MCT's attorney fees and costs ($23,096.45 in costs and $54,227.00 in fees) as the amounts for which they were applying. The fees and costs requested in the February 10, 2009 filing are used as the basis for computing the award in this case.

I. Standards to Be Applied.

The Vaccine Act permits a special master to award compensation to cover reasonable attorney fees and costs if the special master determines that the petition was brought in good faith and that there was a reasonable basis for the claim. § 300aa–15(e)(1). When a petitioner is successful and receives compensation, the Vaccine Act requires an award of compensation to cover "reasonable" attorneys' fees and other costs. §§ 300aa-15(e)(1)(A) and (B).

This court applies the lodestar method to any request for attorney's fees and costs. *See Blanchard v. Bergerson*, 489 U.S. 87, 94 (1989). "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate" (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984)). *See also Avera v. Sec'y, HHS*, 515 F.3d 1343, 1347-48 (Fed. Cir. 2008) ["*Avera II"*] and *Saxton v. Sec'y, HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993). The standards set forth in *Hensley v. Eckerhart*, 461 U.S. 424, 429-37 (1983) for calculating attorney fees "are generally applicable in all cases in which Congress has authorized an award of fees." *Hensley*, 461 U.S. at 433, n. 7.

The reasonable hourly rate is "the prevailing market rate," which is defined as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896, n.11. The "prevailing market rate" is determined using the "forum rule." *Avera II*, 515 F.3d at 1349 ("to determine an award of attorneys' fees, a court in general should use the forum rate in the lodestar calculation"). Prior to the Federal Circuit's decision in *Avera II*, the Court of Federal Claims applied the "geographic rule" to determine the appropriate rate of compensation. The geographic rule is based on the community in which the attorney performs the services, rather than the prevailing market rate in the forum community. *See Avera v. Sec'y, HHS*, 75 Fed. Cl. 400, 405-06 (2007) ["*Avera I*"].

In determining the number of hours reasonably expended, a court must exclude hours that are "excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission." *Hensley v. Eckerhart*, 461 U.S. at 434 (1983). Ordinarily, an attorney should not bill for attorney time for tasks that a paralegal should perform, nor should he bill for paralegal time when the tasks involved are of a secretarial nature. *See, e.g., Plott v. Sec'y, HHS,* No. 92-0633V, 1997 U.S. Claims LEXIS 313, at *4 (Fed. Cl. Spec. Mstr. Apr. 23, 1997).

Special masters may rely on their experience with the Vaccine Act in order to determine if the hours expended are reasonable. *Wasson v. Sec'y, HHS*, 24 Cl. Ct. 482, 486 (1991), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993). Under the Guidelines for Practice under the National Childhood Vaccine Injury Compensation Program ["Guidelines for Practice"], petitioners' counsel are instructed to maintain contemporaneous time

records[4] that indicate the date and character of the service performed, the number of hours, or fractions of hours expended, and the identity of the person performing them. *See* Guidelines for Practice, Section XIV.A.3 (emphasis added). These guidelines encourage separate, rather than "lumped," entries in order to better assess the reasonableness of a fee request. Both of petitioners' attorneys are experienced Vaccine Act attorneys and are expected to understand and comply with the Guidelines for Practice.

As this case was settled and compensation was awarded to petitioners, reasonable attorney fees and costs are appropriate and shall be awarded. However, the special master has the statutory responsibility to determine what is reasonable. While a line by line analysis is not necessary, given the nature of the tasks claimed in the requested attorney fee application, and the objections lodged by respondent, a more detailed review of the fees claimed is necessary.

II. Procedural Background.

Petitioners' case was originally assigned to Chief Special Master Gary Golkiewicz. On December 18, 2000, the case was consolidated with the other hepatitis B cases handled by Mr. Shoemaker, who was then representing petitioners. *See* Order, dated December 18, 2000. The case was reassigned on April 5, 2001, to Special Master Richard Abell. From that date until reassigned to me on February 8, 2006, the limited activity in the case included only a generic motion for subpoena authority filed in most of Mr. Shoemaker's hepatitis B cases, an order staying the case pending resolution of common issues in the hepatitis B cases, and petitioners' July 19, 2002 status report, requesting inclusion in the hepatitis B omnibus proceeding.

After the case was reassigned to me, I held an in-person, recorded status conference and ordered petitioners to file Catherine's medical records. *See* Orders, dated February 24 and April 4, 2006. At the March 27, 2006 status conference, Mr. Shoemaker indicated his intent to transfer this case to another attorney because his caseload precluded his effective representation of his many hepatitis B cases. On April 27, 2006, petitioners filed Exhibits 1 and 2, containing a total of 87 pages of medical records. Shortly thereafter, on May 31, 2006, Ms. Toale was substituted as petitioners' attorney of record, and she continued as petitioners' counsel throughout the remainder

[4] *See Ceballos v. Sec'y HHS*, 99-097V, 2004 U.S. Claims LEXIS 77, at *36-43 (Fed. Cl. Spec. Mstr. March 25, 2004) (where the attorney did not keep specific time records and, instead, estimated the hours expended, the court reduced the hours awarded to the hours reasonably expended in other Program cases.). *See also Naporano Iron & Metal Co.*, 825 F.2d 403, 404 (Fed. Cir. 1987) (commenting on an Equal Access to Justice Act fee request, the court stated: "The court needs contemporaneous records of exact time spent on the case, by whom, their status and usual billing rates, as well as a breakdown of expenses such as the amounts spent copying documents, telephone bills, mail costs and any other expenditures related to the case. In the absence of such an itemized statement, the court is unable to determine whether the hours, fees and expenses, are reasonable for any individual item.").

of the case.

