

A. Reasonable Hourly Rate

1. *Mr. Andrew Dodd*

Petitioner requests an hourly rate of \$225.00 per hour for counsel and \$75.00 per hour for paralegal work. Fee petition at p. 2. Respondent objects to the hourly rates and suggests that \$150.00 for counsel and \$45.00 for his paralegal are fair rates in this matter. Resp. Obj. at 4-5.

As support for his requested hourly rate, petitioner's counsel, Andrew Dodd, attached the affidavits of three attorneys who practice law in California. Fee petition at Exs. 6 & 8. The affidavits attest that Mr. Dodd's hourly rate is fair and reasonable considering his experience in the pharmaceutical products litigation area. Fee petition at Ex. 6 p. 143, 145. Mr. Dodd also cites to a number of Vaccine Act cases in which he has been awarded an hourly rate of \$225.00 due to his experience and reputation. Fee petition at FN 6. In addition, Mr. Dodd provided a survey referencing that the hourly billing rate for senior partners in area firms is \$275.00 per hour. Fee petition at Ex. 9. It should be noted, however, that Mr. Dodd is a sole practitioner. The survey used to justify his rate is based upon large firms which bill between \$230.00 and \$425.00 an hour. Medium sized firms (63 attorneys) in the same survey charge between \$125.00 and \$175.00 an hour. Fee petition at Ex. 9.

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. Edgar v. Secretary of HHS, 32 Fed. Cl. 506, 509 (1994); Anaya v. Secretary of HHS, No. 91-284V, 1993 WL 241433 at *1 (Fed. Cl. Spec. Mstr. June 17, 1993). Higher hourly rates are only granted because some attorneys' experience serves to minimize the number of hours expended in Vaccine Act cases. Gill v. Secretary of HHS, Nos. 90-85V, 90-912V, 1991 WL 208851 at *3 (Cl. Ct. Spec. Mstr. Sept. 25, 1991).

Although I have awarded Mr. Dodd an hourly rate of \$225.00 in the past for cases in which he was involved in entitlement proceedings, circumstances in this matter compel me to revisit that rate, at least with respect to this particular case. Mr. Dodd concedes that this matter was a case of first impression for him since it was the first post-Act case that he has participated in to any great length. Fee petition at p. 10, 12. He also stated that this case was "intense, complex and very challenging, factors resulting in a substantial expenditure of time" Fee petition at p. 12. Although Mr. Dodd is an experienced litigator under the Vaccine Act, his limited experience in post-Act damages cases has apparently driven up considerably the number of hours he expended on this case, as will be discussed *infra*. As noted, top hourly rates are reserved for those attorneys who, because of their experience, can *minimize* the number of hours expended in a particular case. I find, therefore, that based upon the above considerations and my experience under the Program, \$200.00 per hour is a reasonable hourly rate for Mr. Dodd in this case.

2. *Mrs. Scotti*

Petitioner also requests compensation for paralegal time expended in this matter by Mrs. Scotti. Petitioner states that Mrs. Scotti has previously been awarded a rate of \$45.00 per hour, but requests an increase to \$75.00 per hour due to her five years of experience in Vaccine Act cases. As support for the hourly rate requested, petitioner submitted an affidavit of a paralegal in the Torrance, California area which attests that experienced paralegals are reasonably billed at one-third the hourly rate of their supervising attorney. Fee petition at Ex. 5 p. 140-141.

Paralegal rates awarded under the Program have varied markedly depending on differing factors. Paralegals in similar geographic areas have been awarded hourly rates between \$55.00 and \$65.00 per

hour. See e.g., Higgins v. Secretary of HHS, No. 92-313V, 1993 WL 93920 at *1 (Fed. Cl. Spec. Mstr. March 17, 1993) (awarding \$55 per hour for a Chicago, Illinois paralegal); Ruocco v. Secretary of HHS, No. 90-1130V, 1993 WL 544503 at *1 (Fed. Cl. Spec. Mstr. Dec. 22, 1993) (awarding \$65.00 per hour for a Boston, Massachusetts paralegal). In the past, I have awarded Mr. Dodd's paralegal an hourly rate of \$45.00. Anttila v. Secretary of HHS, No. 90-1004V, 1992 WL 357804 at *1 (Fed. Cl. Spec. Mstr. Nov. 3, 1992). This rate is at the lowest end of rates awarded paralegals under the Program. Considering the geographic area in which Mr. Dodd practices and other rates awarded paralegals under the Program, I find \$60.00 per hour for Mrs. Scotti's services is reasonable in this matter.

