



respondent's objections, the Court awards \$12,262.50 in attorneys' fees, which is approximately 93% percent of the amount requested. The Court also awards \$376.13 in costs.

## **I. Procedural History**

The Duncans filed their petition on July 13, 1999. At that time, they did not file any medical records. Relatively little happened in this case for several years. Although not reflected on the docket of this case, attempts to establish a structure for resolving the many cases involving the hepatitis B vaccine were made by the Office of Special Masters, counsel for many petitioners who alleged that the hepatitis B vaccine caused an injury, and counsel for respondent during some of the period of inactivity in the case.

The Duncans filed some medical records in February 2002 and additional records in July 2005. Otherwise, there was little activity in this case.

By 2006, everyone recognized that attempts to work out a global method for resolving the hepatitis B cases were not going to succeed. Thus, the collection of hepatitis B cases returned to the typical path of litigation. Several hepatitis B cases were assigned to the undersigned special master in 2006.

In 2006, the attorney for the Duncans gathered and filed additional medical records. In addition, the parties discussed resolving this case without adjudication on the merit of the dispute because Carly's history after 1999 indicated that any harm caused by the hepatitis B vaccine was neither serious nor long-lasting.

The parties' discussions were successful. The parties settled this case for \$20,000 while reserving the issue of attorneys' fees. Order, dated August 31, 2007.

On March 21, 2008, the Duncans filed an application for attorneys' fees and costs. Responsive briefing followed.<sup>1</sup> The motion is ripe for adjudication.

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<sup>1</sup> In response to petitioners' objection that respondent did not file an opposition to petitioners' motion for attorneys' fees within the allowed time, the parties are reminded that Mr. Shoemaker and Ms. McCall were both present before the undersigned special master on April 17, 2008, for a hearing in a different case. At this time, the parties discussed the fact that respondent had not filed any opposition to the motion for attorneys fees. Respondent's counsel orally requested additional time and petitioners' counsel did not object. Consequently, respondent was given until May 2, 2008, to file his opposition. Order, filed April 22, 2008.

## II. Analysis

### A. Law

Petitioners in the Vaccine Program who receive compensation are entitled to an award for their attorneys' fees and costs. 42 U.S.C. § 300aa-15(e)(1) (2006). Like other litigation, awards for attorneys' fees and costs must be reasonable.

Reasonable attorneys' fees are determined using the lodestar method – “multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.” Avera v. Sec’y of Health & Human Servs., 515 F.3d 1343, 1347-48 (Fed. Cir. 2008) (quoting Blum v. Stenson, 465 U.S. 886, 888 (1984)).

In this case, the parties have resolved one variable in this equation – the market rate for Ms. Duncan’s attorneys. See exhibit 101. The remaining variable – number of hours reasonably spent on this case – is disputed.

Quoting a decision by the United States Supreme Court, the Federal Circuit has explained some of the limits of the number of hours for which compensation may be sought.

The [trial forum] also should exclude from this initial fee calculation hours that were not “reasonably expended.” . . . Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. “In the private sector, ‘billing judgment’ is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority.”

Saxton v. Sec’y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993) (emphasis in original) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983)).

A decision by a special master to reduce the number of hours is entitled to deference because special masters are familiar with the litigation. Saxton, 3 F.3d at 1521 (reversing decision of judge of the Court of Federal Claims ruling that the special master acted arbitrarily in reducing number of hours); Guy v. Sec’y of Health & Human Servs., 38 Fed. Cl. 403, 406 (1997).

### B. Application

For ease of analysis, this litigation can be divided into three periods: first, the time from filing the petition until 2005; second, from 2006 to 2007; and third, 2008. These periods reflect

the time when relatively little was being done to advance this case, the time when the case was being prosecuted, and the time for the fee application, respectively.

**1. First Period: 1999-2005**

Before 2005, Ms. Duncan's attorney claimed to have spent a total of 21.38 hours. The total amount requested for activities during this period is approximately four thousand dollars (\$3,998.75, to be precise).

Most of the time spent in this period was for obtaining medical records. The person who was primarily working on this task was Sabrina Knickelbein, whose hourly rate was \$155.00 per hour. Almost all tasks performed by Ms. Knickelbein appear necessary and appropriate. Ms. Knickelbein obtained information from Ms. Duncan and sought records from appropriate doctors and medical facilities. Records also indicate that Ms. Knickelbein followed up on requests for records that were outstanding. Follow up activity is not unusual. The custodian of medical records sometimes requires multiple requests to obtain the medical records. Therefore, with the few exceptions discussed below, no adjustments are made to the time claimed for activities during this period.