With the substitution of counsel, efforts to resolve the issue of causation began in earnest. Numerous medical records were filed on September 8, 2006. Petitioners filed medical expert reports and medical literature from Drs. Yehuda Shoenfeld and Andrew White, and respondent filed a report and medical literature from Dr. Carlos Rosé. After mediation, the parties filed a joint status report reflecting a tentative settlement. A joint stipulation followed, and on December 3, 2008, I issued a decision awarding compensation. Judgment was entered on December 12, 2008.

With the filing of the two applications for attorney fees and costs, and respondent's objections thereto, the issue of compensation for attorney fees and costs is now ripe for consideration.

III. Issues Regarding the Requested Attorney Fees and Costs.

A. Attorney fees.

Respondent did not challenge the hourly rate requested by either Mr. Shoemaker or Ms. Toale. Having examined the hourly rates requested, I am satisfied that the rates are reasonable and appropriate and do not contravene the Federal Circuit's requirement, set forth in *Avera II*, that the forum rate is the applicable rate of compensation, except when the *Davis* exception to this rule applies. *Davis v. U.S. Env. Prot. Agency*, 169 F.3d 755, 759 (D.C. Cir. 1999) (District of Columbia forum rates justified for all lawyers "except those few who practice in far less expensive legal markets and perform the bulk of their work on the case at home in those markets."). In this case, the bulk of the work was performed outside the District of Columbia. The requested hourly rates are either the subject of an agreement negotiated before *Avera II* (Mr. Shoemaker's) or are rates that are in accord with the *Davis* exception (Ms. Toale's).

Respondent did challenge some of the hours billed. In addition to those matters raised by respondent, other areas of concern emerged during my review of the time sheets submitted.

1. Hours billed by Shoemaker and Associates law firm.

In total, petitioners' previous law firm, Shoemaker and Associates, billed 33.2 hours for professional services, totaling $8,276.17. Mr. Shoemaker billed 27.9 hours at his rate of $250.00 for work performed before 2005, and $300.00 for work performed from 2006 forward. Also included was a billing of $290.96 in costs associated with the litigation of this case.

As respondent noted, these bills involved efforts in "advancing a case through

the embryonic stages of litigation." Response at 13. During the majority of the time billed, this case was stayed. Respondent argued that such a large fee request "for such a limited advancement of a case is *ex facie* excessive and unreasonable." *Id.* Although I agree with respondent that the total hours are excessive and unreasonable for the work performed, it is certainly appropriate for Mr. Shoemaker to receive compensation for his firm's work in developing the skeletal file upon which Ms. Toale built the case for compensation.

The experience Mr. Shoemaker has with Vaccine Act litigation permits him to command a higher hourly rate, with the expectation that he will more efficiently perform the tasks required in such cases.[5] Therefore, the skeletal nature of the case file at the time I was assigned to the case, the small number of medical records filed before the case was transferred, and the extremely limited and entirely standardized nature of the filings made during the time frame that Mr. Shoemaker was attorney of record do not support Mr. Shoemaker's bill for 33.2 hours of work.

The time sheets submitted with the attorney fees request reflected a great deal of client contact. The majority of the time billed to client contact appears, in general, to be reasonable, in spite of respondent's objections.[6] A line-by-line analysis is not required of the special master to determine whether the total number of hours billed is unreasonable.[7] However, the following, non-exhaustive, list of specific issues serves to illustrate the problems noted in Mr. Shoemaker's fees application.

On December 8, 2000, Mr. Shoemaker billed 0.8 hours for preparing the petition for filing. A review of the petition reflects that it is a form document, identical in most respects to other petitions filed by this firm, with only the caption and three of its ten

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[5] *See Plott,* 1997 U.S. Claims LEXIS 313, at *4 ("Because of the Vaccine Act's fairly straightforward nature, hourly rates under § 15(e) of the Act are often lower than rates charged by attorneys in other areas of civil litigation.... Higher hourly rates are only granted because some attorneys' experience serves to minimize the number of hours expended in Vaccine Act cases.").

[6] Mr. Shoemaker's time sheets in this case reflect a number of entries involving both client contact and other types of activity. This form of non-specific billing impairs the special master's ability to determine the reasonableness of the hours claimed. The court reminds him that dissimilar activities should not be lumped together. *See* GUIDELINES FOR PRACTICE UNDER THE NATIONAL INJURY COMPENSATION PROGRAM § XIV.A.3, at 19 (Office of Special masters, United States Court of Federal Claims, November 2004) ("Each task should have its own line entry indicating the amount of time spent on that task. Several tasks lumped together with one time entry frustrates the court's ability to assess the reasonableness of the request."). *See also Broekelschen v. Sec'y, HHS*, 07-137V, 2008 WL 5456319, at *4 (Fed. Cl. Spec. Mstr. Dec. 17, 2008) ("'block billing' is not preferred."). **Future fees applications that combine dissimilar tasks risk the disapproval of the entire entry**. This is the last such warning I intend to give Mr. Shoemaker concerning "lumped" entries.

[7] *See Kantor v. Sec'y, HHS*, 01-679V, 2007 U.S. Claims LEXIS 100, at *5 (Fed. Cl. Spec. Mstr. Mar. 21, 2007) ("special masters need not engage in a line-by-line analysis of an application but may utilize their experience with litigation before this body and the attorneys involved.").

short paragraphs slightly edited to be specific to this case. It does not contain a fact-specific description of the injury claimed. Although the billing records reflect that Mr. Shoemaker and the petitioners had been in contact for five months prior to filing the petition (for which nearly 10 hours of work on the case was billed), the petition was filed without an affidavit from petitioners or any medical records because "the statute of limitations is running on this matter." Petition, ¶ 10.

