In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-584V

(Filed: December 13, 2010)

TO BE PUBLISHED[1]

FRED KING and MYLINDA KING, parents of Jordan King, a minor,	*	Vaccine Act Interim Costs; Fees for Omnibus Proceedings; Expert Costs; Expenditures For Original Research Articles; Dr. Mark Geier.
Petitioners,	*	
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

DECISION AWARDING INTERIM COSTS

HASTINGS, ***Special Master***.

In this case under the National Vaccine Injury Compensation Program (hereinafter "the Program"), the petitioners seek, pursuant to 42 U.S.C. § 300aa-15(e),[2] an interim award for attorneys' costs incurred in the course of the petitioners' attempt to obtain Program compensation. After careful consideration, I have determined to grant the request, in part, at this time, as it pertains to certain of the PSC "shared costs," for the reasons to be set forth below.

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[1] Because I have designated this document to be published, each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b); 42 U.S.C. § 300aa-12(d)(4)(B). Otherwise, this entire document will be available to the public.

[2] The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (2006). Hereinafter, for ease of citation, all "§" references will be to 42 U.S.C. (2006).

I

BACKGROUND

This case concerning Jordan King is one of more than 5,000 cases filed under the Program in which it has been alleged that a child's disorder known as "autism," or an autistic spectrum disorder, was caused by one or more vaccinations. A detailed history of the controversy regarding vaccines and autism, along with a history of the development of the 5,000 cases in this court, was set forth in my Decision filed in his case on March 12, 2010, and will not be repeated here. However, a very brief summary of that history follows.

A. The Omnibus Autism Proceeding

Beginning in 1998, certain theories were raised suggesting that the measles-mumps-rubella ("MMR") vaccine, and/or a mercury-based preservative known as "thimerosal" contained in several childhood vaccinations, might be causing the neurodevelopmental disorder known as autism. The emergence of those theories led to a large number of claims filed under the Program, each alleging that an individual's autism, or a similar disorder, was caused by the MMR vaccine, by thimerosal-containing vaccines, or by both. To date, more than 5,000 such cases have been filed with this court, and most of them remain pending.

To deal with this group of cases involving a common factual issue – *i.e.*, whether these types of vaccinations can cause autism – the Office of Special Masters (OSM) devised special procedures. On July 3, 2002, the Chief Special Master, acting on behalf of the OSM, issued a document entitled *Autism General Order #1,*[3] which set up a proceeding known as the Omnibus Autism Proceeding (OAP). In the OAP, a group of counsel selected from attorneys representing petitioners in the autism cases, known as the Petitioners' Steering Committee (PSC), was charged with obtaining and presenting evidence concerning the *general issue* of whether vaccines can cause autism, and, if so, in what circumstances. The evidence obtained in that general inquiry was to be applied to the individual cases. *Autism General Order #1*, 2002 WL 31696785, at *3, 2002 U.S. Claims LEXIS 365, at *8.

Ultimately, the PSC elected to present two different theories concerning the causation of autism. The first theory alleged that the *measles* portion of the MMR vaccine can cause autism, in

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[3] *Autism General Order #1* is published at 2002 WL 31696785, 2002 U.S. Claims LEXIS 365 (Fed. Cl. Spec. Mstr. July 3, 2002). I also note that the documents filed in the Omnibus Autism Proceeding are contained in a special file kept by the Clerk of this court, known as the "Autism Master File." An electronic version of that File is maintained on this court's website. This electronic version contains a "docket sheet" listing all of the items in the File, and also contains the complete text of most of the items in the File, with the exception of a few documents that are withheld from the website due to copyright considerations or due to 42 U.S.C. § 300aa-12(d)(4)(A). To access this electronic version of the Autism Master File, visit this court's website at www.uscfc.uscourts.gov. Select the "Vaccine Info" page, then the "Autism Proceeding" page.

situations in which it was alleged that thimerosal-containing vaccines previously weakened an infant's immune system. That theory was presented in three separate Program "test cases" during several weeks of trial in 2007. The second theory alleged that the mercury contained in the thimerosal-containing vaccines can *directly affect* an infant's brain, thereby substantially contributing to the development of autism. The second theory was presented in three additional "test cases," including this *King* case, during several weeks of trial in 2008.

On February 12, 2009, decisions were issued concerning the three "test cases" pertaining to the PSC's *first* theory. In each of those three decisions, the petitioners' causation theories were rejected. I issued the decision in *Cedillo v. Secretary of HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). Special Master Patricia Campbell-Smith issued the decision in *Hazlehurst v. Secretary of HHS,* No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). Special Master Denise Vowell issued the decision in *Snyder v. Secretary of HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009).

Those three decisions were later each affirmed in three different rulings, by three different judges of the U.S. Court of Federal Claims. *Hazlehurst v. Secretary of HHS*, 88 Fed. Cl. 473 (2009); *Snyder v. Secretary of HHS*, 88 Fed. Cl. 706 (2009); *Cedillo v. Secretary of HHS*, 89 Fed. Cl. 158 (2009). Two of those three rulings were then appealed to the U.S. Court of Appeals for the Federal Circuit, again resulting in affirmances of the decisions denying the petitioners' claims. *Hazlehurst v. Secretary of HHS*, 604 F. 3d 1343 (Fed. Cir. 2010); *Cedillo v. Secretary of HHS*, 617 F. 3d. 1328 (Fed. Cir. 2010).

On March 12, 2010, the same three special masters issued decisions concerning three separate "test cases" pertaining to the petitioners PSC's *second* causation theory. Again, the petitioners' causation theories were rejected in all three cases. I issued the decision in this *King* case. *King v. Secretary of HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010). The other two decisions were *Mead v. Secretary of HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010), and *Dwyer v. Secretary of HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010). None of the petitioners elected to seek review of any of those three decisions.

B. The Request for "Interim" Costs in this Case

On November 4, 2008, the petitioners in this case filed their application for interim fees and costs. Respondent filed a response on February 6, 2009, and a number of additional materials addressing the application have been filed by both parties since that time.

In their application, petitioners sought a total of $7,202,653 for interim fees and costs. This total reflected the fact that this case was, as explained above, one of the "test cases" in the OAP. Because this was a "test case" in which the petitioners sought to present *all* of the "general causation" evidence concerning the theory that thimerosal-containing vaccines can cause autism, several different law firms participated in the development and presentation of the evidence, while

five expert witnesses prepared expert reports and testified at length for petitioners during the evidentiary hearing. The high total sought by petitioners reflects the participation of all those law firms and expert witnesses.

In addition, in this fees application the PSC lawyers also sought compensation for *several years* of work concerning the Omnibus Autism Proceeding, *prior* to the "test cases." During the period between 2002 and 2007, PSC lawyers, from a number of different firms, were engaged in extensive discovery proceedings and other preliminary matters that set the stage for the "test case" hearings in 2007 and 2008. The PSC attorneys, thus, sought compensation in this application for those years of work.

In response to this massive request for fees and costs encompassing years of work by multiple attorneys and expert witnesses, the respective parties engaged in lengthy discussions. As to several of the law firms involved, after such discussions the law firm in question reduced its claim, and the respondent withdrew its objection to that firm's claim. The parties also agreed that it made sense, in these unusual circumstances, that the overall request be separated into parts, according to the various law firms involved, with several different "interim fees" awards being made if necessary.

Accordingly, I have filed a series of interim fees decisions in this case, each decision resolving a part of the overall claim. On July 10, 2009, I issued an interim award for fees and costs attributable to the law firm primarily representing the King family, Williams Love O'Leary & Powers. On July 27, 2009, I issued an interim award for fees and costs attributable to Ed Kraus, one of the attorneys on the PSC. On September 28, 2009, I issued an interim award for fees and costs of several other law firms whose interim fees and firm-specific costs requests remained pending. The last major item was a request for $1.35 million in costs, chiefly expert witness costs, that had been *shared* among a number of PSC firms. On January 7, 2010, I issued an interim award resolving all of those "shared cost" claims, with the *exception* of the following four experts or consultants: (1) David Geier, (2) Dr. Mark Geier, (3) Dr. Robert Hirsch, and (4) Dr. Heather Young. This decision resolves the dispute regarding claimed compensation for those four experts/consultants.