It is, at least, arguable that the hourly rate assigned to Ms. Knickelbein's time is too high. Most of the tasks performed by Ms. Knickelbein are tasks that are commonly done by paralegals at a much lower hourly rate (perhaps between \$90-\$100 per hour). Ms. Knickelbein's hourly rate appears to be a reasonable rate for a new attorney. But, the routine process of requesting medical records does not usually call for the specialized training of an attorney.

Respondent, however, does not argue that Ms. Knickelbein's hourly rate is too high. Indeed, respondent entered into an agreement for a reasonable hourly rate for Ms. Knickelbein. See exhibit 101. The parties reached their agreement knowing that Ms. Knickelbein typically obtains medical records. The parties could have bargained for different hourly rates for Ms. Knickelbein depending upon whether the task being performed was attorney or paralegal work. However, the parties did not. Absent a compelling reason, the parties' agreement regarding hourly rates for Ms. Knickelbein will not be disregarded. Special masters, like other members of the judiciary, should promote agreements that settle disputes.

Ms. Knickelbein's training as an attorney suggests that she will conduct tasks more efficiently than a person without this advanced education. Therefore, her activities are reviewed to determine whether they took an unreasonable amount of time. The following items warrant adjustment.

#	Date	Staff	Description	Hours - Claimed	Hours - Awarded	Rate	Extra Amount
1	1/20/04	CJS	Review case with Sabrina and discuss how to proceed	1.00	0.25	\$250	\$187.50
2	1/26/04	SSK	Review file to see what needs to be done and general status of the case	1.00	0.50	\$155	\$ 77.50
3	6/25/04	CJS	Meeting re medical literature and recent decisions (½ travel time charged)	0.05	0.00	\$250	\$ 12.50
4	10/7/04	SSK	Review documents from client; prepared and sent out letter to client regarding authorization.	0.50	0.50	\$155	\$ 0.00
5	10/8/04	CJS	Review questionnaire and other info from client in IPP	1.00	0.25	\$250	\$187.50
6	10/12/04	SSK	Reviewed documents from client and two witness statements; started to prepare CIS	1.00	0.25	\$155	\$116.25
7	10/19/04	SSK	Completed CIS with additional doctor info	0.50	0.25	\$155	\$ 38.75
8	10/25/04	SSK	Reviewed file and CIS; prepared and sent out medical request letters; put provider info into TM.	1.00	1.00	\$155	\$ 0.00
9	10/25/04	SSK	Reviewed file and CIS; prepared and sent out medical request letters; put provider info into TM.	2.00	0.00	\$155	\$310.00

#	Date	Staff	Description	Hours - Claimed	Hours - Awarded	Rate	Extra Amount
10	10/11/05	SSK	Reviewed file to see the status of the case, what needs to be done, if case is ready for hearing, if can be transferred, notes to file; put information into chart	0.50	0.20	\$155	\$ 46.50
TOTAL							\$976.50

Items 1 and 2 concern review of the case by Mr. Shoemaker and Ms. Knickelbein. In January 2004, the case had barely been developed. Exhibits 1 and 2 were filed in February 2002. These exhibits totaled 15 pages. Between February 2002 and January 2004, the attorneys' time records show little substantive progress. A reasonable amount of time to spend discussing the case was probably 15 minutes (and even that amount of time seems lengthy). A reasonable amount of time for the associate to spend reviewing the case is 30 minutes. Thus, these time entries are reduced accordingly.

Item 3 is a relatively small entry, worth only \$12.50. However, this task is rejected entirely. In June 2004, the attorneys possessed only two medical records. Thus, any discussion with an expert was premature.<sup>2</sup>

Items 4 and 5 relate to review of information provided by Ms. Duncan. Ms. Knickelbein indicates that she spent 30 minutes on reviewing documents and sending out letters to obtain authorizations. This time is allowed in full. On the next day, Mr. Shoemaker indicates that he spent 60 minutes reviewing what appear to be the same documents. Mr. Shoemaker's time is reduced to 15 minutes. As the more experienced attorney, Mr. Shoemaker should delegate tasks to the more junior attorneys, such as Ms. Knickelbein. If they are both reviewing documents, then the effort is redundant and unnecessary. Furthermore, Ms. Knickelbein reviewed documents and sent out letters. Thus, her time appears reasonable, but Mr. Shoemaker's does not.

