

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 10-491 V

Filed: January 31, 2012

To be Published

CHANDRA HILAND, parent of *
LILLYEN HILAND, deceased *

Petitioner, *

v. *

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

Respondent. *

Chandra Hiland, Kalispell, MT, for petitioner (pro se).
Justine E. Daigneault, Washington, DC, for respondent.

Interim Attorneys' Fees and Costs;
Avera factors; McKellar; Hours
Reasonably Expended

MILLMAN, Special Master

DECISION AWARDING INTERIM ATTORNEYS' FEES AND COSTS¹

On July 29, 2010, petitioner Chandra Hiland, on behalf of her deceased daughter Lillyen Hiland, filed a petition under the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-10-34 (2006) ("Vaccine Act" or "Act"). Petitioner alleges that diphtheria-tetanus-acellular pertussis ("DTaP"), inactivated polio ("IPV"), haemophilus influenzae type b ("Hib"), pneumococcal conjugate ("PCV"), and Rotavirus vaccinations caused Lillyen's death six days after vaccination. Respondent denies that the DTaP, IPV, Hib, PCV, and Rotavirus vaccinations

¹ Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post this unpublished decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub.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). Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would constitute a clearly unwarranted invasion of privacy. When such a decision is filed, petitioner has 14 days to identify and move to redact such information prior to the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall redact such material from public access.

caused Lillyen's death, arguing that petitioner failed to show a prima facie cause of causation and is not entitled to compensation.

In a Motion for Extension of Time, filed on May 9, 2011, petitioner's counsel indicated petitioner was searching for alternative counsel to represent her in these proceedings. On July 21, 2011, petitioner filed a motion for interim attorneys' fees and costs. On October 7, 2011, petitioner's counsel filed a motion to withdraw, which the undersigned granted on October 28, 2011. The interim fees motion has been fully briefed and is now ripe for decision.

I. Procedural History

Petitioner filed an Application for Interim Attorneys' Fees and Costs ("Fee App.") on July 21, 2011. In her motion, petitioner requests \$14,871.00 in interim fees, \$2,077.54 in interim costs, and \$2,999.35 in fees and costs for petitioner's former attorney, E. Craig Daue. Fee App. 1-2.

On August 22, 2011, respondent filed her Opposition to Petitioner's Application for Interim Attorneys' Fees and Costs ("Opp'n"). First, respondent argues that the Vaccine Act does not authorize awards of fees and costs on an interim basis.² Opp'n 6-7. Recognizing that the Federal Circuit's decision in Avera v. Sec'y of HHS, 515 F.3d 1343 (Fed. Cir. 2008), permits interim fee awards in some situations, respondent then argues that the circumstances in this case do not justify an interim award. Opp'n 9-12. Specifically, the procedural posture of the instant case does not fall within the limited procedural posture addressed in Avera: a request for payment of an undisputed portion of a fee award during the pendency of an appeal of the fee award. Opp'n 9. Additionally, respondent contends that petitioner has not demonstrated that an interim award is appropriate under the factors given in Avera, including whether proceedings in the case are protracted, costly experts are retained, or petitioner has suffered undue hardship. Opp'n at 10-11.

Alternatively, respondent argues that even if the special master rejects the argument that an interim award is not appropriate under the Vaccine Act or Avera, an interim fee award is still impracticable because it is premature to assess whether there is a reasonable basis for the claim, as required by the Act. Opp'n 12-16. Respondent emphasizes the absence of a filed expert report in the case and maintains that the medical records and medical literature do not support causation. Opp'n 14. Additionally, respondent suggests that even if petitioner had a reasonable basis for her claim initially, petitioner may not have had a reasonable basis for maintaining her claim once she reviewed Dr. Thomas Gill's expert opinion, which petitioner never filed, presumably because it was not supportive of her allegations. Opp'n 15.

Furthermore, respondent objects to specific time entries in petitioner's fee application. Opp'n 16-22. Respondent contends that many of the hours billed by petitioner's counsel's firm are excessive partly because six different attorneys as well as several law clerks and paralegals worked on the case. Opp'n 17. This amounted to approximately 13.7 hours billed for internal

² Respondent acknowledges in a footnote that the undersigned has rejected her statutory argument in a past decision but raises the statutory objection again to preserve the issue in the event of an appeal. Opp'n 6 n.5.

communications such as reviewing internal case memos and attending case meetings or conferences. Opp'n 17–19. Respondent also objects to time billed for drafting petitioner's affidavit and the amended petition and reviewing a one-page VAERS report, claiming these hours were excessive or redundant. Opp'n 19–20. Additionally, respondent objects to time billed for administrative tasks, consulting petitioner about a possible civil claim, reviewing and editing routine motions filed with the court, certain tasks billed at Mr. Homer's rate, and preparing exhibits that were never filed. Opp'n 20–21.

Concerning expert fees for Dr. Gill, respondent contends that petitioner has not submitted enough information regarding Dr. Gill's fees to assess whether the costs are reasonable. Opp'n 22. Respondent reiterates this same objection to Mr. Daue's fee application, arguing that petitioner has not shown that Mr. Daue's hourly rates are reasonable or why the court should fully compensate Mr. Daue for travel time. Opp'n 22.

On September 1, 2011, petitioner filed a reply to respondent's opposition. Petitioner asserts that the Federal Circuit in Shaw v. Sec'y of HHS, 609 F.3d 1372 (Fed. Cir. 2010), specifically rejected respondent's argument that the Vaccine Act does not permit an award of interim fees before a judgment has been entered on entitlement. Reply 7–8. Additionally, petitioner argues that the factors listed in Avera are not prerequisites to an interim fee award. Reply 11. Even under the factors given in Avera, petitioner contends that she is entitled to an interim fee award. Reply 12–13.

In response to respondent's argument that reasonable basis is questionable in the case, petitioner emphasizes the temporal proximity between the dates of vaccination and the vaccinee's death demonstrated in the medical records and the supporting medical literature that she filed. Reply 15. Petitioner also argues that respondent is equating reasonable basis and entitlement, contrary to what the statute requires. Reply 15.

Concerning respondent's objection that the number of hours billed is unreasonable and excessive, petitioner argues that petitioner's counsel is in the best position to determine how to analyze and present petitioner's case. Reply 17–18.

Also on September 1, 2011, petitioner filed a Supplemental Application for Interim Final Attorneys' Fees ("Supp. Fee App."). Petitioner requests an additional \$2,535.10 in fees for work performed drafting, editing, and filing the reply. Supp. Fee App. Tab A.

On September 13, 2011, respondent filed Respondent's Opposition to Petitioner's Supplemental Application for Interim Final Attorneys' Fees ("Supp. Opp'n"). Respondent reiterates the arguments made in her original opposition and emphasizes that petitioner's filing a supplemental application shows that interim fee applications burden the Vaccine Program with collateral litigation. Supp. Opp'n 2–3.