On April 9, August 6, and August 17, 2001, the time sheets reflect the same entry: "Review pleading; corr to client," with a total of 0.80 hours claimed. A comparison of the time sheets to the docket sheets and the pleadings to which these entries refer reveals that the "pleadings" are an order assigning over 80 of Mr. Shoemaker's cases to the same special master; a generic request for subpoena authority filed by Mr. Shoemaker in many of these same cases; and an equally generic order granting subpoena authority. Between a status report on July 19, **2002**, and the reassignment of the case to me on February 8, **2006**, there were no filings at all. Nevertheless, an entry on January 13, **2004**, reflects a review of the pleadings and a discussion with a law clerk. Given that the documents filed at that point in time consisted of the petition and these generic pleadings, billing 0.5 hours for their review and discussion with anyone is not reasonable.

An entry on June 22, 2004, reflects a billing entry for 0.40 hours to review a notice of appearance by a Department of Justice ["DoJ"] attorney, review of the status of the file, and a telephone call to the client. There are two problems with this entry. First, it is an example of lumped billing of dissimilar activities. Second, and somewhat more disconcerting, is that the docket does not reflect that this particular DoJ attorney ever entered an appearance in this case. Thus, I have no confidence that this bill pertains to this case.

An entry on June 1, 2006, concerned review of a motion to substitute petitioners' new attorney, filed on May 30, 2006, and granted on May 31, 2006. This entry appears reasonable, in that Mr. Shoemaker may have wanted to ensure he was released as counsel of record. However, it is followed by a bill on June 5, 2006, to review the Pacer docket and to make sure that the new firm entered an appearance–the very matter reviewed four days earlier. As soon as the substitution for attorney was granted on May 31, 2006, Mr. Shoemaker ceased to be the attorney for petitioners. While it is understandable that he would review the order granting the substitution and possibly be consulted by petitioners' new counsel for lingering questions, the bill reflects a duplication of the effort made on June 1, 2006. Ms. Toale's billing records do not reflect receipt of a June 5, 2006 email from Mr. Shoemaker.

Other attorney and staff entries also reflected similar problems. On July 17, 2002, another of the firm's attorneys billed 0.4 hours for preparing a generic status report, similarly filed in most, if not all, of this firm's other hepatitis B cases, indicating petitioners' election to participate in the hepatitis B omnibus proceeding . While some period of time would have been necessary to change the caption of this filing, the body

of the status report remained generic, making billing for 0.4 hours excessive, particularly in view of payment for preparing it in several other cases. On June 12, 2001, a third attorney billed 0.4 hours for review of the skeletal file, a task which could scarcely have taken ten minutes. A paralegal made an entry on February 6, 2004, concerning a review of files and account folders for bills for medical records. On its face, the entry appears reasonable, but this identical entry was made in numerous other hepatitis B cases filed by this firm, and has been disallowed by special masters as it does not appear to reflect an allocation of work on a particular case. *See Hamrick v. Sec'y, HHS*, No. 99-683V, 2007 U.S. Claims LEXIS 415, at *22-23 (Fed. Cl. Spec. Mstr. Nov. 19, 2007) (reducing the number of hours awarded from .8 to .25 of the identical February 6, 2004 billing entry); *See also Duncan v. Sec'y, HHS*, 83 Fed. Cl. 476 (Fed. Cl. Spec. Mstr. May 30, 2008) (denying compensation for duplicate billing in hepatitis B cases where petitioners' attorney already received compensation for the billed entry). A similar generic entry was made on October 11, 2005, one repeated in many other hepatitis B cases filed by this firm.[8]

Based on the hours and the hourly rates claimed, the preliminary and cursory development of petitioners' case file prior to Ms. Toale assuming representation and applying my experience in reviewing fees and costs applications by this firm and others, the requested fees of $8,276.17 are unreasonable. Given the standardized nature of the filings, the long suspension of activity due to the case being stayed pending discussions of the hepatitis B cases in general, and the efficiency expected from an attorney billing at such a high rate in the program, an award of $6,500.00 for fees is reasonable.

The costs of $290.96 are also reasonable. According to the General Order 9 statement filed by petitioners on May 15, 2009, however, the filing fee of $120.00 was a cost borne by petitioners personally. As acknowledged in Pet. Reply, this fee was erroneously included by Shoemaker & Associates in their original submission to petitioners' counsel. *See* Pet. Reply at 11. This filing fee portion of the costs will be awarded directly to petitioners and the remainder of $170.96 will be awarded jointly.

Therefore, I award a total of $6,670.96 to the firm previously representing petitioners, Shoemaker & Associates.

2. Hours billed by the MCT law firm.

Ms. Anne Toale, petitioners' second attorney, billed $54,227.00, for her firm's work in developing and ultimately settling this case. The attorney and paralegal time sheets are extensive and detailed. Unlike Mr. Shoemaker's billing records, they do not

[8] Each of the firms that worked on the hepatitis B omnibus proceeding submitted attorney fees and costs applications for this general effort. The application for "Hep B Panel" costs for this firm was recently decided by Chief Special Master Golkiewicz in *Riggins v. Sec'y, HHS*, No. 99-382V, 2009 WL ___, authorizing substantial fees for Mr. Shoemaker for work in common on the hepatitis B cases.

lump unrelated tasks. With regard to the time billed by Ms. Toale's firm, I have no difficulty in concluding that the hours billed were actually expended on this case. Whether all of the hours billed were reasonably expended is another issue.

Respondent interposed several specific objections to the bill submitted by MCT, including: (1) paralegal work billed at an attorney's rate; (2) time spent by both an attorney and a paralegal in reviewing routine filings; (3) billing travel time at the full, hourly attorney rate; and (4) some of the fees associated with attorney and paralegal research, obtaining documents, and drafting and finalizing an expert report. Several of these objections are well-taken; others are not.

a. Paralegal Work.