B. Reasonable Number of Hours

Petitioner requests 461.9 hours of attorney time for Mr. Dodd and 57.6 hours of paralegal time for Mrs. Scotti. ⁽²⁾

Fee petition at p. 2. Respondent objects to the number of hours requested by petitioner in this matter as excessive. Resp. Obj. at 5.

The rules promulgated by this forum are intended to facilitate "less-adversarial, expeditious, and informal" proceedings, 42 U.S.C.A. § 300aa-12(d)(2) (West Supp. 1995), Vaccine Rule 3(b), and they are designed to promote prompt and efficient resolution of Program claims. Vaccine Rule 1. The Vaccine Act and the Vaccine Rules require the parties to work together to narrow the issues and focus the controversy. On the other hand, in certain cases, the contentious nature of the proceedings actually drives up, rather than diminishes, the number of hours of attorney time in a particular case.

The undersigned notes, as an initial matter, that as far as can be determined, no attorney has been awarded fees for more than 300 hours of attorney time in a post-Act case. See Edgar v. Secretary of HHS, No. 90-711V, 1994 WL 256609 (Fed. Cl. Spec. Mstr. May 27, 1994) (a post-Act damages case in which petitioner requested 518.9 hours of attorney time and special master awarded 300 hours) *aff'd* 32 Fed. Cl. 506 (Dec. 20, 1994); Wasson v. Secretary of HHS, No. 90-208V, 1992 WL 26662, (Cl. Ct. Spec. Mstr. Jan. 2, 1992) *aff'd* 988 F.2d 131, 1993 WL 18492 (Fed. Cir. Jan. 29, 1993) (in a post-Act damages case of "moderate difficulty" special master awarded 100 hours after petitioners requested 698.50 hours of attorney time).

Respondent raises a number of objections to the hours claimed by petitioner's attorney. Respondent first objects to the number of hours Mr. Dodd spent prior to the filing of the petition in this matter. Resp. Obj. at p. 7. Several hours claimed by Mr. Dodd in preparation for filing the petition were spent on tasks that could have easily been performed by his paralegal. ⁽³⁾ Respondent further objects to the 1.4 hours Mr. Dodd spent preparing a FOIA request. Resp. Obj. at 13. The undersigned agrees that petitioner has provided no reasonable justification for this request.

Respondent also objects to time spent by Mr. Dodd on "unnecessary litigation." Resp. Obj. at 8. Respondent offers several examples where Mr. Dodd objected to requests made by respondent, such as an independent medical evaluation and a supplemental nursing assessment, which requests, according to respondent, are usually granted by the special masters in damages cases. Resp. Obj. at 8. Respondent also objects to the time spent by Mr. Dodd preparing status updates, writing letters, retrieving medical records, and reviewing the same. Resp. Obj. at 9. Respondent cites to several instances in which the special master admonished Mr. Dodd that excessive use of written status reports and updates is not reasonable as it wastes the court's time and resources. Resp. Obj. at 9. Respondent also asserts that Mr. Dodd spent much of his time on paralegal tasks and secretarial work which should be reduced to a paralegal rate or disallowed altogether. Resp. Obj. at 10-12.

Respondent further objects to the amount of time Mr. Dodd spent on legal research in this matter, claiming that this is considered an overhead cost which benefits Mr. Dodd more than it does his client. Resp. Obj. at 12-13. Mr. Dodd admits that he spent a great deal of time on researching post-Act case issues as well as following the changes in the applicable law to establish himself on the "learning curve." Fee petition at 10-11. Counsel stated that the information he learned during this case will be helpful to him on future post-Act cases. Fee petition at p. 12. The undersigned notes that while attorneys do have an obligation to know the law, they also have an obligation not to bill for excessive amounts of research.