II. Legal Standard for Attorneys' Fees

A. In General

The Vaccine Act permits an award of “reasonable attorneys’ fees” and “other costs.” 42 U.S.C. § 300aa–15(e)(1). A petitioner need not prevail in the case-in-chief in order to receive a fee award as long as petitioner brought the claim in “good faith” and with a “reasonable basis” to proceed. Id. Good faith and reasonable basis are presumed when a petitioner prevails. The special master has “wide discretion in determining the reasonableness” of attorneys’ fees and costs. See Perreira v. Sec’y of HHS, 27 Fed. Cl. 29, 34 (1992), aff’d, 33 F.3d 1375 (Fed. Cir. 1994); see also Saxton ex rel. Saxton v. Sec’y of HHS, 3 F.3d 1517, 1519 (Fed. Cir. 1993) (“Vaccine program special masters are also entitled to use their prior experience in reviewing fee applications”).

B. On an Interim Basis

In Avera, the Federal Circuit interpreted the Act’s fee provision to allow special masters to award fees on an interim basis. 515 F.3d at 1351 (“There is nothing in the Vaccine Act that prohibits the award of interim fees.”). The court suggested that interim fees would be “particularly appropriate in cases where proceedings are protracted and costly experts must be retained” or where petitioners established that they “suffered undue hardship.” Id. at 1352.

In cases decided since Avera, the Federal Circuit has affirmed interim fees awarded prior to a decision on entitlement. See Shaw, 609 F.3d at 1373–74. In doing so, the court recognized that “[a] special master can often determine at an early stage in the proceeding whether a claim was brought in good faith and with a reasonable basis.” Id. at 1375 (quoting Avera, 515 F.3d at 1352). Thus, a special master may decide an interim fee request before deciding the merits of the underlying claim. See id. at 1375, 1377.

III. Analysis

A. Appropriateness of an Interim Award

Respondent argues that neither section 15(e)(1) of the Vaccine Act nor Avera permit an award of interim fees. The Federal Circuit in Avera rejected respondent’s interpretation of section 15(e)(1), holding that “[t]he statute permits [interim] awards.” 515 F.3d at 1352; see also Shaw, 609 F.3d at 1354 (“In Avera, we held that the Vaccine Act permits the award of interim fees and costs, rejecting the government’s argument that a fee award is only permissible after judgment under § 300aa–15.”) (citation omitted). Since Avera, special masters have routinely awarded interim fees. See Crutchfield v. Sec’y of HHS, No. 09–39V, 2011 WL 3806351, at *4–5 (Fed. Cl. Spec. Mstr. Aug. 4, 2011) (collecting cases). According to the reasoning in these decisions, the Vaccine Act authorizes interim fee awards, notwithstanding respondent’s repeated assertions to the contrary.

Respondent next argues that an interim award would be inappropriate in the case at hand because a decision has not been made on the merits. Respondent interprets the holding of Avera narrowly, permitting an award only in the procedural posture at issue in Avera in which the case had been dismissed on the merits and the only reason for appeal was the amount of attorneys’ fees awarded after the dismissal of the case. Thus, because petitioner seeks an interim award in a different procedural context, namely before an entitlement decision has been issued, respondent argues the holding of Avera does not apply. Opp’n 8–9.

This argument plainly ignores the import of the Federal Circuit’s decision in Shaw. In that case, the special master awarded the undisputed portion of an interim fee request after she conducted an entitlement hearing, but before she ruled on entitlement. Shaw v. Sec’y of HHS, No. 01–707V, 2009 WL 1010058, at *3 (Fed. Cl. Spec. Mstr. Mar. 27, 2009). On review, the Court of Federal Claims concluded only “final” decisions of special masters were reviewable under the Vaccine Act. Shaw v. Sec’y of HHS, 88 Fed. Cl. 463, 465 (Fed. Cl. 2009). Because the special master had not ruled on entitlement, there was no final decision in the case, and thus, the court concluded it did not have jurisdiction to review the interim award. Id.

The Federal Circuit reversed and held that “the Court of Federal Claims has jurisdiction to review an interim fees decision prior to the decision on the merits of the underlying claim,” rejecting the same argument respondent puts forth in the instant case. Shaw, 609 F.3d at 1376. The court characterized respondent’s argument as “more of an attack on the availability of interim fees than their reviewability.” Id. at 1377. It concluded that “[f]oreclosing review of a denial of interim fees is tantamount to a denial of such fees.” Id. at 1376.

Respondent contends that Shaw addressed the narrow issue of jurisdiction and that the procedural history of that case did not provide respondent with a “proper vehicle” to appeal the language in Avera. Opp’n 9 n.10. Shaw is binding, both on the undersigned and respondent. See also McKellar v. Sec’y of HHS, No. 09–841V, __ Fed. Cl. ___, 2011 WL 5925323, at *5 n.7 (Fed. Cl. Nov. 4, 2011) (noting the same argument and stating that “Shaw is binding”). Its implication is clear: “Avera and Shaw, when construed together, provide that interim fees are allowed under the Act, and more specifically, that interim fees are permitted even before an entitlement decision is made.” Id. at *6. Thus, the fact that petitioner filed an application for interim fees before a decision on the merits has been issued does not preclude an interim fee award.

Respondent next argues that interim fees are not appropriate in this case because petitioner has not shown that an interim award is justified under the factors set forth in Avera. Opp’n 10–12. In addition, respondent contends that an intention to withdraw as counsel is not a circumstance contemplated by Avera justifying an interim fee award. Opp’n 12.

The Federal Circuit in Avera listed several examples of cases in which interim fees would be “particularly appropriate:” where proceedings are protracted, where costly experts must be retained, and where petitioners have suffered an undue hardship. 515 F.3d at 1352. Ultimately, the court found that petitioners therein made no showing justifying an interim award, reasoning that the fees sought were not substantial, no experts had been employed, and there was only a short delay in the award pending the appeal. Id.

Since Avera, there have been numerous cases discussing under which circumstances an interim award would be appropriate. Crutchfield, 2011 WL 3806351, at *5–7 (listing cases). These cases indicate that an award of interim fees is discretionary; special masters may look at the overall circumstances present in a case and are not limited to the specific criteria provided in Avera. See e.g., Crutchfield, 2011 WL 3806351, at *6–8 (finding the overall circumstances of the case are appropriate for an interim award); Kirk v. Sec’y of HHS, No. 08–241V, 2009 WL 775396, at *1–2 (Fed. Cl. Spec. Mstr. March 13, 2009) (interpreting Avera factors as considerations, not limits, in determining appropriateness of interim award); Broekelschen v. Sec’y of HHS, No. 07–137V, 2008 WL 5456319, at *2–3 (Fed. Cl. Spec. Mstr. Dec. 17, 2008)

(finding that the anticipated delay, among other factors in the case, warranted an interim fee award).