Respondent objected to an attorney updating case records, preparing a medical chronology, and attempting to locate an expert witness. The hours expended in updating case records and reviewing the filing of medical records are de minimus, and no deduction will be made. Billing an hour of attorney time to prepare a medical chronology is not appropriate; such tasks are commonly performed by paralegal staff or nurse consultants at much lower rates than that of Ms. Toale. Although petitioners implied that the paralegals employed by Ms. Toale's firm were unable to prepare a chronology, their inability to do so does not warrant paying an attorney at attorney rates to perform a paralegal's task. This hour of attorney time is replaced by two hours of paralegal time, billed at a rate of $75.00 per hour, for the same task.[9]

Finally, although it is appropriate for an attorney to play a role in the location and selection of expert witnesses, the description of the work performed does not reflect what was being done to locate the witness. It is certainly within the ambit of a paralegal specialist's capabilities to locate potential expert witnesses, whether through a literature search, an examination of the authors of relevant publications, or through contact with agencies that specialize in such tasks. On the other hand, the personal contact of an attorney with the potential expert is often necessary in order to persuade the physician or other expert to review the case. I will authorize two hours at the attorney rate and two hours at the paralegal rate for the tasks associated with locating a new expert witness.

Respondent suggested that this work be compensated at the 2007 paralegal billing rate of $75.00 an hour instead of the attorney billing rate of $250.00. This would result in a $910.00 deduction from the $1,300.00 billed amount, making the compensation for these hours $390.00. However, I have decided to award petitioners' counsel the hours noted above, and utilized the attorney billing rate of $250.00 and

[9] *See Barnes v. Sec'y HHS*, 90-1101V, 1999 U.S. Claims LEXIS 241, at *18-19 (Fed. Cl. Spec. Mstr. Sep. 17, 1999) (reducing attorney's fee rates to paralegal fee rates for hours where the work would reasonably be expected to be done by a paralegal).

paralegal billing rate of $75.00 to reach an award of **$850.00** for these tasks.

b. Time Spent Reviewing Electronic Notices and Orders.

Respondent's objections to the time spent by an attorney reviewing electronic notices, docketing entries, and orders are denied. The hours claimed are not excessive. Unless the items reviewed are common to a number of cases (*see, e.g.*, *Savin v. Sec'y, HHS*, No. 99-537V, 2008 WL 2066611 (Fed. Cl. Spec. Mstr. Apr. 22, 2008), *aff'd*, 85 Fed. Cl. 313 (Fed. Cl. 2008), *Lamar v. Sec'y, HHS*, No. 99-583V, 2008 U.S. Claims LEXIS 384 (Fed. Cl. Spec. Mstr. Jul. 30, 2008), *Lamar v. Sec'y HHS*, No 99-584V, 2008 WL 3845157 (Fed. Cl. Spec. Mstr. Jul. 30, 2008), and *Carrington v. Sec'y, HHS*, No. 99-495V, 2009 U.S. Claims LEXIS 131 (Fed. Cl. Spec. Mstr. Jun. 18, 2008), *aff'd*, 85 Fed. Cl. 319 (Fed. Cl. 2008)), such that an attorney is billing the Program repeatedly for reading the identical order, I will continue to grant fees in order to ensure that orders are read.

c. Travel Time Billed at a Full, Hourly Rate.

The standard practice in the Vaccine Program is that attorney travel time is billed at half the hourly rate, reflecting that even if an attorney is performing case-related work, the vicissitudes of travel are such that no attorney is operating at peak efficiency on an airplane or a train, much less while traveling to or from an airport, undergoing security screening, or boarding or exiting an aircraft. *See Carter v. Sec'y,* HHS, No. 04-1500V, 2007 U.S. Claims LEXIS 249, at *18-22 (Fed. Cl. Spec. Mstr. Jul. 13, 2007); *see also Scoutto v. Sec'y, HHS*, No. 90-3576V, 1997 U.S. Claims LEXIS 195, at *17-18 (Fed. Cl. Spec. Mstr. Sep. 5, 1997); *but see Kuttner v. Sec'y, HHS*, No. 06-195V, 2009 WL 256447 (Fed. Cl. Spec. Mstr. Jan. 16, 2009) ("[W]hether travel should be billed at ½ time or full time depends on whether counsel is working while traveling, the fact of traveling by itself is not determinative....Thus, if counsel can establish how much of the travel time is devoted to working, those hours will be compensated fully."). In this case, Ms. Toale did not assert that the 14 hours of travel time billed were *actually spent* performing work on petitioners' case, merely that it was *her practice to do so* to prepare for the upcoming event. She did not mention, even in terms of her general practice, any work on the case performed during the return travel time.[10] As there is no evidence that case-related tasks were performed during this particular travel, the travel hours will be reimbursed at one-half the attorney billing rate. When case-related work is performed during travel, the time sheets should reflect the work performed and the hours spent performing it, with the remainder of the travel hours billed at one-half the standard hourly rate.

[10] I note that, in addition to 8.5 hours of return travel time billed on July 25, 2008, counsel also billed for 5.5 hours of case-related work on that same date.

Although not raised by respondent, I note another instance of billing for four hours of travel at the full hourly rate ($275.00) in entries made on April 7, 2008. Ms. Toale's bill does not reflect the performance of any case-related tasks during this travel and does not reflect whether the travel was of such a nature that case-related tasks could be performed. These four hours will be reimbursed at one-half the hourly attorney billing rate then in effect.