II

LEGAL STANDARD

Special masters have the authority to award "reasonable" attorney's fees and costs in Vaccine Act cases. § 300aa-15(e)(1). This is true even when a petitioner is unsuccessful on the merits of the case, if the petition was filed in good faith and with a reasonable basis. (*Id*.) The determination of the amount of reasonable attorneys' fees and costs is within the special master's discretion. *Saxton v. Secretary of HHS*, 3 F.3d 1517, 1520 (Fed. Cir. 1993); see also *Shaw v. Secretary of HHS*, 609 F.3d 1372, 1377 (Fed. Cir. 2010).

Further, as to all aspects of a claim for attorneys' fees and costs, the burden is on the *petitioner* to demonstrate that the amounts claimed are "reasonable." *Sabella v. Secretary of HHS*, 86 Fed. Cl. 201, at 215 (Fed. Cl. 2009); *Hensley*, 461 U.S. at 437; *Rupert*, 52 Fed.Cl. at 686; *Wilcox*

v. Secretary of HHS, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr., Feb. 14, 2007). The petitioners' burden of proof to demonstrate "reasonableness" applies equally to *costs* as well as attorneys' fees. *Perreira v. Secretary of HHS*, 27 Fed. Cl. 29, 34 (1992), *aff'd* 33 F.3d 1375 (Fed. Cir. 1994). The petitioner is not given a "blank check to incur expenses." *Id*.

One test of the "reasonableness" of a fee or cost item is whether a hypothetical petitioner, who had to himself pay his attorney for Vaccine Act representation, would be willing to pay for such expenditure. *Riggins v. Secretary of HHS*, No. 99-382V, 2009 WL 3319818, at *3 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff'd by unpublished order* (Fed. Cl. Dec. 10, 2009), *appeal pending* (Fed. Cir.); *Sabella v. Secretary of HHS*, No. 02-1627V, 2008 WL 4426040, at *28 (Fed. Cl. Spec. Mstr. Aug. 29, 2008), *aff'd in part and rev'd in part*, 86 Fed. Cl. 201 (2009). In this regard, the United States Court of Appeals for the Federal Circuit has noted that--

> [i]n 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 Services, 3 F.3d 1517, 1521 (Fed. Cir. 1993) (emphasis in original), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433-34. Therefore, in assessing the number of hours reasonably expended, the court must exclude those "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); see also *Riggins*, 2009 WL 3319818, at *4. This is true for hours of an expert or consultant, as well as for those of an attorney. *Riggins*, 2009 WL 3319818, at *14.

Additionally, while a special master may choose to utilize a "line-by-line" analysis to analyze a fees and costs application, the special master is not *required* to do so. Depending on the circumstances of the case, the special master may find it appropriate to make a *percentage reduction* of hours, to use his or her experience to *estimate* a reasonable number of hours that it should have taken to accomplish a particular task, or to use some other method to determine a reasonable amount for a fees or costs item. *Saxton*, 3 F. 2d at 1521 (50% reduction of attorney hours approved by Federal Circuit); *Wasson v. Secretary of HHS*, 24 Cl. Ct. 482 at 484-86 (Ct. Cl. 1991), *aff'd*. 988 F. 2d 131 (Fed. Cir. 1993); *Riggins*, 2009 WL 3319818 at *4; *Jeffries v. Secretary of HHS*, No. 99-670, 2006 WL 39303710, at *8 (Fed. Cl. Spec. Mstr. Dec. 15, 2006); *Ray v. Secretary of HHS*, No. 04-184V, 2006 WL 1006587, at *10 (Fed. Cl. Spec. Mstr. Mar. 30, 2006); *Broekelschen v. Secretary of HHS*, No. 07-137, 2008 WL 5456319, at *6 (Fed. Cl. Spec. Mstr. Dec. 17, 2008); *Castillo v. Secretary of HHS*, No. 95-652V, 1999 WL 1427754, at *3 (Fed. Cl. Spec. Mstr. Dec. 17, 1999).

When a petitioner's counsel incurs *expert* costs that the attorney expects to submit to the special master as the cost of a Vaccine Act case, it is that counsel's duty to "monitor the expert's overall fees to ensure that the fees remain reasonable." *Simon v. Secretary of HHS*, No. 05-941V, 2008 WL 623833 at *2 (Fed. Cl. Spec. Mstr. Feb. 21, 2008); *Riggins*, 2009 WL 3319818, at *14. See also *Perreira v. Secretary of HHS*, No. 90-847V, 1992 WL 164436, at *4 (Cl. Ct. Spec. Mstr. June 12, 1992), *aff'd* 33 Fed. 3d 1375 (Fed. Cir. 1994) ("This court has continuously warned counsel

of their obligation to monitor expert fees.") Further, it has been noted in prior Vaccine Act cases that a petitioner's attorney "should not hesitate to bring to the court's attention for guidance any unusual fee or cost which could foreseeably be objected to as unreasonable by respondent, before such fee or cost is incurred." *Riggins*, 2009 WL 3319818, at *5. See also *Isom v. Sec'y of HHS*, No. 94-770V, 2001 WL 101459, at *4 (Fed. Cl. Spec. Mstr. Jan. 17, 2001) ("[a]ny aberrant or unforseen expenses should be brought to the Court's attention before they are incurred"); *Glaser v. Sec'y of HHS*, No. 06-746V, 2009 WL 1320964 (Fed. Cl. Spec. Mstr. April 22, 2009) (order ruling upon a petitioner's oral motion for pre-approval of an expert fee rate).

III

AN INTERIM AWARD IS APPROPRIATE

An "interim award" of costs is permissible, if appropriate under the particular circumstances, in a Program case. *Avera v. Secretary of HHS*, 515 F.3d 1343 (Fed. Cir. 2008). A detailed discussion of the appropriateness of awarding interim fees and costs in this case, and of the appropriateness of multiple interim fees and costs awards in this case, is set forth in my Decision filed on July 10, 2009 (pp. 4-5), and will not be repeated here. As noted above, respondent's counsel has represented that due to the unique nature of this *King* case as a "test case" in the Omnibus Autism Proceeding, respondent does not object to the issuance of a series of interim awards to the several law firms that participated in the presentation of evidence in this specific case.

During an unrecorded telephonic status conference on January 13, 2010, counsel for both parties reported that despite extensive discussions, the parties had been unable to resolve the issue of an appropriate award, if any, for the four experts/consultants noted above. This decision, accordingly, will address the issue of those four individuals.[4]

[4]I note that there has been considerable delay between the status conference of January 13, 2010, when I was notified by the parties that they would not be able to settle the Geier-Young-Hirsch portion of the interim fees and costs request, and the issuance of this Decision. Under ordinary conditions, I would have been able to issue this Decision much more promptly after being so notified, and I regret that I was not able to complete this Decision sooner. However, during the time period in question, I was initially engaged in the enormous task of preparing the decision in the autism "test case" which was filed as *King v. Secretary of HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mastr. March 12, 2010). Further, during the many months that it took me to complete that *King* decision, a number of other matters "stacked up" for resolution, and I needed to finish those matters before turning my attention to this Decision in recent weeks.

IV

LIST OF MOST RELEVANT DOCUMENTS FROM THIS *KING* RECORD

The record of this *King* case, of course, is vast. The documents most relevant to the adjudication of the issues to be resolved in this Decision, however, are relatively few. Those documents, upon which I have chiefly based my ruling, are as follows:

1) "Petitioners' Application for Interim Fees and Costs," filed on November 4, 2008, at Tab C, pp. 3888-91, 3896, 3972-4056, 4094-99, 4325-63 (hereinafter, "Pet. Application").

2) "Respondent's Memorandum of Law In Support of Respondent's Objections to the Fees and Costs Requested in the King Case," filed on February 6, 2009, at pp. 159-67, 172, 201-02 (hereinafter, "Resp. Memorandum").

3) "PSC Reply In Support of Interim Fee Application," filed March 27, 2009, at Tab 12 ("PSC Reply").

4) "Respondent's Sur-Response to the PSC Reply," filed June 5, 2009, at pp. 26-28, 33 ("Resp. Sur-Response").

5) "Petitioners' Supplemental Brief Re PSC Expert Costs In Interim Fee Petition," filed July 28, 2010 ("Pet. Supp. Brief").

6) "Respondent's Response to Petitioners' Supplemental Brief Re PSC Expert Costs In Interim Fee Petition," filed October 6, 2010[5] ("Resp. Response").