The most recent case to discuss Avera is McKellar.³ In that case, the Court of Federal Claims reversed a special master's decision awarding interim fees and remanded for a new determination of the reasonable basis of the claim. McKellar, 2011 WL 5925323, at *9. In the court's discussion of Avera, the court interpreted the Federal Circuit's decision as requiring "some special showing" by petitioner that an interim fee award is warranted. Id. at *4 ("If mere good faith and reasonable basis were all that is necessary, the Avera factors become superfluous . . ."). The court continued, however, stating that Avera requires a showing "*including but not limited to* the delineated factors of protracted proceedings, costly experts, or undue hardship." Id. (emphasis added).

On the question whether interim fees were warranted in that particular case, the court explained that petitioner did not demonstrate that any of the factors mentioned in Avera were present. Moreover, the court stated that "the mere fact that an attorney plans to withdraw is not necessarily a hardship that triggers an award of interim attorneys' fees and costs." Id. at *6.

Ultimately, the court remanded for a new determination of reasonable basis, which it thought the special master conflated with a determination of good faith. Id. at *9. In her decision, the special master had noted the "weakness of the claim" and lack of support in the medical records. Id. at *7 (citation omitted). The court viewed the special master's statements as an effective rejection of the petition, making it unlikely that new counsel would appear and seek fees later in the case. Id. In light of these circumstances, the court stated that it would "treat the petition as if it were from a routine final award of fees," id., and instructed the special master to make a new determination of reasonable basis on remand, id. at 9.⁴

The undersigned views the circumstances set forth in Avera as illustrative rather than exhaustive. See also Woods v. Sec'y of HHS, No. 10-377V, 2011 WL 6957598, at *4 (Fed. Cl. Spec. Mstr. Dec. 13, 2011), appeal docketed, No. 10-377-MCW (Fed. Cl. Jan. 17, 2012). In the Avera opinion, the Federal Circuit described cases in which interim fees would be "particularly appropriate." 515 F.3d at 1352. This language does not foreclose other situations in which interim fees would also be appropriate.

Moreover, the Federal Circuit acknowledged in Avera one of the "underlying purposes of the Vaccine Act was to ensure that vaccine injury claimants have readily available a competent bar to prosecute their claims." Id. (citation omitted). The court reasoned that the award of interim fees advances this purpose because "delaying payments [of fee awards] decreases the effective value of awards." Id. This explanation further suggests that interim fee awards are appropriate in cases beyond those listed in the opinion, keeping with the general purpose of the Act to maintain a competent bar to pursue petitioners' claims. See Kirk, 2009 WL 775396, at *2

³ The undersigned prefaces a discussion of McKellar with the caveat that special masters are not bound by their own or other special masters' decisions, or those of the United States Court of Federal Claims, except in the same case. Hanlon v. Sec'y of HHS, 40 Fed. Cl. 625, 630 (1998).

⁴ Special Master Lord filed a decision on remand on January 13, 2012.

(stating that the “guidance offered by the Circuit in Avera is slim, but the general principle underlying an award of interim fees was clear: avoid working a substantial financial hardship on petitioner and their counsel and thereby ensure ‘that vaccine injury claimants have readily available a competent bar . . .’” (citation omitted)).

McKellar supports this interpretation. Although the court interpreted Avera to require “some special showing . . . to warrant interim fees,” it went on to state that such a showing “include[s] but [is] not limited to the delineated factors of protracted proceedings, costly experts, or undue hardship.” McKellar, 2011 WL 5925323, at *4.

To the extent that the court in McKellar held that withdrawal of an attorney is not a circumstance in which an interim fee award is appropriate, the undersigned respectfully disagrees. There are many reasons why an attorney and a client may choose to part ways. The attorney and client may not get along personally, or the attorney may recommend one course while the client wants to pursue another. Once an attorney’s service is at an end, however, the undersigned can find no reason to delay compensation. The fee application will be “interim” in the sense that it is filed before a special master has issued a decision on entitlement and judgment has entered. The attorney, however, should not be filing future fee applications in the case. A special master can issue a decision on fees once the matter is fully briefed.

Moreover, it does not serve the Vaccine Act’s purpose to ensure a readily available and competent bar for vaccine injury claimants if counsel must wait for indefinite periods of time to receive their fees. Staying a decision on a fully-briefed interim fee motion until an unknown time in the future when entitlement is resolved accomplishes the opposite result. This practice deters counsel from taking difficult cases, and worse, encourages attorneys who should withdraw to stay on a case because of their concern over payment of fees. As the undersigned has found before, “[p]laying attorneys when their service is complete is appropriate.” Gabrielle v. Sec’y of HHS, No. 07–304V, 2011 WL 2445941, at *1 (Fed. Cl. Spec. Mstr. May 26, 2011); see also Soto v. Sec’y of HHS, No. 09–897V, 2011 WL 2269423, at *4 (Fed. Cl. Spec. Mstr. June 7, 2011) (fees paid upon counsel’s withdrawal while entitlement pending).

In the instant case, petitioner’s counsel has withdrawn.⁵ During a telephonic status conference held on January 23, 2012, petitioner indicated that she is seeking new counsel. She has contacted an attorney and sent him the medical records but, thus far, he has been unresponsive. Petitioner stated that she will continue to call attorneys on the Vaccine Attorney list⁶ if this new counsel declines to represent her. Additionally, petitioner discussed looking for a pathologist to review the vaccinee’s autopsy records.

To date, the case has lasted one and one-half years. It will take time for petitioner to search for alternative counsel. If she cannot find an attorney, then based on communications thus far, petitioner intends to proceed pro se and go forward with the case on the merits. It will take more time for the case to be resolved. It is uncertain whether this case will proceed to settlement or be litigated and ultimately decided on entitlement. For the practical reality that

⁵ As stated above, the undersigned granted the motion to withdraw on October 28, 2011.

⁶ The Vaccine Attorney list can be found at the Court’s website:
<http://www.uscfc.uscourts.gov/sites/default/files/Vaccine%20Attorneys%2012%2001%2011.pdf>

there is no need for counsel to wait until the end of litigation, whenever that may occur, and to further the Vaccine Act's purpose of maintaining an active petitioners' bar, an interim award is appropriate at this time.

B. Reasonable Basis to Proceed

Respondent next argues that an interim award is inappropriate at the present time because there is insufficient information to assess whether petitioner had, and continues to have, a reasonable basis for her claim.⁷ Opp'n 12. Respondent asserts that the medical records petitioner filed do not support causation, petitioner has not produced an expert report, and the medical articles filed by petitioner do not apply to petitioner's case, indicating a lack of reasonable basis. Opp'n 14. Furthermore, respondent contends that even if a reasonable basis existed when the petition was filed, it ceased to exist once petitioner's former counsel received Dr. Gill's opinion. Opp'n 15–16.