Ms. Toale billed for a total of $4,950.00, representing 18 hours of travel time at her full attorney rate of $275.00. I will compensate her **$2,475.00** for the full 18 hours, but at the reduced rate of $137.50.

d. Time Spent on Dr. White's Report.

In addition to the 10 hours of work by Dr. White on his opinion, petitioners' counsel billed for 46.3 hours of Ms. Toale's efforts and 14.1 hours of the paralegal's efforts to research, draft, and edit substantial portions of his opinion.[11] Respondent challenged the nature of the work performed, as well as the hours expended, noting that the MCT firm's hours related to preparing Dr. White's report exceeded the total of the time expended by all three of the experts in this case. Response at 13, n.12. Petitioner affirmed that "her significant involvement in researching and preparing a draft of Dr. White's report" was "wholly appropriate under the facts of this case." Reply at 6.

Both Ms. Toale's hourly rate and that of her paralegal are less than the rate billed by Dr. White. Paying an attorney or a paralegal lower rates to search for medical literature might be a more cost-effective way of providing such literature to the court than paying a doctor a higher fee to do so.

However, this case illustrates the principle that those commanding higher fees earn those fees, at least in part, by their efficiency in performing the tasks assigned. It is patently unreasonable to bill over 60 hours of attorney and paralegal time to perform many tasks for a medical expert who should be able to perform them in substantially less time. This holds true regardless of the difference between the higher expert rate and the lower attorney rate. The sheer extent and nature of the medical research and analysis performed by an attorney and her support staff also raises considerable doubts about the medical expert for whom these tasks were performed. Expert witnesses command high fees because of their expertise. An expert who lacks that expertise cannot reasonably bill at a high rate for the period of time necessary to acquire it, any

[11] According to the chart in the Response filed by respondent, the total value of the billing entries claimed was actually $12,670.00, not the $11,425.00 cited in the response. *Id.* at 12. Additionally, the court notes that a review of the MCT billing records shows several other entries related to Dr. White's report (*see, e.g.*, billing entries on 8/29/2007, for reviewing email from potential expert, and 12/4/2007, for a teleconference with Infotrieve.com), but not included in respondent's chart. For the purposes of this decision, the court will focus only on the charted entries submitted by respondent and use the corrected value of $12,670.00, for a total of 60.4 hours, when evaluating compensation.

more than an attorney may ethically bill a client for the costs of developing expertise in a particular area of law. *See* ABA Model Code of Professional Responsibility, Canon 6-3, http://www.abanet.org/cpr/mrpc/mcpr.pdf, (last visited on June 18, 2009).

Ms. Toale will be compensated one hour, at the 2007 attorney rate of $250.00, for the time spent contacting and corresponding with Dr. White. Her paralegal will be compensated for paralegal tasks, including contacting various medical literature search agencies. Ms. Toale will not be compensated for her efforts in preparing Dr. White's expert report. Because a Vaccine Act attorney is expected to be conversant with the literature upon which an expert relies, compensation for some of the time Ms. Toale spent reviewing medical literature is appropriate. However, the total number of hours claimed indicates that Ms. Toale's efforts went far beyond that of reviewing the medical literature upon which an expert relied. It is clear from the billing entries that Ms. Toale was engaged in a search of "massive medical literature" in order to determine the research upon which her expert should rely and actually prepared a draft of the expert report. Fees App. at 6, entry dated November 28, 2007.

Based on the literature actually submitted with Dr. White's report, I authorize four hours, at the 2008 hourly rate of $275.00, to read and review the report, and also award the time spent contacting Dr. White for a total compensation of **$1,250.00**. I reiterate that I am confident Ms. Toale and her paralegal actually performed the tasks indicated for the many hours claimed; the issue is whether it was reasonable for them to do so. I find that, for the bulk of the hours claimed, it was not.[12]

e. Other Billing Entries.

Several entries in Ms. Toale's billing records reflect contact with or letters to other attorneys representing Vaccine Act petitioners. *See, e.g.*, billing entries on March 30, 2007, March 29, 2008, and April 14 and 24, 2008. With two exceptions, these

[12] In view of my resolution of this issue, I do not address respondent's contention that Ms. Toale stretched, if not actually crossed, the ethical boundary involved in the "ghost-writing" of expert reports. It is certainly appropriate for an attorney to review a draft report from an expert and to suggest changes that make the report clearer or more useful to the court in resolving the causation issues presented. Drafting an expert's report does not appear to violate Vaccine Rules, but it gives rise to questions about the reliability of an expert's opinion. In Vaccine Act litigation, opposing counsel do not often challenge authorship of expert reports in cross-examination of experts. I hope that this case represents an aberration, rather than the rule, concerning authorship of expert reports, because an expert's opinion will not be enhanced by cross-examination regarding the efforts of less-qualified medical professionals, much less the attorney representing a party, in researching, drafting, and ghost-writing an expert opinion on causation. Were the Rules of the Court of Federal Claims ["RCFC"] directly applicable to this matter, Ms. Toale's actions may have resulting in Dr. White's violation of them. Rule 26(a)(2)(B) requires that an expert witness' report be prepared and signed by the expert witness. Although Dr. White's report was signed by him, it appears that it was actually drafted by Ms. Toale. However, unless referenced by the Vaccine Rules (Appendix B to the RCFC), the RCFC do not apply in Vaccine Act cases.

entries do not reflect how this contact advanced this particular case. Simply indicating that hours were expended is not sufficient. Billing records must reflect what was done and if the relationship to the case is unclear, a simple entry may clarify that. For example, in addition to the entry regarding a letter to Ms. SCC, another attorney who represents Vaccine Act petitioners, the entry should reflect the reason for the contact. For example, "Letter to Ms. SCC re: locating an expert" would reflect a case-connected reason for such contact. Given the relatively minimal hours billed for with this type of ambiguous entry, I do not deduct hours. However, counsel is on notice that in future billing entries, these hours will not be awarded.