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[5]In addition to citing the documents listed above, filed specifically in relation to the interim attorney fees application, at times I will cite other parts of the vast record of this case. For an explanation of those citations, see the paragraphs below:

Petitioners filed, on various occasions, exhibits numbered 1 through 35. I will refer to those exhibits as Ex. 1, Ex. 2, etc. Respondent filed, on various occasions, exhibits designated as Ex. A through Ex. AAA. I will refer to those exhibits as Ex. A, Ex. B, etc.

In addition, "Tr." references will be to the pages of the *corrected* transcript of the evidentiary hearing held on May 12 through May 30, 2008. That "Revised and Corrected" transcript was filed, in multiple volumes, on October 21 to 24, 2008.

I also note that due to the large amount of medical literature filed by the parties in this case, the parties devised a special system of citation to those documents. Each party compiled a "reference list" of articles. Petitioners have styled their list as the Petitioners' Master Reference List ("PML"), and respondent's list has been dubbed the Respondent's Master List of Articles ("RML"). Petitioners filed a compact disc containing items 1 through 664 of the PML on May 6, 2008.

V

SUMMARY OF CLAIM TO BE ADJUDICATED IN THIS DECISION

As noted above, this Decision concerns the PSC's claim for compensation for amounts paid, or to be paid, to four experts/consultants: Dr. Mark Geier, David Geier, Dr. Heather Young and Dr. Robert Hirsch. Conceptually, this claim can be broken into two parts. First, petitioners seek approximately $500,000 to compensate all four of those individuals for work on an *original medical article* that was published in 2008. Second, petitioners seek about $167,000 more for miscellaneous additional services provided by Mark Geier and David Geier between 2003 and 2008. I will deal with these two parts separately. In part VI of this Decision, I will explain why I decline to award any of the amounts claimed for producing the medical article in question. Then, in Part VII of this Decision, I will deal with the claim for additional amounts for the work of Mark Geier and David Geier.

VI

COMPENSATION FOR PRODUCTION OF THE "YOUNG-GEIER ARTICLE"

A. Introduction

On May 1, 2008,[6] an article was published, in the Journal of the Neurological Sciences, entitled *Thimerosal exposure in infants and neurodevelopmental disorders: An assessment of computerized medical records in the Vaccine Safety DataLink*, 156 JOURNAL NEUROLOGICAL SCIENCES (2008). The named authors were Heather Young, David Geier, and Mark Geier. During the trial in this case, on or about Friday, May 16, 2008, petitioners' counsel presented copies of that article to me, to the other participating special masters, and to the respondent.[7] The article was formally placed into the record of this case by the petitioners, as PML 665, on June 19, 2008. In the article, the authors reviewed certain data from a database known as the Vaccine Safety Datalink (VSD). They concluded that the data demonstrated a statistical association between exposure to the

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Additional compact discs containing additional items added to the PML were filed on August 4, 2008, April 3, 2009, and July 6, 2009. Respondent filed compact discs containing the items of the RML on March 21, April 29, May 23, and October 7, 2008.

[6]The copy of the article placed into the record of this case (PML 665) does not indicate a date of publication. However, on July 6, 2009, the petitioners filed a copy of the PML as electronic document No. 166-2 in the case. At p. 41 of that document, petitioners indicate a publication date of May 1, 2008, for the Young-Geier article.

[7]The article was presented to the special masters and respondent without a recorded discussion in the trial transcript. However, a subsequent discussion at pp. 3371-72 of the transcript, which took place on May 27, 2008, indicates that the initial presentation of the article took place on Friday, May 16--*i.e.*, "on Friday the first week" of the trial--see Tr. 3372, line 8.

mercury in thimerosal-containing vaccines and neurodevelopmental disorders. The petitioners in this case offered the article as evidence in support of their "general causation" theory that thimerosal-containing vaccines can contribute to the causation of autism.

Petitioners have submitted, as part of their overall claim for fees and costs in this case, a series of bills from the three named authors of that article, to which I will hereinafter refer as the "Young-Geier article," and from another individual, Dr. Robert Hirsch, who is said to have also contributed initial work to the analysis that was published in the article. They contend that those four individuals should be compensated about $500,000 for their efforts in producing the article, including designing and carrying out data analysis, and writing the article. Dr. Young would receive $248,636, the Geiers would receive around $197,000, and Dr. Hirsch would receive $41,000.[8]

Respondent argues strenuously, in response, that it would be wholly unreasonable for the Program to provide compensation to these individuals for their efforts concerning the article.

I acknowledge that the *topic* of the Young-Geier study *was* relevant to the "general causation" issue addressed in this *King* case--*i.e.*, whether thimerosal-containing vaccines can contribute to the causation of autism. However, after full consideration, I conclude that, under all the circumstances, it would not be reasonable for me to award compensation for the work on the study. There are a number of reasons for this conclusion, which I will set forth below.

B. General issue of awarding fees to experts for producing articles for publication

Respondent has argued strongly that a special master should *never* award, as a part of the costs of a Vaccine Act proceeding, payments to experts for their efforts in producing an *original medical article for publication*. Respondent does not dispute that in most Program cases, petitioners pay expert witnesses to produce written *expert reports*, sometimes lengthy ones, designed to demonstrate that an individual petitioner's injury was vaccine-caused, or to demonstrate generally

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[8]The petitioners' figure for Dr. Young, of $248,636.91, appears at Petitioners' Application, Tab C, p. 3896. The petitioners' figure for Dr. Hirsch of $41,000 appears at Tab C, p. 3891. The petitioners' total figure for the Geiers of $364,596.05, appears at Tab C, pp. 3888-90. It consists of $16,333.85 paid to Mark Geier (p. 3888), plus $339,097.20 in additional amounts billed by Mark Geier but unpaid (p. 3889), plus $9,165.00 paid to "Medcon, Inc.," which seems to be an alternative billing vehicle for both Geiers (p. 3890).

The respondent has calculated that of the $364,596 requested for the Geiers, approximately $197,000 represents work on the Young-Geier article, while about $167,000 was billed for other work. (Resp. Memorandum, p. 159.) The petitioners have not taken issue with this breakdown of the Geier billings. But in my final analysis of the case, it does not matter precisely how much of the Geiers' bill relates to the Young-Geier article, and how much to additional services. As will be detailed below, I have decided to deny all of the Geiers' claims related to the Young-Geier article, all of David Geier's claims, and all non-article claims for work of Mark Geier that do not fall into certain specified tasks. Accordingly, it is unnecessary to determine exactly how much of the Geiers' overall billings relate to the Young-Geier article.

that a certain type of vaccination can cause a certain type of injury. Respondent does not dispute that a special master should award a reasonable amount to the petitioners in each case in order to pay experts to produce such expert reports. But, respondent contends, it is conceptually a different matter to pay experts for their efforts in producing *medical articles for publication*, and that such payments should not be made by special masters in Vaccine Act cases.

Respondent points to the fact that in three Vaccine Act cases, special masters have *declined* to compensate Dr. Mark Geier for time that he spent working on medical articles for publication. *Jeffries v. Secretary of HHS*, No. 99-670V, 2006 WL 3903710, at *13-14 (Fed. Cl. Spec. Mstr. Dec. 15, 2006); *Sabella v. Secretary of HHS*, No. 02-1627V, 2008 WL 4426040, at *30-32 (Fed. Cl. Spec. Mstr. Aug. 29, 2008), *aff'd on this point and rev'd on other point*, 86 Fed. Cl. 201, 218-219 (2009); *Masias v. Secretary of HHS*, No. 99-697V, 2009 WL 1838979, at *39-41 (Fed. Cl. Spec. Mstr. June 12, 2009), *aff'd by unpublished order* (Dec. 10, 2009), *appeal pending* (Fed. Cir.). In contrast, the petitioners have not cited any opinion in which a special master has in fact awarded funds to compensate an expert for producing a medical article for publication.

I note that the Supreme Court has expressed the view that medical *studies* produced expressly for litigation purposes should be viewed with skepticism. See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626 n.17 (2008). Other judicial opinions have made the same point. See, e.g,, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F. 3d 1311, 1317 (9th Cir. 1995); *Nelson v. American Home Products Corp.*, 92 F. Supp. 2d 954, 967-8 (W.D. Mo. 2000); *Nelson v. Tennessee Gas Pipeline Co.*, 243 F. 3d 244, 252 (6th Cir. 2001); *Lauzon v. Senco Products*, 270 F. 3d 681, 692 (8th Cir. 2001); *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F. 3d 398, 408 (6th Cir. 2007); *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F. 3d 426, 434-35 (6th Cir. 2007). The views of these courts, then, reinforce the concern that if a lawyer involved in a Vaccine Act case chooses specific experts and pays them to carry out a study, the potential is great for bias in the study, toward the outcome that would assist the clients of the lawyer paying for the study. Thus, it is arguable that, as the respondent contends, it would be poor public policy, in general, for special masters to award public funds for such original studies. Therefore, these court opinions offer some support to the respondent's view that it would generally *not* seem appropriate for special masters to compensate experts for producing *original studies* for publication.