In response, petitioner argues that the medical records demonstrated the vaccinee died only days after receiving multiple vaccinations. Reply 15. Moreover, petitioner filed an amended petition analyzing the case and referencing medical literature which circumstantially supported her claim. *Id.* Petitioner characterizes respondent's argument as misconstruing proving a prima facie case of causation with demonstrating a reasonable basis to proceed. *Id.*

The Vaccine Act provides that a special master may award reasonable attorneys' fees and costs if the special master determines that the petition was "brought in good faith and there was a reasonable basis for the claim" 42 U.S.C. § 300aa–15(e)(1). When a petitioner prevails on the merits, reasonable basis is presumed. When a petitioner loses on the merits, or moves for interim fees before a special master has ruled on entitlement, the special master must determine whether the petition was brought in good faith and had a reasonable basis.

The requirement of "reasonable basis" is "objective, looking not at the likelihood of success [of a claim] but more to the feasibility of the claim." *Turner v. Sec'y of HHS*, No. 99–544V, 2007 WL 4410030, at *6 (Fed. Cl. Spec. Mstr. Nov. 30, 2007) (quoting *DiRoma v. Sec'y of HHS*, No. 90–3277V, 1993 WL 496981, at *1 (Fed. Cl. Spec. Mstr. Nov. 18, 1993)). A special master may consider a number of factors when determining reasonable basis, including the factual basis, medical support, jurisdictional issues, and the circumstances under which a petition is filed. *Id.* at *6–8 (citations omitted). Special masters historically have been "quite generous in finding a reasonable basis for petitioners." *Id.* at *8 (citation omitted).

Additionally, counsel must ensure that a reasonable basis exists during the course of litigation. A filed petition containing only bare allegations of a vaccine injury or death still has a reasonable basis at the time of filing if a petitioner obtains and files supporting medical records or an expert opinion as the case proceeds. *Id.* (citation omitted). Conversely, a petition with a reasonable basis at the beginning of litigation may lack a reasonable basis at a later phase if an expert report has not been filed for a prolonged time or an expert report is unsupported and deficient. *Perreira*, 27 Fed. Cl. at 31–34 (affirming a special master's denial of fees after the submission of an unsupported expert opinion based on the finding there was no reasonable basis to continue the case).

⁷ Respondent does not contest that the petition was brought in good faith. Opp'n 12 n.14.

In the instant case, petitioner filed her petition on July 29, 2010, alleging that the vaccinations Lillyen received on July 30, 2008 caused her death on August 5, 2008. The petition was timely filed. See 42 U.S.C. § 300aa-16(a)(3) (petition must be filed before the expiration of 24 months from the date of death). Petitioner filed her medical records on compact disc on August 23, 2010. Petitioner filed her affidavit, an amended petition, and medical literature on September 3, 2010.

The postmortem examination report stated that Lillyen died of sudden infant death syndrome (“SIDS”). Pet’r’s Ex. 17, at 1, 4. SIDS is defined as “the sudden and unexpected death of an apparently healthy infant, typically occurring between the ages of three weeks and five months, and not explained by careful postmortem studies.” Dorland’s Illustrated Medical Dictionary 1850 (32d ed. 2012). Lillyen’s organs, however, were enlarged. The internal examination reported Lillyen’s organ weights:

Brain: 827 grams
Heart: 33 grams
Liver: 296 grams
Right Lung: 99 grams
Left Lung: 76 grams
Spleen: 19 grams
Right Kidney: 27 grams
Left Kidney: 24 grams
Thymus: 34 grams

Pet’r’s Ex. 17, at 2. On September 3, 2010, petitioner filed Exhibit 13, Handbook of Autopsy Practice (3d ed. 2002). Exhibit 13 reports the normal organ weights of children five months old:

Brain: 644 grams
Heart: 29 grams
Liver: 188 grams
Right Lung: 38 grams
Left Lung: 35 grams
Spleen: 16 grams
Right Kidney: 25 grams
Left Kidney: 25 grams
Thymus: 12.5grams

Pet’r’s Ex. 13, at 561. Lillyen’s organs, except her kidneys and spleen, were significantly larger than the normal organ weights for a five-month-old child. It is conceivable, based on the abnormally enlarged organs, that there was some inflammatory process underway at the time of Lillyen’s death.

Additionally, the coroner contacted Dr. Sorenson, Lillyen’s pediatrician, as part of his investigation, who indicated to the coroner that Lillyen did not have any apparent medical problems when he administered the vaccinations except that her mother said Lillyen had been fussy lately. Pet’r’s Ex. 7, at 9. Fussiness could be insignificant or indicative of an infectious process which the DTaP, IPV, HiB, Prevnar, and Rotavirus vaccinations made worse. Moreover,

the Commonwealth of Virginia Department of Health, Childhood Death Investigation Form, noted that Lillyen had no symptoms prior to death but a rash on her face, again conceivably indicating an infectious process. Pet'r's Ex. 17, at 35, 36. At this point in the litigation, there is a reasonable basis to go forward to determine whether the vaccinations caused or were substantial factors in causing Lillyen's death.

Respondent argues that even if a reasonable basis existed at the time of filing, it ceased to exist when petitioner reviewed a report prepared by Dr. Gill on or about January 14, 2011. Opp'n 15 (citing Perreira, 27 Fed. Cl. at 33–34). Petitioner's former counsel did not file the report before she withdrew from the case. Presumably, as respondent points out, Dr. Gill's opinion was not favorable to petitioner, or she would have filed it to support her claim.

Respondent cites to Perreira to support the proposition that “reasonable basis can cease to exist as the case progresses.” Opp'n 15. In Perreira, the court affirmed the special master's exercise of discretion to deny fees for hours expended after counsel knew or should have known that the expert opinion was insufficient to support the claim. See 27 Fed. Cl. at 33–34. The medical theory offered by petitioners' expert was neither accepted by any part of the medical community nor supported in reputable medical literature. Id. at 33. The special master denied counsel's fees up to the point of the hearing, reasoning that counsel “failed to reassess the case after the expert submitted his report.” Id. The court affirmed the denial of fees, stating that it was unreasonable for petitioners to “proceed with a case knowing there was no medical or scientific opinion supporting their case.” Id. at 224. That is not the situation here.

Once petitioner's former counsel learned of Dr. Gill's opinion, she did not proceed to hearing as petitioners did in Perreira. Instead, she expended hours conferring with the client via e-mail and phone, searching for alternative counsel, communicating her efforts to the court and respondent's counsel, and preparing a fee application. See Fee App. at 14–17. It is reasonable for counsel to “wrap up” the case once she decides she can no longer represent the client for whatever reason. Moreover, the undersigned is not in a position to hold that, presuming Dr. Gill's report was unhelpful to petitioner, there is no other doctor available to her who can provide her with evidentiary support for her allegations.

Petitioner is entitled to be compensated for the hours reasonably expended on ending her counsel's representation.

C. Reasonable Attorneys' Fees

The Federal Circuit has approved the lodestar approach to determine “reasonable attorneys' fees” and costs under the Act. Avera, 515 F.3d at 1347. The lodestar approach involves a two-step process. First, a court determines an “initial estimate . . . by ‘multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.’” Id. at 1347–48 (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)). Secondly, the court may make an upward or downward departure from the initial calculation of the fee award based on specific findings. Id. at 1348.