The exception involves contact with Mr. Shoemaker, the attorney formerly representing petitioners. Because Mr. Shoemaker represented petitioners for some time and had a degree of familiarity with their concerns, I am willing to presume that all such contact was case-related. However, the better practice would be to reflect a reason for the contact, something that was done with regard to several entries (*see, e.g.,* entry on April 10, 2008, regarding Dr. Shoenfeld's schedule).

f. Supplemental Fees.

In the reply, filed by petitioners on February 10, 2009, Ms. Toale amended her fees request to include an additional **$5,340.50** in fees generated from December 19, 2008, through February 9, 2009, representing 16.9 hours of attorney time and 7.4 hours of paralegal time.

Included in these additional hours were 13 hours of attorney time dedicated to legal research in support of the reply. Although the hours expended on legal research for the reply might ordinarily be deemed excessive, the issue of the ethics of an attorney "ghost writing" an expert report is unique. Therefore, these hours are awarded in full.

The additional fees include case activity unrelated to respondent's objections and at least one duplicate entry involving review of the electronic notice regarding respondent's request for an enlargement of time. A deduction of $66.50, representing 0.7 paralegal hours, is made for these entries.

A total of **$5,274.00** is awarded for the supplemental fees filed for in Pet. Reply.

B. Costs.

Petitioners' counsel are obligated to monitor costs and submit substantiated applications for attorney fees and costs that are complete when filed. *Savin,* 85 Fed. Cl. at 317, citing *Duncan*, 2008 U.S. Claims LEXIS 351, at *1 ("[T]he request for fees must be complete when submitted.").

1. General costs.

Petitioners requested reimbursement of costs related to travel[13] and the reimbursement of $350.00 paid to Shoemaker & Associates in December, 2000. Because there was no General Order 9 filed with this fee application and signed by both counsel and petitioners, I requested that petitioners file one. Pet. Reply at 11 indicated that the amount represented $120.00 for the filing fee and $230.00 in medical records, both amounts paid by petitioners to Shoemaker & Associates, as the General Order 9 statement, filed on May 15, 2009, reaffirmed.[14]

According to petitioners' General Order 9 statement, the total cost incurred by petitioners was **$2,977.69**. Respondent raised no further objections to these costs. I find that the travel costs and the additional costs incurred by petitioners were reasonable and hereby award them the full amount claimed.

2. Guardianship costs.

Petitioners asserted that they paid $1,227.00 in legal fees to obtain appointment by an Illinois probate court as guardians of Catherine's estate.[15] Additionally, the MCT firm claimed $3,042.50 in legal fees to Malkinson and Halperin, an Illinois law firm, for other expenses associated with petitioners' appointment as guardians. *See* Supp. App. They seek reimbursement of these fees paid personally, as well as those paid by the MCT firm.

Respondent objected to paying compensation "for services and expenses

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[13] The travel expenses claimed appear reasonable and properly reimbursable. However, petitioners' counsel is reminded that all expenses, including those of petitioners themselves, should be supported by receipts. *See* Guidelines for Practice at XIV(A)(4) (stating that expenses should be "explained sufficiently"). Initially, I was unable to determine if these costs were paid by petitioners themselves or by the MCT firm. *See* Fees App., Ex. 1, at 7 (reflecting that MCT took care of the expenses incurred by petitioners). The General Order 9 statement, filed on May 15, 2009, clarified that petitioners actually expended the funds for this travel. The distinction is important because costs personally incurred by petitioners and approved by the court are paid directly to petitioners alone. The other fees and costs awarded are made payable jointly to petitioners and their counsel.

[14] As indicated earlier, petitioners will be reimbursed for the filing fee rather than Shoemaker & Associates.

[15] The original invoice for these fees appears at Fees App., Ex. B at 27. According to this bill, the $1,227.00 represents the court filing fee and a required surety bond. The remainder of the $4,024.00 bill represented $2,800.00 in legal fees involving client contact, drafting documents, and court appearances associated with establishing the guardianship. The fee also included "multiple conferences with vaccine counsel." *Id.* However, petitioners' counsel later filed a supplemental application for the probate fees and costs ["Supp. App."], on April 2, 2009, that increased the amount requested to $4,269.50, reflecting an increase in attorney fees to $3,042.50. For the purposes of the application for attorney fees and costs, I adopt the later-filed amount as what petitioners request in costs.

associated with establishing a guardianship or trusts." Response at 15. Citing to § 300aa-15(e)(1) and *Mol v. Sec'y, HHS*, 50 Fed. Cl. 588, 591 (2001) (and several earlier cases with similar holdings), respondent noted that fees associated with state probate proceedings, including surety bonds, were not considered compensable costs under the Vaccine Act. Response at 15-16. Respondent also objected to the amount requested, correctly noting that the bill from the Illinois law firm did not explain how the firm's cost figures were derived.[16]

What respondent did not mention was that **respondent required** the guardianship as a condition of the settlement in this case. Paragraph 12 of the stipulation of settlement, filed on December 3, 2008, provides in part: "No payments pursuant to this Stipulation shall be made until petitioners provide the Secretary with documentation establishing their appointment as guardians/conservators of Catherine's estate." Respondent required petitioners to establish this guardianship even though they were already Catherine's "legal representatives."[17] *See* §§ 300aa-11(b)(1)(A) and 33(2).