When determining the number of hours which were reasonably expended, the court must "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." Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). A special master may rely upon her own experience under the Program as well as her experience with counsel in each case to make a determination of a reasonable number of attorney hours expended in a particular matter. Wasson v. Secretary of HHS, 24 Cl. Ct. 482, 483 (1991). In this case, although respondent conceded that petitioner was entitled to compensation, respondent fervently contested virtually all issues with respect to the amount of the damage award requested. Indeed, this case was one of the most contentious I have presided over during my tenure as a special master in this Program. However, after a thorough review of the fee petition, I find that the number of hours claimed by petitioner's counsel is nevertheless excessive. Many of the hours Mr. Dodd spent were for routine, simple tasks which should have been more appropriately delegated to a paralegal.⁽⁴⁾

"A request for attorneys' fees and expenses should not result in another extensive proceeding, and the special master is given reasonably broad discretion when calculating such awards. Inter alia, the special master may rely upon both her own general experience and her understanding of the issues raised." Wasson v. Secretary of HHS, 24 Cl. Ct. 482, 483 (1991) (citations omitted). In my own experience, the case of Stotts v. Secretary of HHS, No. 89-108V, 1990 WL 300674 (Cl. Ct. Spec. Mstr. June 3, 1990), comes closest to matching the proceedings in the instant case. It, too, was a post-Act damages case involving a child who was even more severely damaged than William Plott. To my knowledge, it was the first post-Act damages decision and involved two lawyers representing petitioner from a well-established Los Angeles law firm. As in this case, the proceedings were contentious and protracted. In the fee decision, Stotts v. Secretary of HHS, No. 89-108V (Cl. Ct. Spec. Mstr. February 10, 1993) (unpublished) (attached hereto), I awarded petitioner's counsel a total of 224.82 hours for the services of two attorneys in the matter. (A total of 377.5 hours had been claimed).

After carefully considering the history of the proceedings in this matter, I find that petitioner has failed to support the number of hours claimed to be expended on this case. However, to go through each and every entry to assess its reasonableness would be fruitless, as in many cases Mr. Dodd, in his time records, has lumped together several tasks, rendering it impossible to assess the reasonableness of any particular task. Therefore, after considering the proceedings in this matter, as well as the fee petition, respondent's objections, and fees awarded under this Program in other cases, I find that petitioner should reasonably be compensated for 300 hours of attorney time in this matter. In my view this number of hours is still more than reasonable to compensate petitioner's attorney. See Stotts v. Secretary of HHS, No. 89-108V (Cl. Ct. Spec. Mstr. February 10, 1993) *supra*.

Finally, Respondent objects to numerous hours spent by Mr. Dodd's paralegal, Mrs. Scotti, claiming that most of her time was spent on secretarial tasks and is not reimbursable. Resp. Obj. at 13. After a review of the entries, the undersigned finds that 4.8 hours⁽⁵⁾ of Mrs. Scotti's time was spent making tabs, a task I consider to be secretarial in nature. This amount shall be disallowed. Furthermore, Mrs. Scotti spent

6.5 hours⁽⁶⁾ of her time copying. Again, copying is considered secretarial work and is not compensable. Accordingly, a total of 11.3 hours shall be deducted from Mrs. Scotti's time.⁽⁷⁾

II. Reasonable Costs

Petitioner may also be reimbursed for reasonable costs incurred during the proceedings under the Program. Petitioner's counsel requests a total of \$40,220.03 for costs incurred in this matter. Fee petition at p. 2, Ex. 3.

Respondent first objects to petitioner's request for reimbursement for dividers, notebooks, and other office supplies, suggesting that these items are part of the attorney's overhead. Resp. Obj. at 14. Petitioner incurred costs totaling \$241.49 for dividers, notebooks, tabs, and special mailing envelopes. Fee petition at Ex. 3 p. 82. Office expenses, such as secretarial expense, pens, pencils, note pads, binders, envelopes, etc., are not recoverable under the Program. *See, e.g., Yeoman v. Secretary of HHS*, No. 90-1049V, 1994 WL 387855 at *4 (Fed. Cl. Spec. Mstr. July 11, 1994); *Roedl v. Secretary of HHS*, No. 90-1994V, 1993 WL 534740 at *1 (Fed. Cl. Spec. Mstr. Dec. 10, 1993). Therefore, \$241.49 shall be disallowed.