In this Decision, however, I do *not* reach a conclusion concerning respondent's general legal contention that a special master should *never* award funds to pay experts to produce medical articles. While this general argument of respondent has considerable appeal, I do *not* need to reach such a general conclusion in order to decide this case. Rather, I conclude that under all the specific circumstances of this case, it would not be reasonable for me to compensate the named individuals for the production of *this particular article*. There are in fact a number of very strong reasons for that conclusion, to be discussed in the pages that follow.

C. Petitioners' indication that the article would have been produced in any event

In one of their briefs, the petitioners argue as follows:

> The work [on the Young-Geier article] was reasonable and compensable because it was *not* "pursued solely for purposes of litigation." *Resp.*, p. 159. This was a research project pursued for purposes of *publication*. Dr. Geier had pursued this project for several years, completely apart from his involvement in this litigation. His goal at all times was to produce a legitimate scientific work product that would withstand peer review and be published in a scientific journal. He succeeded.

(PSC Reply in Support of Interim Fee Petition, filed March 27, 2009, Tab 12, p. 7.) In this passage, the petitioners seem to be arguing not only that the Young-Geier article was *not* a "litigation-driven" article, but also that the authors would have produced the article even had the Vaccine Act litigation not existed.

As to the former point, I am simply not persuaded by the suggestion that the article was not litigation-driven. Beginning with the inception of the Omnibus Autism Proceeding in 2002, the PSC lawyers were in the process of attempting to find evidentiary support for their clients' theory that thimerosal-containing vaccines can contribute to the causation of autism. And, as will be discussed in detail at pp. 16-19 below, prior to producing this article, the Geiers already had a long track record of producing data analyses and articles supportive of the theory that vaccines can contribute to causing autism. The mere fact that the PSC lawyers contributed or promised monetary support for *another* article co-authored by *the Geiers*, concerning the topic of whether thimerosal-containing vaccines can cause autism, is itself strong evidence that the article was litigation-driven.

Further, the very fact that the petitioners are now seeking Vaccine Act funds for the cost of producing the article is a very strong indication that the article was litigation-driven.

Moreover, in the passage quoted above, the petitioners expressly state that Dr. Geier's "project" that resulted in the article was "completely apart from his involvement in this litigation," implying that the article would have been produced even absent the Vaccine Act litigation. But if that is true, that would seem to argue *against* the award that petitioners seek here. If the article was produced "completely apart from [Dr. Geier's] involvement in this [Vaccine Act] litigation," and would have been produced even absent that litigation, that would seem to *contradict* the petitioners' claim that paying the cost of producing the article was a necessary and reasonable cost *of the Vaccine Act litigation.*

D. The Young-Geier article itself did not add any value to the petitioners' causation case.

Perhaps the strongest factor leading to my result here is my conclusion that the Young-Geier article itself did *not* add any value to the petitioners' causation presentation in this case. Two epidemiologic experts, both of them testifying for respondent, testified at the trial in this case concerning the merits of the Young-Geier article, and both testified that the article was *deeply flawed*. (Tr. 3386-94, 3423-24, 3664-68, 3753-60.) Dr. Michael Rutter testified that the Young-Geier study was a "poor study for several different reasons" (Tr. 3387), especially because of its "strange design" (Tr. 3387), which was not "scientifically sensible" (Tr. 3390). Dr. Eric Fombonne opined that manipulation of data in the study was "dishonest" and "unacceptable," involving "adding

numbers which are completely invented." (Tr. 3757-58.) He stated that parts of the data analysis were "incompetent." (Tr. 3759.) He stated that the article would not have been accepted by a scientific journal that specialized in autism. (Tr. 3758.)

And, very significantly, *none* of the petitioners' five medical experts who testified at the trial offered *any* testimony in support of the validity of the Young-Geier article. It is especially striking that among petitioners' experts was an expert who has excellent credentials in *epidemiology*, Dr. Sander Greenland. Dr. Greenland in fact testified *negatively* about the Geiers' *prior* epidemiology articles concerning the vaccine-autism controversy, describing those studies as "deficient in methodology." (Tr. 122-23.) Dr. Greenland was not asked specifically during the trial about the Young-Geier article. This failure is curious, and appears to be the result of a deliberate decision by petitioners' counsel to ensure that Dr. Greenland was *not asked* about the Young-Geier article. I note that according to the article itself, a draft of the article was received by the publishing journal on December 20, 2007, a revised draft was received on March 27, 2008, and that revised draft was accepted for publication on April 1, 2008. (PML 665, p. 1.) The article was published on May 1, 2008. (See fn. 6 above.) Petitioners' counsel, who had been paying much money to Dr. Young and the others for their work on the article, must have been aware of those drafts, of the acceptance of the article on April 1, 2008, and of the publication of the article on May 1, 2008. Yet they put Dr. Greenland on the witness stand in this *King* case on May 12, 2008 (Tr. 69-135), did not ask him about the article, and did not reveal the existence of the article to the special masters and respondent until May 16 (see fn. 7 above), thus ensuring that no one could ask Dr. Greenland about the Young-Geier article. From these circumstances, the most reasonable inference is that petitioners' counsel *deliberately intended* to avoid any questioning of Dr. Greenland, their epidemiologic expert, about the Young-Geier article.[9] Moreover, even if that inference is not correct, and for some reason petitioners' counsel did not have a copy of the Young-Geier article until after Dr. Greenland's testimony, nevertheless the petitioners certainly could have brought Dr. Greenland back for rebuttal testimony, either in person or by telephone (another trial witness did testify solely by phone), or could have filed a post-trial supplemental expert report by Dr. Greenland, *if* he would have had anything positive to say about the Young-Geier article.[10]

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[9]I also note that if, as seems likely, petitioners' counsel knew that the Young-Geier article had been accepted for publication on April 1, 2008, it is not clear why those counsel could not have submitted a "pre-publication" copy to the special masters, the respondent, and to petitioners' own expert witnesses, particularly their epidemiologic expert Dr. Greenland, *prior* to the commencement of the trial on May 12, 2008. And even if petitioners' counsel did not have a pre-publication copy, if the article was published on May 1, 2008, as indicated by the petitioners' own filing (see fn. 6 above), it would appear that petitioners' counsel could and should have submitted a copy of the published article at the very beginning of the trial rather than doing so on or about May 16, 2008, after Dr. Greenland had already testified.

[10]In the brief filed on February 6, 2009 (p. 162), respondent represented that Dr. Greenland later stated on the Internet that the Young-Geier study was just as "unreliable" as the earlier Geier studies, which Dr. Greenland had described as "deficient in methodology" during his testimony in this case. I do *not* rely on this statement, but if it is an accurate representation of Dr. Greenland's

Thus, the fact that *none* of the petitioners' experts, including the epidemiologic expert Dr. Greenland, had anything to say about the Young-Geier article, adds *another* reason to conclude that the respondent's epidemiologic experts were correct in their unrebutted testimony that the Young-Geier article was deeply flawed.

In addition, I myself analyzed the Young-Geier article. As I wrote in my Decision filed in this case on March 12, 2010 (p. 87), I too found the Young-Geier article to be flawed and therefore devoid of persuasive value. And the other two Vaccine Act special masters who analyzed the Young-Geier article reached the same conclusion. See *Dwyer v. Secretary of HHS*, No. 03-1202V, 2010 WL 892250, at *72 (Fed. Cl. Spec. Mstr. Mar. 12, 2010) ("For the reasons indicated in the criticisms of Drs. Fombonne and Rutter, I have accorded the Young study little weight."); *Mead v. Secretary of HHS*, No. 03-215V, 2010 WL 892248, at *39 fn.78 (Fed. Cl. Spec. Mstr. March 12, 2010) (indicating that the "2008 Young study" is flawed in ways similar to the deficiencies of the previous Geier articles concerning the alleged vaccine-autism connection).