Items 6 - 9 are entries relating to Ms. Knickelbein's efforts to track information. The amount of time spent on these tasks seems excessive. When the medical records were eventually obtained, they amounted to only 11 exhibits filed in this case. Even if the information from Ms. Duncan spurred the collection of medical records, the attorneys learned in October 2004 about

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<sup>2</sup> The undersigned has previously rejected a claim for compensation for this same task. Hamrick v. Sec'y of Health & Human Servs., Fed. Cl. 99-683V, 2007 WL 4793152 \*8 (Spec. Mstr. Jan. 9, 2008).

only nine additional doctors. (The attorneys already had filed two exhibits in February 2002.) Furthermore, item 9 is eliminated because it duplicates item 8.

Item 10 is reduced. In October 2005, Ms. Knickelbein looked at the file for 30 minutes. No activity had been done on the case since July 2005 (three months earlier). No activity would be done on the case again until February 2006 (four months later). This isolated activity seems unproductive. Therefore, it is reduced to only ten minutes.

In sum, the adjustments total a reduction of \$976.50. The amount awarded is \$3,022.25 (\$3,998.75, the amount charged, minus \$976.50, the amount of the reduction).

## **2. Second Period: 2006-2007**

In 2006-07, the bulk of the substantive work was done. Ms. Duncan's attorneys claim to have spent 35.35 hours, valued at \$8,569.75. Respondent's objections concern activities in this period of time.

Respondent objects "to reimbursement for 15.9 hours (totaling \$4,770.00) of time billed by Mr. Shoemaker from February 15, 2006, through December 20, 2006, for tasks that constitute overhead, should be billed at a paralegal rate, reflect excessive inter-office communication, or are not sufficiently explained." Resp't Resp., filed May 1, 2008, at 2. Respondent provides seven examples of activities that, he contends, show that the request for attorneys' fees is unreasonable.

In this period, the following items warrant some discussions:

#	Date	Staff	Description	Hours - Claimed	Hours - Awarded	Rate	Extra Amount
1	2/15/06	CJS	Review order of 20060208 - Re reassignment to SM Moran	0.10	0.00	\$300	\$ 30.00
2	3/28/06	CJS	Review notes and email staff re deadlines, etc	0.30	0.30	\$300	\$ 0.00
3	5/5/06	CJS	Review order of 20060504 - CMECFs granted	0.10	0.10	\$300	\$ 0.00
4	5/7/06	CJS	Review order of 20060504-designating as ECF	0.10	0.00	\$300	\$ 30.00

#	Date	Staff	Description	Hours - Claimed	Hours - Awarded	Rate	Extra Amount
5	7/19/06	CJS	Prepare for status conference; status conference; memo to file; discuss with Sabrina	1.00	1.00	\$300	\$ 0.00
6	7/19/06	SSK	Discussed case with Cliff; Attended Status Conference	0.30	0.30	\$165	\$ 0.00
7	7/20/06	CJS	Review order of 20060719-setting Aug 18 deadline and email Sabrina	0.30	0.10	\$300	\$ 60.00
8	7/20/06	SSK	Reviewed order from the Court regarding Affidavit, Medical Records and Status Conference; noted deadlines on calendar	0.20	0.10	\$165	\$ 16.50
9	8/11/06	CJS	Review correspondence of 20060811- GEN SUBP- Babies Can't Wait	0.10	0.00	\$300	\$ 30.00
10	8/11/06	CJS	Review correspondence of 20060811- GEN SUBP- Rosewill OB/GYN	0.10	0.00	\$300	\$ 30.00
11	8/11/06	CJS	Review correspondence of 20060811- GEN SUBP- Amy Hardin, MD	0.10	0.00	\$300	\$ 30.00
12	8/11/06	CJS	Review correspondence of 20060811-GEN SUBP- Robert Poole, MD-L&D	0.10	0.10	\$300	\$ 0.00



#	Date	Staff	Description	Hours - Claimed	Hours - Awarded	Rate	Extra Amount
13	8/11/06	CJS	Review order of 20010807-GRANTED issuance of subpoenas	0.10	0.10	\$300	\$ 0.00
14	8/11/06	CJS	Review correspondence of 20060811- Re enclosed auths for signature	0.10	0.10	\$300	\$ 0.00
15	8/12/06	CJS	Review order of 19990716-RULE 4(a) ORDER	0.10	0.00	\$300	\$ 30.00
16	8/12/06	CJS	Review of Hep B Inquiry	0.10	0.10	\$300	\$ 0.00
17	8/12/06	CJS	Organize records, enter data and review what is necessary to obtain	3.00	2.50	\$300	\$150.00
18	8/25/06	CJS	Review correspondence 20060825 - Re request for 3 new prov address	0.10	0.10	\$300	\$ 0.00
19	8/26/06	CJS	Review file and update status and category info in TM	0.10	0.10	\$300	\$ 0.00
20	11/09/06	CJS	Review entry of appearance by Melonie McCall and change TM	0.10	0.10	\$300	\$ 0.00
21	12/11/06	CJS	Another email from Sabrina	0.10	0.10	\$300	\$ 0.00
22	11/27/06	CJS	Review pre-pay for med recs - Child Neurology Associates, PC	0.10	0.10	\$300	\$ 0.00
23	12/20/06	CJS	Review med recs payment - Child Neurology Associates PC	0.10	0.00	\$300	\$ 30.00