Respondent next objects to the \$541.61 in costs petitioner incurred for use of express mail services. Resp. Obj. at 14-15. Respondent asserts that these costs are excessive and should be reduced to \$200.00. Resp. Obj. at 15. The undersigned has previously awarded reimbursement for reasonably incurred costs from the use of express mail. However, it is petitioner's burden to show that these costs were reasonable. Petitioner provides documentation for \$46.00 spent on a courier service and \$326.25 spent on federal express services. However, he provides no documentation for \$10.72 spent on U.P.S. and \$158.64 spent on U.S.P.S. (Non-routine postal charges - 1 day mail service). Fee petition at 82-83, Exs. I, J. I simply cannot compensate petitioner for undocumented, unexplained charges. Therefore, a total of \$169.36 shall be disallowed.

Finally, respondent objects to the petitioner's expenses with regard to her experts in this matter. Resp. Obj. at 15. Respondent first objects to petitioner's life care planner's fees. Resp. Obj. at 15. Petitioner requests a total of \$24,219.78 for 238.2 hours plus expenses for services by her life care planner, Jan Roughan. Fee petition at Ex. 3 p. 81 and Tab D. Ms. Roughan charged \$100.00 to \$125.00 per hour for life care planning services, \$45.00 per hour for "administrative" work, and \$125.00 per hour for "expert" services. Fee petition at Ex. 3 p. 92 Tab D. On June 1, 1995, Ms. Roughan increased her rate for deposition testimony from \$125.00 to \$250.00 per hour.⁽⁸⁾

The special masters have consistently found it inappropriate to allow a medical expert to increase his or her fee for trial testimony. *Salimian v. Secretary of HHS*, No. 91-1140V, 1992 WL 185710, *3 (Cl. Ct. Spec. Mstr. July 17, 1992); *Gonzalez v. Secretary of HHS*, No. 91-905V, 1992 WL 92200, *3 (Cl. Ct. Spec. Mstr. Apr. 10, 1992). I see no reason to deviate from this practice for life care experts. Furthermore, petitioner has not adequately explained the increase in Ms. Roughan's rates, nor the difference between her "expert" services and her "life care planning" services. It is petitioner's burden to provide a complete explanation of all costs and rates. Petitioner has failed to meet this burden in this instance. Therefore, I find a rate of \$100.00 per hour is reasonable for all of Ms. Roughan's services in this matter.

Respondent asserts that 10 hours spent by Ms. Roughan should be disallowed because this time was spent preparing a supplemental life care plan which was stricken from the record. Resp. Obj. at 16, FN 12.⁽⁹⁾ Respondent also objects to 41.2 hours spent by Ms. Roughan on administrative tasks, as well as

miscellaneous expenses she charged to petitioner. Resp. Obj. at 16. Respondent further objected to \$456.08 in expenses charged by Ms. Roughan. Resp. Obj. at 16. Specifically, respondent objects to \$131.90 for "Fax/Fedex", \$238.76 in phone charges, and \$1.50 for postage, asserting that these items are part of overhead. Resp. Obj. at 16. Respondent also objects to \$16.65 in copying costs, \$47.11 for "medical records", and \$20.16 for mileage in excess of \$.26 per mile. *Id.* Respondent asserts that the total amount of reimbursement for Ms. Roughan should only be \$19,194.70 for 187 hours of expert services plus costs. Resp. Obj. at 16-17, FN 13.