1. Attorneys' Fees and Costs for Conway, Homer & Chin-Caplan

a. Determination of a Reasonable Hourly Rate

A reasonable hourly rate is “the prevailing market rate defined as the rate prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” Id. (citation and quotation omitted). In Avera, the Federal Circuit found that in Vaccine Act cases, a court should use the forum rate, i.e., the DC rate, in determining an award of attorneys’ fees. Id. at 1349. At the same time, the court adopted the Davis County exception to prevent windfalls to attorneys who work in less expensive legal markets. Id. (citing Davis County Solid Waste Mgmt. & Energy Recovery Spec. Serv. Dist. v. U.S. Env’tl. Prot. Agency, 169 F.3d 755 (D.C. Cir. 1999)). In cases where the bulk of the work is completed outside the District of Columbia, and there is a “very significant difference” between the forum hourly rate and the local hourly rate, the court should calculate an award based on local hourly rates. Id. (finding the market rate in Washington, DC to be significantly higher than the market rate in Cheyenne, Wyoming).

In the instant case, petitioner requests reimbursement for work performed by several individuals at various hourly rates: Amy Fashano (\$208.00–\$211.00); Christina Ciampolillo (\$200.00–\$203.00); Joseph Pepper (\$203.00); Kevin Conway (\$318.00–\$335.00); Ronald C. Homer (\$280.00–\$305.00); Sylvia Chin-Caplan (\$300.00–\$305.00); a law clerk or clerks (\$134.00); and paralegals (\$101.00–\$107.00).

Respondent does not object to the requested hourly rates. See generally Opp’n. The requested hourly rates are reasonable and consistent with the rates at which these attorneys and staff have been compensated in past cases. See Calise v. Sec’y of HHS, No. 08–865V, 2011 WL 2444810, at *6 (Fed. Cl. Spec. Mstr. June 13, 2011); Soto v. Sec’y of HHS, No. 09–897V, 2011 WL 2269423, at *5 (Fed. Cl. Spec. Mstr. June 7, 2011). Accordingly, the undersigned will use the requested hourly rates to calculate an award.

b. Hours Reasonably Expended

The lodestar approach requires that the reasonable hourly rate be multiplied by the number of hours “reasonably expended on the litigation.” Avera, 515 F.3d at 1347–48 (quotation and citation omitted). Counsel must submit fee requests that include contemporaneous and specific billing entries, indicating the task performed, the number of hours expended on the task, and who performed the task. See Savin ex rel. Savin v. Sec’y of HHS, 85 Fed. Cl. 313, 315–18 (Fed. Cl. 2008). Counsel must not include in their fee request hours that are “excessive, redundant, or otherwise unnecessary.” Saxton, 3 F.3d at 1521 (quoting Hensley v. Eckerhart, 461 U.S. 424, 434 (1983)). It is “well within the special master’s discretion to reduce the hours to a number that, in [her] experience and judgment, [is] reasonable for the work done.” Id. Furthermore, the special master may reduce hours sua sponte, apart from objections raised by respondent and without providing petitioner notice and opportunity to respond. See Sabella v. Sec’y of HHS, 86 Fed. Cl. 201, 208–09 (Fed. Cl. 2009).

Respondent has a number of specific objections to items in petitioner’s fee application, which the undersigned will address in turn. Respondent contends that petitioner’s former counsel, the Homer firm, billed excessively because six attorneys and an unknown number of law clerks and paralegals worked on the case. Opp’n 17. This practice resulted in hours billed

for multiple attorneys attending case meetings, reviewing the case file, and communicating internally via case memos. In response, petitioner argues that it is petitioner's counsel, not respondent, who should determine how to prosecute the case. Reply 16. Moreover, petitioner states that collaboration among numerous counsel is the longstanding practice of the firm. Reply 17–19.

The undersigned finds the hours billed for internal firm communications to be excessive and redundant. While attorneys in a firm may choose to consult with their colleagues and solicit their opinions, it is not reasonable to bill for each attorney's time. This is especially true when six different attorneys and an unknown number of law clerks and paralegals are working on the case, resulting in duplicative work and incredible inefficiency.

On May 14, 2010, two paralegals had a case meeting and billed for both paralegals' time. The additional entry is unreasonable and redundant, particularly when it is unclear why two paralegals were needed to work on the case. The undersigned reduces the award by \$21.00.

On July 21, 2010, both Ms. Ciampolillo and a law clerk billed for a case meeting to discuss "case work up." Billing for both individuals' time is excessive. The undersigned reduces the award by \$26.80, measured by the law clerk's entry.

On July 26, 2010, both Ms. Ciampolillo and a law clerk billed for a case meeting to review petitioner's affidavit. This is in addition to 1.70 hours billed by Ms. Ciampolillo for editing the affidavit and 1.2 hours billed by the law clerk for drafting the affidavit and preparing it for Ms. Ciampolillo's review. Billing for a case meeting to discuss a document for which the attorney and law clerk already billed to draft and edit is excessive. The undersigned reduces the award by \$60.00 and \$40.20 for both entries.

On July 27, 2010, both Ms. Ciampolillo and a law clerk billed for a case meeting to discuss revisions to the petition. This is in addition to the 4 hours the law clerk spent drafting the petition, 0.3 hours Ms. Ciampolillo spent drafting a skeleton petition, and 0.1 hours Mr. Conway spent editing the petition. Billing for a case meeting to discuss the document on top of these other charges is excessive. The undersigned reduces the award by \$40.00 and \$26.80 for both entries.

On July 29, 2010, Ms. Ciampolillo, a paralegal, and a law clerk each billed 0.3 hours for a case meeting where they discussed missing medical records from a pediatrician. It is duplicative to charge both for a paralegal's time and a law clerk's time on this matter. The undersigned reduces the award by \$31.50, measured by the paralegal's entry.

On August 11, 2010, Ms. Ciampolillo and Mr. Homer each billed 0.5 hours for attending a case meeting where they discussed the pediatrician's records and the implications for the case. On the same day, Ms. Ciampolillo also billed 0.2 hours for a case memo written to Mr. Homer. It is excessive to bill both for a case meeting and a case memo memorializing that meeting. The undersigned reduces the award by \$40.00, measured by the entry for the case memo.

On August 17, 2010, Ms. Ciampolillo and a law clerk each billed 0.3 hours for a case meeting regarding an amended petition. This is in addition to 5.4 hours billed by Ms. Ciampolillo for drafting and reviewing the amended petition, 0.4 hours billed by a law clerk revising the amended petition, and 0.6 hours spent by Mr. Homer revising the amended petition. On August 23, 2010, Ms. Chin-Caplan and Mr. Homer each billed 0.6 hours for a case meeting in which they discussed the amended petition. Mr. Homer also performed a final edit of the amended petition on September 2, 2010, billing 0.3 hours. These entries demonstrate that three attorneys and one law clerk each billed for discussing, drafting, reviewing, and revising an amended petition. It is unclear whether each person's input was necessary to draft the amended petition. This redundancy, however, resulted in 8.5 hours billed among four people for a total of \$1,863.80 in fees, which is excessive. The undersigned reduces the award by \$60.00 and \$40.20 for the August 17, 2010 case meeting, and \$53.60 for the law clerk's revision on August 20, 2010 which, based on the billing entries, had to be rewritten by Mr. Homer and Ms. Ciampolillo later that day.