Section 300aa-15(e)(1) permits the award of attorney fees and costs "incurred in any proceeding on such petition," referring to the petition for compensation. Some special masters and judges have interpreted the "any proceeding" language to exclude costs associated with litigation in other fora. *See, e.g., Mol v. Sec'y, HHS*, 50 Fed. Cl. 588, 591 (2001); *Siegfried v. Sec'y, HHS*, 19 Cl. Ct. 323, 325 (1990) (disallowing coverage of the costs of establishing or administering an estate); *Lemon v. Sec'y, HHS*, 19 Cl. Ct. 621, 623 (1990) (compensation for estate expenses were denied). However, more recent decisions by this court have clarified that guardianship costs are compensable under the Act and have therefore awarded them to petitioners. *Ceballos*,

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[16] In view of respondent's acknowledgment that special masters may rely on their general experience in determining fees and costs awards, respondent's comment that "[p]etitioners provided no explanation as to how one can determine the reasonableness of [the law firm's] charges" (Response at 16) is a bit disingenuous. *See* Response, filed February 2, 2009, pp. 1-2,15. The court further notes that respondent's concern was with the hourly rate charged, not the hours billed or the description of the work conducted by the probate attorney.

[17] I have no objection to respondent imposing this requirement, which works to protect the interest of a vaccine-injured minor (or other person under legal disability) by imposing some measure of court oversight to protect a damage award designed to benefit the minor. The requirement is a sensible one; respondent's approach to reimbursing this necessary and required cost is not, particularly when the Act's intent that compensation for the injured person be generous is considered. As the court noted in *Loving:* "'In adopting the Vaccine Act, Congress sought to "establish a Federal 'no-fault' compensation program under which awards can be made to vaccine-injured persons quickly, easily, and with certainty and generousity.' H.R. Rep. No. 99-908, at 3 (2d Sess. 1986), *reprinted in* 1986 U.S.C.C.A.N. 6334, 6343." *Loving v. Sec'y, HHS*, 86 Fed. Cl. 135, 141 (Fed. Cir. 2009). Although there is no similar admonishment regarding awards of fees and costs, when the costs incurred are for the benefit of the vaccine-injured individual and the reason for incurring the cost is directly related to how the damage award is administered, common sense would suggest that reasonable guardianship costs are reimbursable, as no award on a petition will be paid by respondent until the guardianship is established.

2004 U.S. Claims LEXIS 77, at *72-73 (Fed. Cl. Spec. Mstr. Mar. 25, 2004) (finding that costs associated with the establishment of a guardianship are reimbursable if it is established by order of the special master as an element of the agreed-upon settlement with respondent); *see also Velting v. Sec'y, HHS*, No. 90-1432V, 1996 U.S. Claims LEXIS 223, at *6-10 (Fed. Cl. Spec. Mstr. Sep. 24, 1996) (finding that, in the situation where a conservatorship was set up specifically to handle a Program award, compensation is authorized by the statute); *Hill v. Sec'y, HHS*, No. 03-619V, (*unpublished*) slip op. at 3-4 (Fed. Cl. Spec. Mstr. Jul. 19, 2007).

Notwithstanding the language in *Mol*, which is persuasive but not binding authority, I conclude that when respondent or the court requires the creation of a guardianship as a condition precedent to payment of a damages award, the reasonable costs of establishing that guardianship are compensable as "costs incurred in any proceeding on such petition." When petitioners filed separately for the guardianship fees, the amount was increased to $4,269.50, ostensibly to cover fees generated by the misfiling of a fees application by the probate attorney. The additional fees are not warranted to correct the mistakes of counsel. However, the original amount of $4,027.00 claimed in the Fees App. appears to be a reasonable fee to establish a guardianship and is awarded in full.

3. Expert Witnesses.

Respondent objected to the costs associated with three physicians who were retained as expert witnesses, Drs. C. Elga Rabinovich, a pediatric rheumatologist[18]; Andrew White, another pediatric rheumatologist; and Yehuda Shoenfeld, an immunologist.

In the Vaccine Program, most petitioners do not personally pay "up front" for experts' services; the attorney generally advances the retainer for the experts and then bills the Vaccine Program for those costs at the conclusion of the litigation. Under fee-shifting statutes, the general rule is that an attorney may not bill the government (or the opposing party) for fees that would not be billed to a private client. Petitioners, and petitioners' counsel in particular, have an obligation to monitor expert fees. *See Perreira v. Sec'y, HHS*, 90-847V, 1992 U.S. Claims LEXIS 289, at *10-11 (Cl. Ct. Spec. Mstr. Jun. 12, 1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994). This duty to monitor costs includes those attributed to expert consultants, where an expert is contacted for advice or assistance on the case, but no expert report is filed nor does the expert offer testimony. *See Lamar*, 2008 U.S. Claims LEXIS 384, at *41-47.

The reasonableness of the expert's rate is determined on a case-by-case basis, and it is petitioners' burden to offer supporting evidence for the rate charged. *See*

[18] The bill submitted by Dr. Rabinovich does not identify a medical specialty; respondent provided a website address reflecting her specialty. Response at 17, n.15.

Simon v. Sec'y, HHS, No. 05-941V, 2008 U.S. Claims LEXIS 67, at *5 (Fed. Cl. Spec. Mstr. Feb. 21, 2008). The reasonableness of a witness' rate can be based on such factors as: area of expertise; education and training of the witness; geographic area of practice, including cost of living; and the complexity of the issue upon which the expert opines. *Id.; see also Wilcox v. Sec'y, HHS*, No. 90-991V, U.S. Claims LEXIS 43 (Fed. Cl. Spec. Mstr. Feb. 14, 1997); *Baker v. Sec'y, HHS*, No. 99-653V, 2005 U.S. Claims LEXIS 64 (Fed. Cl. Spec. Mstr. Feb. 25, 2005).

a. Dr. Rabinovich.