Since petitioner's supplemental life care plan was stricken from the record, I find a reduction of 10 hours spent by Ms. Roughan on this task to be appropriate. Furthermore, I can only assume that time spent by Ms. Roughan on "administrative tasks" was related to secretarial work which should be absorbed in her expert fee or attributed to overhead. Just as attorneys may not be compensated for time spent performing secretarial duties, experts, likewise, should not be compensated for such time. Since petitioner does not provide the cost per page for photocopies, I cannot assess the reasonableness of these charges. Likewise, petitioner offers no explanation for a \$47.11 charge for "medical records". Without an adequate explanation of these charges, I am unable to determine whether they were reasonably incurred. Ms. Roughan's bill shall also be reduced by \$47.11 for mileage in excess of \$.26 per mile. However, I find that the charges for faxing, telephone calls, and postage are reasonable in this matter. The Vaccine Program is unique in that it is a national program, requiring petitioners frequently to contact others across the country. I find that reasonable postage, facsimile, and telephone charges are compensable in this matter. Therefore, petitioner shall be reimbursed a total of \$19,566.86 for services provided by Mrs. Roughan.

Respondent next objects to the hourly rate charged by petitioner's expert, Dr. Greisbach. Resp. Obj. at 17. Dr. Greisbach billed \$300.00 per hour for 16.25 hours for her services from January 1993 through January 1994. Fee petition at Ex. 3 p. 81 and Tab C. However, in May 1994, Dr. Greisbach increased her rate to \$350.00 per hour without any explanation for the increase. Dr. Greisbach also charged \$400.00 per hour for her testimony at the hearing in this matter. *Id.* Respondent asserts that \$200.00 is a reasonable hourly rate for all of Dr. Griesbach's services. In the past, I have found \$300.00 to be a reasonable hourly rate only in certain circumstances for highly qualified medical experts. This is such a circumstance. However, as noted above, it is inappropriate for medical experts to increase their hourly fee for testimony at a hearing. Furthermore, petitioner offers no explanation for the increase in Dr. Greisbach's hourly rate. Therefore, I find \$300.00 per hour for all of Dr. Greisbach's services to be reasonable in this matter, for a total of \$4,875.00.

Lastly, respondent objects to the \$125.00 hourly rate charged by IBAR Settlement Company for 16.50 hours for Dr. Schultz's economic analysis. Resp. Obj. at 18. Respondent asserts that \$100.00 is a reasonable hourly rate for these services. I find respondent's objection to be without merit. Petitioner shall be reimbursed for this expense.

After a thorough review of the fee petition, I find the following amounts to be reasonable in this matter:

Mr. Dodd 300 hours @ \$200.00/hr. = \$60,000.00

Mrs. Scotti 46.3 hours @ \$60.00/hr = \$2,778.00

Costs \$30,079.09

Petitioner's cost \$3,952.18

TOTAL \$96,809.27

Accordingly, pursuant to Vaccine Rule 13, petitioner is hereby awarded a total of \$96,809.27 in attorneys' fees and costs.⁽¹⁰⁾ The Clerk is directed to issue two checks. The first check, in the amount of \$3,952.15, shall be made payable to petitioner. A second check, in the amount of \$92,857.12, shall be made co-payable to petitioner and petitioner's counsel. The Clerk of the Court is directed to enter judgment in accordance herewith.⁽¹¹⁾

A copy of this order was faxed to the parties.

IT IS SO ORDERED.