On September 21, 2010, Ms. Fashano and a paralegal each billed 0.1 hours for a case meeting in which they discussed requests for missing medical records. The paralegal also billed 0.1 hours on September 21, 2010 for reviewing a case memo from Ms. Fashano regarding outstanding medical records. This entry is redundant. The undersigned reduces the award by \$10.50 for the paralegal's review of the case memo.

On December 14, 2010, two paralegals each billed 0.1 hours for a case meeting in which they discussed the status of the autopsy slides. It is redundant to have two paralegals working on the same issue, here obtaining the autopsy slides. The undersigned reduces the award by \$10.50 for one of the paralegal's entries.

On January 6, 2011, Ms. Chin-Caplan and a paralegal each billed 0.2 hours for a case meeting in which they discussed an expert report. This is in addition to 0.1 hours billed by the paralegal for drafting e-mails to the expert and 0.3 hours billed by Ms. Chin-Caplan for e-mailing the expert. It is redundant to have a paralegal draft an e-mail, have Ms. Chin-Caplan send the e-mail, and then bill for both individuals' time discussing the matter in a case meeting. The undersigned reduces the award by \$21.00 for the paralegal's case meeting entry.

On January 7, 2011, Ms. Chin-Caplan and Ms. Ciampolillo each billed 0.1 hours for a case meeting in which they discussed the expert's opinion. On January 19, 2011, they each billed 0.2 hours for another case meeting in which they discussed the expert's opinion. Although respondent objects to these entries, at this point in the case, it appears that counsel was deciding whether to withdraw from the case. On January 21, 2011, Mr. Conway and Ms. Ciampolillo drafted a letter to the client and a paralegal prepared a CD and the case materials to send to the client. It was reasonable for Ms. Chin-Caplan and Ms. Ciampolillo to take extra time to confer on the important decision whether to withdraw. The undersigned will not reduce the award for these entries.

Respondent also contends that the firm billed excessively for preparing and filing the skeleton and amended petitions and petitioner's affidavit. The undersigned already reduced the award for time spent on the amended petition above. Concerning the affidavit, the firm billed for

the following from July 2010 to August 2010: 2.0 hours spent by a law clerk drafting the affidavit on July 23; 0.2 hours spent by a law clerk revising after speaking to the client on July 23; 0.2 hours spent by Ms. Ciampolillo editing the affidavit after speaking with the client on July 23; another 1.0 hour spent by the law clerk finishing the affidavit on July 26; another 1.5 hours spent by Ms. Ciampolillo editing the affidavit on July 26; a case meeting attended by a law clerk and Ms. Ciampolillo, billing 0.3 hours each, in which they discussed the edits to the affidavit on July 26 (the undersigned reduced the award for these entries above); 0.3 hours spent by a law clerk on the phone with the client regarding the affidavit on July 26; 0.1 hours spent by Mr. Homer editing the affidavit on July 28; a case meeting attended by Ms. Ciampolillo and Mr. Homer, billing 0.5 hours each, in which they discussed the affidavit on August 11; 0.2 hours spent by Ms. Ciampolillo writing a case memo to Mr. Homer about symptoms noted in the affidavit on August 11 (the undersigned reduced the award for this entry above); 0.3 hours spent by a law clerk drafting a letter to the client and attaching the affidavit on August 11; 0.2 hours spent by a law clerk calling the client regarding the affidavit on August 11; and 0.1 hours spent by a law clerk reviewing the signed affidavit after the client returned it.

In total, three people (possibly more depending on the number of law clerks) at the firm spent 7.7 hours preparing the client's affidavit and billed \$1,309.60 in fees. On September 3, 2010, petitioner filed two documents: an affidavit signed by Ms. Hiland describing her daughter's death and an affidavit in which Ms. Hiland attested that there had been no civil action or prior damages award compensating her for Lillyen's death. The former is two pages, and the latter is one.

Understandably, an affidavit will undergo revision and need adjustments as an attorney learns information from the client. Billing nearly eight hours among three people to draft a total of three pages, however, is patently unreasonable. In addition to the reductions above, the undersigned reduces the award by \$402.00 for three hours spent by a law clerk on July 23 and July 26, drafting and finishing the affidavit, which Ms. Ciampolillo apparently rewrote when she billed 1.5 hours at a cost of \$300.00 editing the affidavit on July 26.

Respondent objects to the time spent reviewing the one-page VAERS report, which is petitioner's exhibit 8. Opp'n 19–20. On June 3, 2010, a paralegal spent 0.1 hours reviewing the VAERS report and updating the file. On June 10, 2010, a paralegal spent 0.2 hours updating "Stage 2 with Ex. 8" and updating Mr. Homer. On June 11, 2010, Mr. Homer spent 0.3 hours reviewing the updated file. This work does not appear duplicative, and it is a relatively small amount of time. The undersigned will not reduce the award for these entries.

Respondent objects to 0.7 hours spent for administrative tasks such as locating contact information, making phone calls, and confirming the delivery of the petition via FedEx. Opp'n 20. The hours spent on these administrative tasks are reasonable, particularly in the instant case where petitioner lives in a remote location and is difficult to contact and when the petition was filed so close to the expiration of the statute of limitations. The undersigned will reimburse petitioner for this time.

Respondent objects to 0.3 hours spent by a paralegal conferring with the client about a civil action. Opp'n 20. It is reasonable to educate the client on the consequences for her claim

in the Vaccine Program if she decided to sue civilly. The undersigned will reimburse petitioner for this time.

Respondent objects to the 0.4 hours spent by Ms. Fashano and Mr. Pepper editing routine motions for an extension of time or, alternatively, respondent argues this service should be billed at a paralegal rate. Opp'n 20–21. Petitioner filed motions for extension of time on March 8, 2011, April 7, 2011, May 9, 2011, and June 8, 2011, requesting additional time while petitioner searched for additional counsel. These motions are each one-page long and are nearly identical, except for the proposed deadlines. Ms. Ciampolillo billed 0.3 hours for drafting each motion and contacting respondent. A paralegal, Ms. Fashano, or Mr. Pepper billed 0.1 hours to review each motion. A second attorney does not need to edit a boilerplate motion, which has essentially been copied and pasted by the first attorney who drafted it. The undersigned will award 0.1 hours for reviewing and filing each motion at the paralegal's rate of \$105 per hour in lieu of the hours billed by Ms. Fashano and Mr. Pepper. This results in a reduction of \$20.40 in the award.