Respondent's objections to Dr. Rabinovich's fees centered on her extremely high hourly rate ($600 per hour) and the lack of detail in the invoice submitted for her services. The bill reflected that Dr. Rabinovich charged $600 per hour to review medical records over an 11-hour period. The attorney time sheets indicate that Dr. Rabinovich prepared some type of report, which was not submitted as an exhibit.

Petitioners responded to both of respondent's objections regarding Dr. Rabinovich by submitting a slightly more detailed bill and reducing her hourly rate to $350.00 per hour. The hours expended in reviewing the records and creating an expert report are in line with those in other Vaccine Act cases. Likewise, the revised hourly rate appears reasonable for a pediatric rheumatologist, a relatively rare medical speciality. *See Durden v. Sec'y, HHS*, No. 05-163V, 2007 WL 4962000, at *12 (Fed. Cl. Spec. Mstr. Sep. 26, 2007) (testimony by Dr. Carlos Rosé that there were only approximately 170 board certified pediatric rheumatologists in the country). In the absence of any further objection by respondent, the revised bill for $3,850.00 is allowed in full.

b. Dr. Shoenfeld.

Respondent objected to both the hours expended and the fee requested by Dr. Shoenfeld, who billed at $400 per hour[19] for 18 hours of work reviewing medical records and literature and drafting a report, claiming both were excessive.

Doctor Shoenfeld was recently awarded $350.00 per hour for his work as an immunologist in another Vaccine Act case, based on the rate previously awarded to Dr. Bellanti, another immunologist who frequently appears as an expert in Vaccine Act cases. *See Sabella v. Sec'y, HHS*, 86 Fed. Cl. 201, 220–21 (Fed. Cl. 2009) (awarding Dr. Shoenfeld the $350.00 rate Dr. Bellanti has been awarded). Petitioners cite to fees awarded expert neurologists to assert that a fee of $400 is appropriate. In the absence of additional and more relevant information upon which to determine an appropriate

[19] Respondent indicated that Dr. Shoenfeld was requesting both a $400.00 per hour rate (Response at 18) and $450.00 per hour (Response at 19). The Fees App., Ex. B, at 30, reflected that Dr. Shoenfeld was requesting a $400.00 per hour rate.

hourly rate for Dr. Shoenfeld, the $350.00 per hour rate authorized other experts in his field, and awarded by the Court of Federal Claims for his specific work, is the best gauge of what hourly rate is appropriate.

The 18 hours spent by Dr. Shoenfeld in reviewing this case and writing portions of his expert report[20] are inordinately high. The report does contain some work unique to this case as well as some medical literature not referenced in previous expert reports by Dr. Shoenfeld. I will authorize 12 hours at the $350.00 rate and award petitioners $4,200.00 for Dr. Shoenfeld's costs.

c. Dr. White.

Respondent did not interpose any objection to Dr. White's hourly rate, but indicated that the lack of specificity in Dr. White's bill, particularly because of Ms. Toale's activities in researching and drafting the report, made it difficult to determine whether the hours requested were reasonable. Because I have reviewed Dr. White's report, I have some indication of the effort expended in its preparation, although determining who expended this effort is impossible based on this record.

The hours billed by Dr. White are comparable to the hours billed by Dr. Rabinovich, and I have already determined that 11 hours is not an unreasonable period of time for reviewing medical records and preparing a report. Thus, it appears that a pediatric rheumatologist might reasonably spend 10 hours in reviewing records and preparing a report. Because I am not compensating Ms. Toale's time[21] in the generation of this report, I will compensate Dr. White for the full amount requested of $3,500.00.

IV. Conclusion.

Because I have determined the amounts reflected below are reasonable and appropriate in this case, I hereby award the total of **$72,151.10**,[22] broken down as

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[20] As respondent notes (Response at 18-19), much of Dr. Shoenfeld's report is not work unique to this case. It contains a standard recitation of Dr. Shoenfeld's qualifications to opine (nearly one and one-half pages of the eight and one-half page report) that has appeared, virtually unaltered, in reports from Dr. Shoenfeld filed in other Vaccine Act cases. Much of the medical literature, including a number of literature surveys co-authored by Dr. Shoenfeld, referenced in his report have been filed and referenced by Dr. Shoenfeld in many other Vaccine Act cases. The summary of Catherine's medical history was drafted by petitioners' counsel (see Fees App., Ex. B, at 2).

[21] *See Valdes v. Sec'y, HHS*, No. 99-310V, 2009 WL 1456437 (Fed. Cl. Spec. Mstr. Apr. 30, 2009) (denying attorney fees where the work with the expert was unreasonable).

[22] This amount is intended to cover all legal expenses. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. Furthermore, 42 U.S.C. § 300aa-15(e)(3) prevents an attorney from charging or collecting fees (including costs) that would

follows:

- a lump sum of **$2,977.69**, in the form of a check payable to petitioners, Gustavo and Teresa Gruber, for litigation costs incurred directly by petitioners;

- a lump sum of **$62,502.45**, in the form of a check payable jointly to petitioners and petitioners' counsel, Anne C. Toale, for attorney fees and costs;

- a lump sum of **$6,670.96**, in the form of a check payable jointly to petitioners and petitioners' previous counsel, Clifford J. Shoemaker, for attorney fees and costs;

In the absence of a timely-filed motion for review filed pursuant to Appendix B of the Rules of the U.S. Court of Federal Claims, the clerk of the court shall enter judgment in accordance herewith.[23]

IT IS SO ORDERED.

s/Denise K. Vowell
DENISE K. VOWELL
Special Master

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be in addition to the amount awarded herein. *See generally, Beck v. Sec'y, HHS*, 924 F.2d 1029 (Fed. Cir. 1991).

[23] Entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review. *See* Vaccine Rule 11(a).