In short, the Young-Geier study itself was severely criticized by respondent's experts, who articulated persuasive reasons for that criticism. In my own analysis, the Young-Geier study also appears flawed. And the other special masters who reviewed that article reached the same conclusion. Clearly, no rational *hypothetical paying client* of the PSC would have agreed to pay for the production of such a flawed study. Thus, the fact that the Young-Geier article did *not* add any value to the petitioners' causation presentation in this case is a very strong reason why I should decline to compensate the PSC for the cost of producing the article.

E. There is particularly strong reason not to compensate the cost of producing an article co-authored by the Geiers.

Even if it might in some circumstances be reasonable to compensate a Vaccine Act petitioner for paying *some hypothetical expert* for producing a medical article for publication, a huge problem for the petitioners in this instance is that two of the co-authors of the article in question were Mark Geier and David Geier. A review of *prior legal opinions* discussing the Geiers casts strong doubt on the reasonableness of compensating the cost of an article co-authored by them. Further, a review of the record of this case as it relates to the *Geiers' prior research* concerning the issue of whether vaccines can cause autism, again offers strong reason to doubt the reasonability of compensating the cost of producing the Young-Geier article in question.

1. Vaccine Act opinions concerning the general credibility of Dr. Geier as an expert witness

In many Vaccine Act cases, stretching over many years, special masters or judges of this court have offered negative comments on the credibility, credentials, honesty, or other aspects of the testimony or opinions of Dr. Mark Geier.

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view, then that would be *yet another* reason to discount the value of the Young-Geier article.

a. Criticisms of Dr. Geier for offering testimony outside his area of medical specialty

In many such cases, special masters have criticized Dr. Geier, or declined to find his opinion to be persuasive, because he was offering opinions in medical specialty areas in which he was not qualified. These opinions note that while Dr. Geier's chief area of medical practice has been in the field of genetics, he has offered his opinion concerning neurology, epidemiology, immunology, or other medical specialties in which he did not possess special qualifications. Examples of such opinions include *Piscopo v. Secretary of HHS*, 66 Fed. Cl. 49, 54-5 (2005) (affirming special master's determination that Dr. Geier was not qualified to offer a reliable opinion on the cause of petitioner's autoimmune disorder.); *Pafford v. Secretary of HHS*, No. 01- 165V, 2004 WL 1717359, at *1, n. 2 (Fed. Cl. Spec. Mstr. July 16, 2004), *aff'd*, 64 Fed. Cl. 19 (2005) (noting that Dr. Geier testified concerning matters that were unrelated to his professional background); *Pafford v. Secretary of HHS*, 451 F. 3d 1352, 1359 (Fed. Cir. 2006)(affirming the special master's rejection of Dr. Geier's testimony because he lacked proper qualifications in the specialty areas in which he testified); *Daly v. Secretary of HHS*, No. 90-590V, 1991 WL 154573, at *7 (Cl. Ct. Spec. Mstr. July 26, 1991) ("Dr. Geier clearly lacks the expertise to evaluate [neurologic] injuries and render an opinion thereon."); *Haim v. Secretary of HHS*, No. 90-1031V, 1993 WL 346392, at *15 (Fed. Cl. Spec. Mstr. Aug. 27, 1993) ("Dr. Geier's testimony is not reliable, or grounded in scientific methodology and procedure. His testimony is merely subjective belief and unsupported speculation."); *Ormechea v. Secretary of HHS*, No. 90-1683V, 1992 WL 151816, at *7 (Cl.Ct. Spec. Mstr. June 10, 1992) ("Because Dr. Geier has made a profession of testifying in matters to which his professional background (obstetrics, genetics) is unrelated, his testimony is of limited value to the court."); *Thompson v. Secretary of HHS,* No. 99-436V, 2003 WL 21439672, at *19 (Fed. Cl. Spec. Mstr. May 23, 2003) (discounting the value of Dr. Geier's testimony concerning neurologic issues); *Bruesewitz v. Secretary of HHS*, No. 95-266V, 2002 WL 31965744, at * 16 (Fed. Cl. Spec. Mstr. Dec. 20, 2002) (stating that Dr. Geier's experience "does not qualify him to diagnose neurological diseases"); *Raj v. Secretary of HHS*, No. 96-294V, 2001 WL 963984, at *12 (Fed. Cl. Spec. Mstr. July 31, 2001) (finding that "Dr. Geier is wholly unqualified to testify concerning the two major issues in this case"); *Doe v Secretary of HHS*, No. 99-670V, 2004 WL 3321302, at *22 (October 5, 2004) (discounting Dr. Geier's testimony concerning an epidemiologic matter because he lacks qualifications in that speciality); *Weiss v. Secretary of HHS*, No. 03-190V, 2003 WL 22853059, at *2 (Fed. Cl. Spec. Mstr. Oct. 9, 2003) (concluding that Dr. Geier is not qualified to opine concerning neurological matters); *Sabella v. Secretary of HHS*, No. 02-1627V, 2008 WL 4426040, at *29-32 (Fed. Cl. Spec. Mstr. Aug 29, 2008) (discounting Dr. Geier's qualifications to testify on a neurological issue); *Sabella v. Secretary of HHS*, 86 Fed. Cl. 201, 218-19 (2009) (affirming a special master's finding that Dr. Geier lacked the necessary qualifications to opine about a neurological injury); *Lehmann v. Secretary of HHS*, No. 89-99V, 1990 WL 608694, at *2 (Oct. 2, 1990) (discounting Dr. Geier's testimony concerning a neurologic issue); *Riggins v. Secretary of HHS*, No. 99-382V, 2009 WL 3319818, at *11 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff'd by unpublished order* (Fed. Cl. Dec. 10, 2009) (finding Dr. Geier unqualified to serve as an expert in the subject matter); *Masias v. Secretary of HHS*, No. 99–697V, 2009 WL 1838979, at *39 (Fed. Cl. Spec. Mstr. June 12, 2009) (finding that the decision to retain Dr. Geier concerning a rheumatology issue was not reasonable), *aff'd by unpublished order* (Fed.Cl. Dec. 10, 2009); *Wadie v. Secretary of HHS*, No.

99-493V, 2009 WL 961217, at *6 (Fed. Cl. Spec. Mstr. March 23, 2009) (not reasonable to utilize Dr. Geier concerning gastrointestinal and immunological issues); *Aldridge v. Secretary of HHS*, No. 90-2475V, 1992 WL 153770 at *8 (Fed. Cl. Spec. Mstr. June 11, 1992) (discounting Dr. Geier's testimony concerning a neurologic issue); *Einspahr v. Secretary of HHS*, No. 90-923V, 1992 WL 336396, at *10 (Cl. Ct. Spec. Mstr. Oct. 28, 1992), *aff'd* 17 F. 3d 1444 (Fed. Cir. 1994) (describing Dr. Geier's testimony concerning the pertussis vaccine as "worthless").

b. Opinions questioning Dr. Geier's honesty, candor, or veracity

In other cases, special masters have gone so far as to conclude that Dr. Geier is not an honest, candid witness. In *Marascalco v. Secretary of HHS*, No. 90-1571V, 1993 WL 277095, at *5-6 (Fed. Cl. Spec. Mstr. July 9, 1993), Special Master Edwards described Dr. Geier's testimony as "intellectually dishonest" and "an egregious example of blatant, result-oriented testimony." In *Aldridge v. Secretary of HHS*, No. 90-2475V, 1992 WL 153770, at *9-10 (Fed. Cl. Spec. Mstr. June 11, 1992), Special Master Abell stated that one aspect of Dr. Geier's testimony was "at best negligent if not a fraud on the court," and noted Dr. Geier's "lack of candor or preparation." In *Haim v. Secretary of HHS*, No. 90-1031V, 1993 WL 346392 at *11, *15 (Fed. Cl. Spec. Mstr. Aug. 27, 1993), Special Master Millman stated that "Dr. Geier's testimony is merely unsupported speculation," and that "Dr. Geier may be clever, but he is not credible." And I myself concluded that Dr. Geier was not offering an honest, candid opinion in *Platt v. Secretary of HHS*, No. 93-264V, 2000 WL 1862640, at *13 (Fed. Cl. Spec. Mstr. Dec. 1, 2000). See also the opinion of a non-Vaccine Act federal judge questioning Dr. Geier's "veracity" in *Jones v. Lederle Laboratories*, 785 F. Supp. 1123, 1126 (E.D. N.Y. 1992).