Respondent objects to billing entries made by Mr. Homer for reviewing court orders and updating the case file, arguing that these tasks should be billed at a paralegal rate and not Mr. Homer's higher hourly rate. Opp'n 21. Mr. Homer is the counsel of record in this case and a supervising partner at the firm. It is not unreasonable for him to stay involved in the case by reading the orders resulting from status conferences and making notes in the file. There are no duplicative entries from other attorneys performing the same task, and each entry is for 0.1 hours, a small amount of time. The undersigned will reimburse petitioner for this time.

Respondent objects to 0.1 hours billed by Mr. Homer for reviewing an order on August 26, 2010 and states that no order was issued on August 26, 2010. Opp'n 21. Petitioner points out that a CM/ECF notice was entered on August 26, 2010 that a compact disc was received by the Clerk's Office on August 23, 2010. Reply 21–22 & Tab A. Respondent's objection is inapposite since, instead of an order, petitioner's counsel reviewed a CM/ECF notice; the undersigned will reimburse petitioner for this time.

Respondent objects to billing entries for exhibits and documents that were never filed in the case. Opp'n 21–22. Respondent states that Exhibits 17 and 18 were never filed; petitioner filed Exhibits 17, 18, and 19 on September 1, 2011, albeit after respondent filed her Opposition making this point. This objection is moot, and the undersigned will reimburse petitioner for the reasonable hours expended preparing and filing these exhibits.

Respondent also objects to time billed for a "DRAFT Response to Respondent's Request for additional information" on January 6, 2011 and editing that response on January 7, 2011. Opp'n 21–22. Respondent states that she never received this response. Opp'n 22. Petitioner states in her reply that she began to prepare a response to Respondent's Request for Additional Information, but did not finish it because counsel decided not to pursue the case further. Reply 23. Given this explanation, the undersigned will reimburse petitioner for this time, as well as the time spent collecting additional records which were never filed but presumably provided to petitioner when counsel withdrew and returned the case file.

In Respondent's Opposition to Petitioner's Supplemental Application for Interim Final Attorneys' Fees filed on September 13, 2011, respondent maintains her position that an interim fee award is inappropriate at this juncture in the litigation. Supp. Opp'n 2-3. In addition, respondent emphasizes that petitioner represented that the first Fee Application was her "final" fee application and now has billed an additional 12.5 hours in a supplemental fee application, proving respondent's point that interim fees produce needless collateral litigation. Opp'n 2.

In petitioner's Supplemental Application for Interim Final Attorneys' Fees, petitioner requests reimbursement for an additional 11.9 hours expended by Ms. Ciampolillo, Mr. Conway, Mr. Homer, and a paralegal for work associated with reviewing respondent's Opposition and preparing a reply. Once again, two attorneys billed 0.2 hours for attending a case meeting on August 31, 2011. Ms. Ciampolillo billed 7.2 hours for drafting the reply on September 1, 2011, and Mr. Homer billed 1.2 hours for editing the reply on the same day.

The undersigned does not consider the number of hours requested in the supplemental application to be reasonable. For her original interim fee application, petitioner submitted billing invoices, receipts, and copies of checks written by Ms. Hiland. The billing invoice submitted by the Conway, Homer & Chin-Caplan firm contained excessive and duplicative entries. The billing invoice submitted by the Buxbaum, Daue & Fitzpatrick firm (petitioner's prior counsel) was vague and unsupported. Respondent predictably filed a lengthy and detailed opposition. In turn, petitioner filed a 25-page reply and three attachments, which included documentation supporting Dr. Gill's and Mr. Daue's requested rates. Petitioner billed 10.3 hours drafting, reviewing, revising, and filing the reply and attachments, totaling \$2,208.50 in fees.

If petitioner had submitted a well-supported fee application the first time, the hours expended on the reply by three attorneys and a paralegal would not have been necessary, or at least so numerous. The undersigned will not reimburse attorneys for supplementing a poorly prepared fee application, which should have included proper supporting documentation and arguments in the first instance. Accordingly, the undersigned reduces by one-quarter the 7.2 hours expended by Ms. Ciampolillo drafting the reply on August 31, 2010 and September 1, 2010 and the 1.2 hours expended by Mr. Conway editing the reply on September 1, 2011. The undersigned reduces the award by \$365.30 from Ms. Ciampolillo's billing entries and \$100.50 from Mr. Conway's billing entries.

c. Expert Fees

Respondent objects to the request for \$1,500.00 in an expert fee for Dr. Thomas Gill, arguing that there is insufficient information submitted in the fee application to determine whether the expense is reasonable. Opp'n 22. In response, petitioner filed Dr. Gill's curriculum vitae and argues that Dr. Gill's hourly rate of \$300 is reasonable for a doctor with his experience. Reply 23-24 & Tab B.

Dr. Gill is board-certified in neuropathology (obtained in 1977), anatomic pathology (obtained in 1979), and forensic pathology (obtained in 2000). Reply Tab B. He is licensed currently in the states of California and Missouri. Id. He received an M.S. and M.D. from Oregon Health Sciences University in 1969, and has been practicing in the field of pathology since 1969. Id. The hourly rate of \$300 is a reasonable rate for an expert with his level of

experience. See Doe 21 ex rel. Doe v. Sec’y of HHS, No. 02–411V, 2011 WL 6941671, at *5 (Fed. Cl. Spec. Mstr. Oct. 26, 2011) (awarding hourly rate of \$275 for out-of-court work performed by pathologist in 2009); Doe 11 ex rel. Doe v. Sec’y of HHS, 2010 WL 529425, at *11 (Fed. Cl. Spec. Mstr. Jan. 29, 2010) (awarding \$300 hourly rate for petitioners’ expert immunologist for work performed in 2006 and 2007); Hart ex rel. Estate of Miclea v. Sec’y of HHS, No. 01-357V, 2004 WL 3049766, *6 (Fed. Cl. Spec. Mstr. Dec. 17, 2004) (listing cases in which experts were awarded hourly rate of \$300).

Respondent also objects to the number of hours expended by Dr. Gill. Opp’n 22. Dr. Gill’s invoice indicates he spent three hours reviewing the case file and conducting research for his opinion on January 8, 2011. Fee App. Tab B, at 8. On January 10, 2011, he spent two hours drafting his opinion. Id. The undersigned considers a total of five hours to review medical records and research and draft an opinion to be reasonable. The undersigned will reimburse petitioner fully for Dr. Gill’s opinion.

2. Attorney’s Fees and Costs for Buxbaum, Daue & Fitzpatrick

Petitioner requests \$2,999.35 in fees and costs for the work performed by E. Craig Daue and his paralegal before her case was referred to Conway, Homer & Chin-Caplan. Fee App. 1 & Tab C. Respondent objects to this request, contending that petitioner has not demonstrated that the hourly rates requested or the hours expended are reasonable, or that it is reasonable to compensate former counsel fully for travel time. Opp’n 22. In response, petitioner contends that the hourly rates of \$250 for an attorney and \$100 for a paralegal are not excessive in the Vaccine Program and submits an e-mail from Mr. Daue stating that \$250 per hour is his customary hourly rate. Reply 24 & Tab C.