#	Date	Staff	Description	Hours - Claimed	Hours - Awarded	Rate	Extra Amount
24	7/03/07	RJG	rec'd & reviewed stipulation	0.50	0.30	\$215	\$ 43.00
25	7/09/07	CJS	Review 20070702 correspondence - Re Stipulation	0.10	0.10	\$310	\$ 0.00
26	7/26/07	RJG	rec'd stip back, checked it, sent it to DOJ	0.25	0.25	\$215	\$ 0.00
TOTAL							479.50

The first item concerns the review of an order reassigning the case. This order, which was signed by the Chief Special Master, reassigned 27 cases to the undersigned. The order is exactly one sentence long.

Normally, charging one-tenth of an hour to read an order (even a short order) is appropriate. However, this order differs from other others because the same order was issued in 27 cases. In some of these other cases, Mr. Shoemaker has received compensation for the reading of the other. He included a charge for reading this order in Nicks, No. 99-663V; Perrodin, No. 99-573V; Emmendorfer, No. 99-553V; and Goss, No. 99-407V. These previous awards of compensation reasonably reimburse Mr. Shoemaker for this activity. See Saxton, 3 F.3d at 1520 (recognizing that special masters may use their experience in determining reasonable attorneys' fees).

To the extent that each of the 27 cases requires a separate action, such as updating a database to reflect a reassignment, Mr. Shoemaker is not entitled to separate compensation. Merely updating a database is a clerical task. Mr. Shoemaker's hourly rate takes into account that some functions are overhead, performed by a secretary. See Town of Grantwood Village v. United States, 55 Fed. Cl. 481, 486 (2003) (reducing number of hours because some tasks were administrative); Presault v. United States, 52 Fed. Cl. 667, 681 (2002); Doe v. Sec'y of Health & Human Servs., 19 Cl. Ct. 439, 454 (1990). (If the law firm could be reimbursed for time spent on this one-sentence order, then the law firm ultimately would charge \$810.00 (27 cases \* 0.10 hours per case \* \$300 per hour). This amount is unreasonable for a single-sentence order.) Thus, because Mr. Shoemaker has been compensated in other cases, no compensation is warranted in this case.

Item 2 is an entry that respondent identified. No reduction is warranted here. As stated in the reply brief, Mr. Shoemaker, as the senior and supervising attorney, must spend some time delegating tasks and providing instructions to other attorneys. Delegation increases the

efficiency of his office and reduces the overall time spent on the case. Thus, this time is reasonable.

Items 3 and 4 both concern review of an order designating this case as one with electronic case filing. Item 4 is eliminated because it is duplicative.<sup>3</sup>

Items 5 through 8 relate to a status conference held on July 19, 2006. While Mr. Shoemaker and Ms. Knickelbein spent time preparing for the status conference, attending the status conference, and reviewing the resulting orders, some reductions are appropriate. Because both attorneys attended the status conference, there is less need for the attorneys to spend, collectively, 30 minutes on reviewing the order, which essentially memorialized what was stated in the status conference.

Items 9 through 14 are for six activities all performed on August 11, 2006. Essentially, Mr. Shoemaker received a standard order authorizing subpoenas, received authorizations from Ms. Duncan to obtain medical records, and reviewed correspondence to four medical providers. By making six entries, Mr. Shoemaker has charged one hour. This much time is not necessary. None of the tasks require much, if any, special analysis. The order granting the subpoena, for example, is a standard order. Letters written to providers are also routine. Thus, a reasonable amount of time for this process from start to finish is 30 minutes. A reduction in the amount of time to complete these collective tasks is supported by item 18. This entry concerns a request for records from three providers and Mr. Shoemaker charged only one-tenth of an hour in total. The amount of time for item 18 is more reasonable. Consequently, items 9 through 14 are reduced to bring the total time requested more in line with the reasonable entry, item 18.

Item 15 is an entry for reviewing an order from 1999. No information was supplied to explain why a seven-year old order was being reviewed. Thus, this entry is eliminated.

Item 16 is another item that respondent identified. Respondent is correct in stating that this entry "Review of Hep B Inquiry" is vague in that it fails to describe what Mr. Shoemaker was doing. Mr. Shoemaker, therefore, is encouraged to be more descriptive about his tasks. Nevertheless, this item is not reduced because Ms. Duncan's reply brief explains the nature of Mr. Shoemaker's activity.