c. Opinions declining compensation or substantially reducing compensation for Dr. Geier's services

In several Vaccine Act cases special masters have substantially reduced or completely denied any compensation for Dr. Geier's services, in light of prior criticisms of Dr. Geier, and/or deficiencies in his testimony in the case at hand. In *Masias v. Secretary of HHS*, No. 99-697V, 2009 WL 1838979, at *39 (Fed. Cl. Spec. Mstr. June 12, 2009), *aff'd by unpublished order* (Fed. Cl. Dec. 10, 2009), the special master denied any award for Dr. Geier, because "the decision to retain Dr. Geier was not reasonable" in light of past criticisms of Dr. Geier. In *Wadie v. Secretary of HHS*, No. 99-493V, 2009 WL 961217, at *6 (Fed. Cl. Spec. Mstr. March 23, 2007), the special master similarly determined that "the consultation with Dr. Geier is not reasonable and will not be compensated." In *Stott v. Secretary of HHS*, No. 02-192V, 2006 WL 2457404, at *6-7 (July 31, 2006), the special master again denied all compensation for costs incurred in retaining Dr. Geier, since his "credentials indicate that he is unqualified to participate in petitioner's case." In *Valdes v. Secretary of HHS*, No. 99-310V, 2009 WL 1456437, at *7 (Fed. Cl. Spec. Mstr. April 30, 2009), *aff'd in part and rev'd in part*, 89 Fed. Cl. 415, 424 (2009), the special master again completely denied any award for the services provided by Dr. Geier because he was not qualified. Upon review of that ruling, in *Valdes v. Secretary of HHS*, 89 Fed. Cl. 415, 424 (2006), the judge rejected a complete denial of an award, but retained a 50% reduction of the amount requested to compensate Dr. Geier, while advising that in future cases involving Dr. Geier, criticisms concerning his

qualifications should be addressed. In *Sabella v. Secretary of HHS*, 86 Fed. Cl. 201, 218-19 (2009), the judge affirmed a special master's significant reduction of Dr. Geier's fees. In *Riggins v. Secretary of HHS*, No. 99-382V, 2009 WL 3319818, at *6-7 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff'd by unpublished order* (Fed. Cl. Dec. 10, 2009), the special master awarded only 10% of the amount claimed for Dr. Geier's services, because he was unqualified and his billing was "grossly unreasonable."

Significantly, in the *Masias* case, Special Master Moran observed that the special masters' expressions of dissatisfaction with Dr. Geier as an expert have been so common that "[t]here appears to be little dispute that a petitioner should not retain Dr. Geier [as an expert] now." 2009 WL 1838979, at *39. Then he added that such expressions by special masters were common even in the earlier years of the Program, so that even by the year 2002 it should have been clear that to retain Dr. Geier as an expert was "unreasonable."

2. Judicial opinions outside of the Vaccine Act

There have also been judicial opinions *outside* of the Vaccine Act that have contained negative commentary concerning Dr. Geier or his qualifications to offer expert testimony concerning the very causation issue involved here--*i.e.*, whether thimerosal can cause autism. In *Blackwell v. Wyeth*, 971 A. 2d 235, 251-260 (Md. 2009), a state court excluded the proffered testimony of Dr. Geier in a lawsuit claiming that thimerosal-containing vaccines caused autism, concluding that there was no scientific foundation for his opinion. In *Doe v. Ortho-Clinical Diagnostics, Inc.*, 440 F. Supp. 2d 465, 469-478 (M.D. N.C. 2006), a federal court excluded Dr. Geier's testimony in a suit alleging that the thimerosal received by the autistic child's mother during the pregnancy caused the child's autism, again finding no scientific support for his opinion. And in *Redfoot v. B.F. Ascher & Co.*, 2007 WL 1593239, at *5-12 (N.D. Cal. 2007), another federal court excluded Dr. Geier's testimony, this time in a suit alleging that the thimerosal contained in "nasal mist" administered to a young child caused the child's autism. See also *Graham v. Wyeth*, 906 F. 2d 1399, 1415-1417 (10th Cir. 1990) (federal appellate court concluded that Dr. Geier gave erroneous testimony); *Militrano v. Lederle*, 769 N.Y.S. 2d 839, 850 (N.Y. Sup. Ct. 2003) (state court found Dr. Geier's testimony to be "unsubstantiated" and unpersuasive); *Jones v. Lederle Laboratories*, 785 F. Supp. 1123, 1126 (E.D. N.Y. 1992) (federal court was "unimpressed with the qualifications, veracity, and bonafides" of Dr. Geier); *Miller v. Connaught Laboratories*, 1995 WL 579969, at *4 (D. Kansas 1995) (federal judge stated that he was "unconvinced" that Dr. Geier was qualified to offer testimony concerning certain vaccine safety issues).

3. Evaluations of the Geiers' prior articles concerning the alleged vaccine-autism connection

Another factor to be considered is that the Young-Geier article is *not* the first article produced by the Geiers concerning the type of causation issue in this case--*i.e.*, whether vaccines can contribute to causing autism. Their previous articles of this type have *not* been well-received in the medical community.

First, Mark Geier and David Geier published two articles relevant to the issue of whether the *MMR vaccine* can contribute to the causation of autism. Those articles were evaluated by a committee of the prestigious Institute of Medicine,[11] which exhaustively studied the issue of the alleged causal connection between the MMR vaccine and autism. (RML 255,[12] pp. 102-05, 119-20,

[11]The Institute of Medicine is the medical arm of the National Academy of Sciences. The National Academy of Sciences ("NAS") was created by Congress in 1863 to be an advisor to the federal government on scientific and technical matters (*see* An Act to Incorporate the National Academy of Sciences, ch. 111, 12 Stat. 806 (1863)), and the Institute of Medicine ("IOM") is an offshoot of the NAS established in 1970 to provide advice concerning medical issues. (RML 255, p. iv.) When it enacted the Vaccine Act in 1986, Congress specifically directed that the IOM conduct studies concerning potential causal relationships between vaccines and illnesses. (§ 300aa-1 note.) In the intervening years, the IOM has formed committees which have prepared numerous reports concerning issues of possible relationships between vaccinations and injuries.

In 2004, the IOM assembled a committee to study the issues of whether MMR vaccines or thimerosal-containing vaccines can cause autism. That committee found that the evidence "favors rejection of causal relationship" both between MMR vaccines and autism, and between thimerosal-containing vaccines and autism. (RML 255, pp. 8, 65, 126, 151-52.) As part of that overall study, the Committee reviewed certain articles authored by the Geiers, as discussed above. It is appropriate that I assign considerable evidentiary weight to the 2004 IOM committee's evaluation of the Geier articles. As noted above, when it enacted the Vaccine Act in 1986, *Congress specifically directed* that the IOM conduct studies concerning potential causal relationships between vaccines and illnesses. That direction obviously implies that when such studies are performed by IOM committees, a special master should carefully consider those studies in deciding Vaccine Act cases. Moreover, I note that during the 20-year history of the Vaccine Act, special masters have consistently relied upon the reports of the Institute of Medicine, and reviewing judges have consistently indicated approval of such reliance. *E.g., Terran v. Secretary of HHS*, 41 Fed. Cl. 330, 337 (1998) (affirming special master's reliance on conclusions of IOM), *aff'd*, 195 F. 3d 1302 (Fed. Cir. 1999); *Ultimo v. Secretary of HHS*, 28 Fed. Cl. 148, 152 (1993) (proper for a special master to rely on IOM report); *Cucuras v. Secretary of HHS*, 26 Cl. Ct. 537, 540 (1992) (same); *Manville v. Secretary of HHS*, 63 Fed. Cl. 482, 491 (2004) (same); *Ryman v. Secretary of HHS*, 65 Fed. Cl. 35, 39 (2005) (same); *Capizzano v. Secretary of HHS*, No. 00-759V, 2004 WL 1399178, at *2, n. 6 (Fed. Cl. Spec. Mstr. June 8, 2004) ("Considering the IOM's statutory charge, the scope of its review, and the cross-section of experts making up the committee, the special masters have consistently accorded great weight to the IOM's findings."), *rev'd on other grounds*, 440 F.3d 1317 (Fed. Cir. 2006); *Larive v. Secretary of HHS*, No. 99-429V, 2004 WL 1212142, at *11 (Fed. Cl. Spec. Mstr. May 12, 2004); *Falksen v. Secretary of HHS*, No. 01-317V, 2004 WL 785056, at *13 (Fed. Cl. Spec. Mstr. Mar. 30, 2004) ("[T]he Court gives great deference to the findings of the Institute of Medicine on the issue of cause and effect between vaccines and discrete injuries."); *Malloy v. Secretary of HHS*, No. 99-193V, 2003 WL 22424968, *15 (Fed. Cl. Spec. Mstr. Aug. 6, 2003); *Hill v. Secretary of HHS*, No. 96-783, 2001 WL 166639, at *3-4 n.2 (Fed. Cl. Spec. Mstr. Jan. 29, 2001); *Castillo v. Secretary of HHS*, No. 95-652V, 1999 WL 605690, at *11 (Fed. Cl. Spec. Mstr. July 19, 1999); *Schell v. Secretary of HHS*, No. 90-3243V, 1994 WL 71254, at *5 (Fed. Cl. Spec. Mstr. Feb. 22, 1994).