Regarding Mr. Daue’s rate, the only evidence substantiating Mr. Daue’s hourly rate is an e-mail from Mr. Daue himself. This is not persuasive evidence. Because petitioner has submitted virtually no evidence on the issue of Mr. Daue’s hourly rate, the undersigned relies on her experience and looks to past decisions by special masters to determine a reasonable rate for work performed in 2008.⁸

Cheyenne, Wyoming is a similar legal market to Missoula, Montana where Mr. Daue works. Special masters have found the local rate for an experienced practitioner in Cheyenne, Wyoming for work performed in fall 2008 to be between \$220 and \$240 per hour. Amar v.

⁸ Under Avera, a fee award is calculated using an attorney’s local rate when the bulk of the work was performed outside of the forum and there is a very significant difference between the local rate and the forum rate. 515 F.3d at 1349. Here, Mr. Daue performed all of his work in Missoula, Montana and Kalispell, Montana. Fee App. Tab C. Comparing Mr. Daue’s requested hourly rate of \$250 for 2008 to the forum rate for 2008, \$350, see Dougherty v. Sec’y of HHS, No. 05–700V, 2011 WL 5357816, at *8 (Fed. Cl. Spec. Mstr. Oct. 14, 2011), the undersigned finds a very significant difference justifying an award based on local rates. Moreover, special masters have held that there is a very significant difference between DC rates and local rates in Cheyenne, Wyoming. See, e.g., Amar v. Sec’y of HHS, No. 06–221V, 2011 WL 6077558, at *17 (Fed. Cl. Spec. Mstr. Nov. 10, 2011); Dougherty, 2011 WL 5357816, at *11–12. Missoula, Montana is a legal market similar to Cheyenne, Wyoming. Accordingly, the undersigned finds that the Davis County exception applies and calculates Mr. Daue’s fee award using local rates.

Sec’y of HHS, No. 06–221V, 2011 WL 6077558, at *16 (Fed. Cl. Spec. Mstr. Nov. 10, 2011) (\$240 per hour); Dougherty v. Sec’y of HHS, No. 05–700V, 2011 WL 5357816, at *11 (Fed. Cl. Spec. Mstr. Oct. 14, 2011) (\$240 per hour); Masias v. Sec’y of HHS, No. 99–697V, 2009 WL 899703, at *5 (Fed. Cl. Spec. Mstr. Mar. 12, 2009), aff’d, 634 F.3d 1283 (Fed. Cir. 2011) (\$220 per hour).

Because petitioner has not provided any information on Mr. Daue’s years of experience or area of expertise, the undersigned uses the lower end of this range to determine Mr. Daue’s hourly rate. Thus, the undersigned finds Mr. Daue’s local rate for work performed in 2008 to be \$220 per hour. The undersigned awards the requested rate of \$100 per hour for Mr. Daue’s paralegal, which is a reasonable rate for work performed by a paralegal.

Regarding reasonable hours expended, Mr. Daue billed 9.1 hours, and his paralegal billed 6.6 hours. Respondent’s objection concerns the hours billed for traveling to Kalispell to meet with petitioner. Respondent argues that petitioner has not shown that it would be reasonable to compensate counsel and his paralegal for full travel time. Opp’n 22.

The Vaccine Program traditionally compensated attorneys for travel time at 50 percent of their hourly rate. See Gruber ex rel. Gruber v. Sec’y of HHS, 91 Fed. Cl. 773, 778 (Fed. Cl. 2010) (citation and quotation omitted). The Court of Federal Claims called this practice into question in Gruber, which cautioned against the use of an automatic rule when the Act requires special masters to review fee applications based on the flexible standard of reasonableness. Id. at 791. The court contemplated that a special master could award full compensation for an attorney’s travel time if presented with sufficient documentation. Id. On the other hand, the court indicated that “even an automatic 50% award may be too high for an undocumented claim, given the possibility that an attorney may use the travel time to work on another matter or not to work at all while traveling.” Id. Ultimately, the court instructed that “each case should be assessed on its own merits.” Id. (citation and quotation omitted).

Before the undersigned is a virtually undocumented claim for travel time. The only documentation submitted by petitioner substantiating Mr. Daue’s travel time is the firm invoice, which states that Mr. Daue and his paralegal each spent 6.4 hours traveling to Kalispell and meeting with the prospective client. See Fee App. Tab C. The undersigned presumes the 6.4 hours includes driving to Kalispell, meeting with Ms. Hiland, and driving back to Missoula. Petitioner does not say whether Mr. Daue and the paralegal performed any work during their travel. Because the claim is virtually unsubstantiated, and because Mr. Daue and his paralegal presumably did not spend the full 6.4 hours meeting with Ms. Hiland, the undersigned reduces these billing entries by one-half. This results in 3.2 hours billed for Mr. Daue’s time and 3.2 hours billed for the paralegal’s time for work performed on October 6, 2008.

IV. Conclusion

Using the requested hourly rates and incorporating the reductions in hours above, the undersigned calculates the following fee award for Conway, Homer & Chin-Caplan:

Fees for Conway, Homer & Chin-Caplan

Total Requested Fees and Costs in Original Fee Application	\$16,948.54
Total Requested Fees and Costs in Supplemental Fee Application	\$2,535.10
Total Reductions from Discussion Above	-\$1,370.30
Reasonable Attorneys' Fees and Costs for Conway, Homer & Chin-Caplan	\$18,113.34

Buxbaum, Daue & Fitzpatrick initially requested attorneys' fees and costs of \$2,999.35. Instead, using the hourly rate of \$220 for Mr. Daue and \$100 for his paralegal, and incorporating the reductions above, the undersigned calculates the following fee award for Buxbaum, Daue & Fitzpatrick:

Fees for Buxbaum, Daue & Fitzpatrick, PLLC			
	Hourly Rate	Hours Expended	Total
Mr. Daue	\$220.00	5.9	\$1,298.00
Paralegal	\$100.00	3.4	\$340.00
Reasonable Attorneys' Fees and Costs for Buxbaum, Daue & Fitzpatrick			\$1,638.00

Thus, the undersigned awards:

- a. **\$18,113.34**, representing reimbursement for attorneys' fees and costs. The award shall be in the form of one check made jointly payable to petitioner and Conway, Homer & Chin-Caplan, PC;
- b. **\$1,638.00**, representing reimbursement for attorneys' fees and costs. The award shall be in the form of one check made jointly payable to petitioner and Buxbaum, Daue & Fitzpatrick, PLLC; and
- c. **\$365.04**, representing reimbursement for petitioner's costs. The award shall be in the form of a check made payable to petitioner.

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.⁹

⁹ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.

IT IS SO ORDERED.

Dated: _____

Laura D. Millman
Special Master