Respondent identified item 17 as an example of when he believed that the amount of time being charged was excessive. Respondent's objection has some merit because Mr. Shoemaker, as the senior attorney, should not be the person who organizes records or enters data. These functions can be performed by either a junior attorney, a paralegal, or a legal assistant. On the other hand, Mr. Shoemaker cannot delegate all responsibilities to his associates. At some point,

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<sup>3</sup> The undersigned has previously rejected the duplication for this task. Hamrick, Fed. Cl. 99-683V, 2007 WL 4793152 \*9.

Mr. Shoemaker must, figuratively, roll up his sleeves and review the case. Therefore, the bulk of the three hours claimed for this task is awarded.

Items 19 and 20 also concern activities of Mr. Shoemaker that arguably could have been performed by a junior (and less expensive) staff member. However, Mr. Shoemaker spent only one-tenth of an hour on each task. (Item 19 is an entry for reviewing the file and updating “TM.” Item 20 is an entry for reviewing a new notice of appearance.) For small tasks, such as these two, it is difficult to evaluate whether the more efficient path is for the senior attorney to do them himself, or for the senior attorney to take some time delegating the tasks to a junior person, who would then spend some time performing the tasks. In light of the small amount of time charged, and given the fact that the tasks must be performed by someone, a reduction in the amount of time is not necessary.

Item 21 is another point raised by respondent. Respondent fairly questions the vagueness of this entry, which reads “Another email from Sabrina.” Certainly, more information would have been helpful to explain what task was being performed for these six minutes. On the other hand, other entries from this same day show that Mr. Shoemaker was working with Ms. Knickelbein about collecting records and with Ms. Gentry about settlement. Hence, the circumstances indicate that Mr. Shoemaker was working on this case for this entry. In addition, given the amount of the time charge (one-tenth of an hour), the brevity in Mr. Shoemaker’s description could be reasonable. Thus, no deduction is made.

Items 22 and 23 both concern reviewing payment to the same provider of medical records. Because these items appear to be duplicative, the second entry is eliminated.

Items 24 through 26 relate to entries for reviewing the stipulation. The time charged for entry 24 is reduced from 0.50 to 0.30. Stipulations in this program are two to three pages long and nearly all the language used in the stipulation is standard language used in stipulations in vaccine cases. The language that changes is the amount of the settlement. Thus, spending half an hour on the task of reviewing a stipulation is unreasonable. (Ms. Gentry charges 30 minutes on this task in addition to the 6 minutes charged by Mr. Shoemaker, listed in item 25.) So, the time is reduced to 0.30. This amount of time is similar to the amount of time spent in item 26, which also concerns reviewing the stipulation.

The sum of these reductions is \$490.50. The amount awarded is \$8,090.25 (\$8,569.75, the amount charged, minus \$490.50, the amount of the reduction).

### **3. Third Period: 2008**

The final period of time is in 2008, when Ms. Duncan’s attorneys prepared their application for attorneys’ fees and also the reply brief addressing respondent’s response. Two hours are claimed to have been spent on the initial application and three hours for the response. The total amount requested is \$1,150.00.

The amount requested is reasonable. Therefore, no reduction is made.

**C. Costs**

Ms. Duncan also seeks an award of the costs incurred in prosecuting her petition. Pursuant to General Order 9, Ms. Duncan states that she, herself, has incurred costs amounting to \$376.13. Ms. Duncan's attorney claims \$28.62 in costs. Respondent has not objected to either amount.

A review of the documentation indicates that it adequately demonstrates the basis for the costs incurred by Ms. Duncan. Thus, she is awarded \$376.13.

The documentation submitted with regards to a cost borne by her attorney is not adequate. Records indicate that on March 23, 2002, the law firm spent \$28.16 for Federal Express. The document does not indicate to whom the package was mailed and does not indicate what was contained in it.

This cost is rejected as not being substantiated. On February 28, 2002, petitioners filed exhibits 1 and 2. The next activity on the attorneys' time sheets was on September 23, 2002. The next activity on the court's docket was February 24, 2003. Thus, there is no evidence that any activity was being done on this case in March 2002. Without any activity, there appears to be no reason for mailing material, let alone the premium cost of using an expedited delivery service.

**III. Conclusion**

The amount of attorneys' fees is \$12,262.50 (\$3,022.25 + \$8,090.25 + \$1,150.00). The amount of costs is \$376.13. The Clerk's Office is ordered to enter judgment in accord with this decision.

IT IS SO ORDERED.

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