[12]RML 255 is the IOM committee's 2004 report. *See*, Institute of Medicine, IMMUNIZATION SAFETY REVIEW: VACCINES AND AUTISM (The National Academies Press 2004).

122-23.) That committee concluded that the Geier studies were flawed, "uninterpretable," and contributed nothing meaningful ("noncontributory") concerning the causation issue. (RML 255, pp. 1002-05, 119-120, 122-23.)

Similarly, Mark Geier and David Geier also authored several articles concerning the specific topic involved in this *King* case--*i.e.*, whether *thimerosal-containing vaccines* can contribute to causing autism. (See Ex. M, para. 111; RML 255, pp. 51-52, 55-62.) Again, a number of these articles were considered by the Institute of Medicine (IOM) committee, which carefully studied not only the MMR/autism causation issue, but also the *thimerosal/autism* causation issue in 2004. (RML 255, pp. 51-52, 55-62.) That committee concluded that the Geier studies were so flawed as to be "uninterpretable," and that the studies contributed nothing meaningful ("noncontributory") concerning the causation issue. (RML 255, pp. 52, 58, 61, 62.) The committee noted that the studies were based on databases that themselves had "significant limitations" (*id*. at 57), and that the studies had "serious methodological problems" (*id*. at 57) or "serious methodological limitations" (*id*. at 61). The committee added that the Geiers' articles describing their analytical methods were "not transparent" and omitted "important details," so that it was impossible to evaluate the studies. (*Id*. at 58, 62.) Other specific deficiencies in the studies were also discussed, including the fact that the Geiers incorrectly used several epidemiologic terms and measures. (*Id*. at 59 n. 18; 60 n. 19; 60 n. 20.)

In addition, one of the respondent's epidemiologic experts in this case, Dr. Eric Fombonne, agreed with the IOM's criticisms of the Geier studies, and testified that the Geier studies in general failed to use accepted epidemiologic methods. (Tr. 3664-65.) Another of respondent's witnesses expert in epidemiology, Dr. Michael Rutter, was critical of the Geier studies as well. (Ex. GG, para. 67-68.) Further, petitioners' *own expert* witness concerning epidemiology, Dr. Sander Greenland, *agreed* with the criticisms of the Geier articles, acknowledging that those studies are "deficient in methodology." (Tr. 122-23.) And *none* of the expert witnesses for the petitioners vouched for the reliability of the Geier studies.

I also note that, like the 2004 IOM committee, a number of judges and special masters have also examined the previous Geier-authored articles purporting to support a causal link between vaccines and autism, and found such articles to be severely flawed. For example, a Maryland state court found that such studies by the Geiers were "not conducted in accordance with generally accepted epidemiological methods." *Blackwell v. Wyeth*, 971 A.2d 235, 253 (Md. 2009). Likewise, special masters of this court have stated a similar critical analysis of such articles. *Mead v. Secretary of HHS*, No. 03-215V, 2010 WL 892248, at *39 n. 78 (Fed. Cl. Spec. Mstr. March 12, 2010); *Dwyer v. Secretary of HHS*, No. 03-1202V, 2010 WL 892250 at *71-72 (Fed. Cl. Spec. Mstr. March 12, 2010); *King v. Secretary of HHS*, No. 03-584V, 2010 WL 892296, at *67-68 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Cedillo v. Secretary of HHS*, No. 98-916V, 2009 WL 331968, at *87 (Fed. Cl. Spec. Mstr. Feb. 12, 2009).

In sum, in the early 2000's, Mark Geier and David Geier collaborated on a number of research articles concerning whether vaccines, either MMR vaccines or thimerosal-containing vaccines, can contribute to the causation of autism. In the 2004 IOM report, the IOM committee found those

articles to be severely defective, and a number of judges and special masters have reached the same conclusion. That emphatic rejection of those articles, particularly the rejection by the IOM committee, is another strong reason to conclude that it was unreasonable of the PSC to decide to fund *another* study of this type to be co-authored by the Geiers, and that it would not be reasonable for me to reimburse the PSC for paying the study's authors. This reason is particularly strong since the IOM report was issued in 2004, *prior* to much of the work by the co-authors on the Young-Geier article.

4. Petitioners' allegation of Dr. Geier's expertise in epidemiology

On July 28, 2010, petitioners filed their "Supplemental Brief re PSC Expert Costs in Interim Fee Petition." Attached to that brief[13] was Ex. 1, a 21-page document apparently intended as evidence concerning the issue of the qualifications of the Geiers. Curiously, the document was not structured as an affidavit from one of the Geiers or from anyone else, but instead was an unsigned narrative describing the Geiers' careers. It is not clear who authored the document.

In that document, it is asserted that Mark Geier is "not just a board-certified geneticist," but "is also a certified epidemiologist." (Ex. 1, p. 3.) To support that assertion, Ex. 1 states that Dr. Geier is "a Fellow of the American College of Epidemiology." (*Id*., pp. 3-4.)

This assertion that Dr. Geier should be considered to be credentialed as an epidemiologist, as well as a geneticist, however, seems dubious in light of the rest of the description of Dr. Geier's career in Ex. 1. The description shows that Dr. Geier's Ph.D. is in genetics, and that his academic appointments, which lasted from 1979 to 1984, were in genetics and psychiatry. (Ex. 1, p. 1.) Further, his actual medical practice seems to have been solely devoted to genetics. (Ex. 1, pp. 2-3.) Thus, Dr. Geier does not appear to have had any formal academic training or degrees or medical faculty experience in epidemiology, and his medical experience has been chiefly in genetics rather than epidemiology. Thus, it is unclear why he was named a "Fellow" of the American College of Epidemiology, and it is doubtful whether he should be considered an expert in epidemiology. I conclude that the petitioners have failed to shoulder *their burden* of demonstrating that Dr. Geier should be considered an expert in epidemiology.

In this regard, I reiterate that a number of special masters and judges of this Court have looked at Dr. Geier's credentials, and have concluded that Dr. Geier's opinion should be given little or no weight in medical specialty areas outside of genetics, since his area of medical expertise is in genetics. See cases cited at pp. 14-15 above. And a number of judges of other courts, in non-Program cases, have also looked at Dr. Geier's credentials, and have excluded his opinions from civil actions in which plaintiffs were attempting to offer Dr. Geier's opinion on the very causation issue involved in this case, *i.e.*, whether thimerosal-containing vaccines can cause autism. See the

[13] Along with that brief, petitioners filed 122 exhibits related to the Geiers. Yet in that brief, the only document to which they refer was Ex. 1. Nevertheless, I did review the other 121 attached exhibits, and considered those exhibits before reaching the conclusions set forth in this Decision.

Blackwell, *Doe*, and *Redfoot* cases cited at p. 16 above. All of these special masters, judges of this court, and judges of other courts, then, do *not* seem to have found Dr. Geier to be an expert in the subject matter of epidemiology.