Elizabeth E. Wright

Special Master

1. The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, 42 U.S.C.A. § 300aa-1 *et seq.* (West 1991 & Supp. 1996).
2. The undersigned notes that Mr. Dodd's time records prior to June 1996 are recorded in "blocks" containing multiple tasks, which make it impossible for the undersigned to determine the exact amount of time spent on each task. This method of recording time also is unhelpful in determining if Mr. Dodd's time expended was reasonable.
3. For example, on a 7/6/92 entry, Mr. Dodd spent part of 5.3 hours preparing a table of contents.
4. For example, Mr. Dodd spent several hours writing numerous drafts of one letter or status report. See e.g., entries dated 3/3/93; 3/4/93; 5/20/93; 6/15/94. Furthermore, Mr. Dodd spent an excessive amount of his own time preparing "extensive" letters to his client. See e.g., entries dated 12/21/92; 2/18/93; 3/3/93; 3/4/93; 12/2/93. It seems that in one instance Mr. Dodd both spoke to his client and wrote an "extensive" letter to his client on the same day. See entry dated 1/30/93. Mr. Dodd also sent two letters to his client two days in a row, the second letter being sent after nothing apparently transpired from the time the first letter was sent. See entries dated 3/3/93 and 3/4/93. Mr. Dodd also spent an excessive amount of time reviewing orders, medical records, and the file in general. See e.g. entries dated 2/26/93; 4/9/93; 5/3/93; 5/6/93; 5/17/93; 5/20/93; 6/4/93; 8/18/93; 9/8/93. Also of note, Mr. Dodd spent part of 1.3 hours preparing a simple, one-page notice of election to remain in the Program. See entry dated 10/7/93.
5. Again, petitioner's paralegal bills for hours in time blocks which make it difficult to determine the specific amount of time spent on each task. Therefore, I have divided the time for each entry by the number of tasks on that date. The 4.8 hours was determined by deducting hours from the following entries: 8/25/92 - .5 hours; 12/22/92 - .3 hours; 1/8/93 - .1 hours; 1/11/93 - .1 hours; 2/12/93 - .3 hours;

2/26/93 - .2 hours; 5/21/93 - .2 hours; 5/21/93 - .2 hours; 9/14/93 - .5 hours; 12/9/93 - .1 hours; 1/13/94 - .3 hours; 1/19/94 - .7 hours; 4/28/94 - .1 hours; 5/6/94 - .75 hours; 8/29/94 - .2 hours; 9/13/94 - .2 hours; 9/20/94 - .1 hours; 4/24/95 - .1 hours; 5/9/95 - .3 hours; 5/9/95 - .3 hours.

6. These hours were deducted from the following entries: 7/6/92 - .4 hours; 12/4/92 - .3 hours; 12/22/92 - .3 hours; 1/19/93 - .9 hours; 2/12/93 - .6 hours; 2/22/93 - .1 hours; 2/23/93 - .1 hours; 2/26/93 - .2 hours; 3/3/93 - .2 hours; 3/4/93 - .6 hours; 3/12/93 - .1 hours; 3/17/93 - .2 hours; 3/25/93 - .1 hours; 3/26/93 - .1 hours; 5/21/93 - .1 hours; 7/14/93 - .2 hours; 10/21/93 - .2 hours; 10/25/93 - .1 hours; 12/3/93 - .5 hours; 12/9/93 - .1 hours; 1/6/94 - .2 hours; 2/2/94 - .1 hours; 5/6/94 - .3 hours; 11/9/94 - .3 hours; 11/15/94 - .2 hours; 1/29/95 - .1 hours; 4/24/95 - .1 hours; 2/23/96 - .1 hours; 5/31/96 - .1 hours; 6/10/96 - .1 hours; 6/11/96 - .1 hours; 7/2/96 - .1 hours; 7/8/96 - .1 hours; 10/21/96 - .1 hours; 11/19/96 - .2 hours; 11/25/96 - .1 hours.

7. Respondent also objected to time spent by Mrs. Scotti on filing documents with the court. Resp. Obj. at 14, Ex. B. Since the court requires petitioner to file all pertinent information with the court, the time spent by Mrs. Scotti on filing the documents is reasonable.

8. However, in a letter dated June 6, 1994, Ms. Roughan gave a \$3,285.00 discount to petitioner. Fee petition Ex. 3 Tab D.

9. Respondent also objected to the 2.2 hours Mr. Dodd spent reviewing and filing the supplemental life care plan. Resp. Obj. at 8. The undersigned considered this objection in her analysis of the reasonableness of the hours spent by Mr. Dodd in this matter.

10. This amount is intended to cover all legal costs. This award encompasses all charges by the attorney against a client, "advanced costs" as well as fees for legal services rendered. It should be noted that Section 15(e)(3) prevents an attorney from charging or collecting fees (including costs) which would be in addition to the amount awarded herein. See generally Beck v. Secretary of HHS, 924 F.2d 1029 (Fed. Cir. 1991).

11. The parties may expedite entry of judgment by filing notices renouncing their right to seek review in this matter.