Further, a number of judges and special masters have also examined Dr. Geier's credentials, and have *specifically concluded* that Dr. Geier should *not* be considered an expert in epidemiology. *Redfoot v. B.F. Ascher & Co.*, 2007 WL 1593239, at *10 (N.D. Cal. 2007) (Dr. Geier is "not qualified as * * * an epidemiologist, either by background or training"); *Doe v. Ortho-Clinical Diagnostics, Inc.*, 440 F. Supp. 2d 465, 471 (M.D. N.C. 2006) ("nor is [Dr. Geier] certified as an epidemiologist"); *Valdes v. Secretary of HHS*, No. 99-310V, 2009 WL 1456437, at *7 (Fed. Cl. Spec. Mstr. April 30, 2009), *aff'd in part and rev'd in part* 89 Fed. Cl. 415 (2009); *Jeffries v. Secretary of HHS*, No. 99-670V, 2006 WL 3903710, at *14 (Fed. Cl. Spec. Mstr. Dec. 15, 2006); *Riggins v. Secretary of HHS*, No. 99-382V, 2009 WL 3319818, at *8 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff'd by unpublished order* (Fed. Cl. Dec. 10, 2009); *Doe/03 v. Secretary of HHS*, 2007 WL 2350645, *3 (Fed. Cl. Spec. Mstr. Aug. 14, 2007); *Doe v. Secretary of HHS*, 2004 WL 3321302, at *22 (Fed. Cl. Spec. Mstr. Oct. 5, 2004).

In contrast, the petitioners in this case have not pointed to *any* judicial opinion in any court in which Dr. Geier has been recognized as an expert in *epidemiology*.

Finally, one measure of Dr. Geier's alleged expertise in the area of epidemiology is the reception that his articles concerning the *very epidemiological issue involved in this case*--that is, whether vaccines cause autism--have received in the general medical community. As described above (pp. 16-19), the record of this case demonstrates amply that the medical community, including the IOM committee and the petitioners' own expert in epidemiology, has found that Dr. Geier's attempts at epidemiological studies in this area were so poorly executed that they are completely useless in analyzing the general causation issues.

For all these reasons, I conclude that Dr. Geier should *not* be considered an expert in epidemiology.

5. Summary concerning the Geiers

For all the reasons set forth above at pp. 13-20, I find that the fact that Mark Geier and David Geier are two of the three co-authors of the Young-Geier article is *another* very strong reason for concluding that it would *not* be reasonable for me to compensate the PSC for the cost of producing that article.

F. I have made ample awards for expert fees in my prior interim fees decisions in this case.

As noted above, it is certainly appropriate in most Vaccine Act cases that the special master award a reasonable amount of funds for petitioners to pay experts to produce expert reports, or to pay consultants to provide necessary services assisting the petitioners in the litigation. I have, in fact,

already awarded a *very substantial* amount to the petitioners for expert witnesses in this case. First, I note that the petitioners in this *King* case expended substantial amounts to pay five expert witnesses (Dr. Greenland, Dr. Kinsbourne, Dr. Aposhian, Dr. Deth, and Dr. Mumper) who wrote multiple expert reports, and who each testified extensively at trial in 2008. The respondent has not opposed a reasonable award for the services of those experts, and I have had no trouble awarding substantial funds to compensate those experts.

Second, in my several prior Interim Fees and Costs Decisions in this case, I have in fact awarded substantial amounts to compensate the petitioners' experts. In one of those Decisions alone, issued on January 7, 2010, I authorized an award of $500,000, all for interim *costs*, not attorneys' fees. A review of the Petitioners' Application at Tab C, pp. 3387-96, indicates that virtually all of that $500,000 went to compensate the PSC for its shared costs of *experts* and *consultants*, including some of the five testifying experts named above, and a significant number of *additional* experts.[14]

But that $500,000 was *not* the only amount that I have awarded to the petitioners in this case for fees for experts. In addition to the costs that were *shared* among the various law firms making up the PSC, which were compensated in the Decision of January 7, 2010, a number of law firms *individually* incurred their own separate costs for experts, and I have in fact awarded significant additional amounts to those individual law firms for expert witness fees. For example, in my Decision filed on July 10, 2009, I awarded $230,000 to the Williams Love law firm for *costs*, much of which constituted expert witness and consultant fees. (See Petitioners' Application, Tab B.)

Further, two other law firms sought large amounts for expert and consultant fees. That is, the Williams Kherkher law firm submitted a bill for $552,869 in costs, including more than $250,000 for expert witness fees. (Petitioners' Application, Tab E, pp. 4390-4403.) And the John Kim law firm submitted a bill for $163,077 in costs, including at least $104,000 for expert witness fees (Petitioners' Application, Tab U, pp. 6521, 6608.) On September 28, 2009, after negotiations by the parties, I awarded a total of $1,550,000 to be divided among eight law firms, including the Williams Kherkher law firm and the John Kim law firm. Based on the record, it is not clear exactly how much of the $1,550,000 awarded in that September 28 decision was directed precisely to expert and consultant costs. But clearly, a substantial amount of that $1,550,000, certainly hundreds of thousands of dollars, consisted of compensation for experts and/or consultant fees.

In sum, for expert fees and costs in this case, I have awarded the $500,000 that went to the PSC in the Decision of January 7, 2010. In addition, the amounts that were awarded in the Decisions of July 10, 2009, and September 28, 2009, added several hundred thousand more for expert/consultant fees. Further, in this Decision, in the pages below I award another $33,130.35 in consultant fees for Dr. Mark Geier. Adding those figures together, it is plain that I have awarded

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[14]The costs listed at Tab C, pp. 3387-96, consisted mainly of about $654,000 for the Geiers, Dr. Young, and Dr. Hirsch, plus more than $600,000 in payments for *other* experts. Therefore, the $500,000 awarded in the Decision of January 7, 2010, clearly was intended to compensate those *other experts*, whose combined bills exceeded $600,000.

substantial funds for expert/consultant fees in this case. The fact that I have declined to award the *additional* requested amount of nearly $500,000, to compensate the experts for the production of the Young-Geier article, does *not* mean that I have been ungenerous or unfair in compensating the petitioners for expert/consultant fees in this case.

G. Argument concerning respondent's payments to experts

The parties have also raised another argument, pointing to certain payments that the *respondent* has paid to experts in past Vaccine Act cases. (Pet. Supp. Brief filed July 28, 2010, pp. 2-3.) Specifically, the petitioners point to three instances in which the respondent apparently paid Dr. Steven Lamm to serve as an expert witness in a Vaccine Act case, and then Dr. Lamm used the work that he performed in the Vaccine Act case as part of a published medical article. (*Id*. at 3.) They also point to a fourth instance in which another paid expert of respondent apparently did the same. (*Id*.)

I do not find this argument to be persuasive. The petitioners' quotations from the articles do not demonstrate exactly what respondent paid Dr. Lamm or the other experts to do, and how such payments related to the medical articles ultimately produced. Moreover, it is not clear how *respondent's* payments to experts in Vaccine Act cases relate to a special master's decision as to what compensation is reasonably awarded to a *petitioner* in a Vaccine Act case. Respondent has a separate source of funds, and respondent's attorneys make their own choice as to what payments to make to expert witnesses. The special masters have no role in awarding funds to respondent for expert costs, or in approving or disapproving the respondent's choices in spending funds for experts. In contrast, the special masters have a specified duty to award funds for *petitioners'* expenses, and are required to compensate only costs that are shown to be *reasonable*.

Moreover, the record in this case contains no information as to how much the respondent paid Dr. Lamm or the other expert. I have no way of knowing whether Dr. Lamm or the other expert has a track record for producing epidemiologic articles that is in any way comparable to the problematic record of the Geiers. I thus have no way of judging whether the payments made by respondent in the cited cases are in any way comparable to the petitioners' request in this case for an award of nearly $500,000 to compensate the production of an article of no discernable value.

I also note that a petitioner raised essentially the same argument in another Vaccine Act case, while unsuccessfully seeking an award to compensate Dr. Geier for producing a different medical article. In *Masias v. Secretary of HHS*, No. 99-697V, 2009 WL 1838979, at *40 (Fed. Cl. Spec. Mstr. June 12, 2009), *aff'd by unpublished order* (Dec. 10, 2009), the special master rejected that argument, and declined to compensate Dr. Geier for production of the article.

H. Dr. Young and Dr. Hirsch

As noted above, Dr. Heather Young was one of the named authors of the Young-Geier article, and, according to petitioners, Dr. Robert Hirsch, although not a named author, also contributed some preliminary work concerning the design of the Young-Geier study. Accordingly,

I have considered whether I should award funds for *their* participation in the Young-Geier study, even while declining to award funds to compensate the Geiers. I have concluded that it would *not* be reasonable to award funds even for the services of Dr. Young and Dr. Hirsch.

To be sure, the qualifications of Dr. Young and Dr. Hirsch to participate in such a study are *not* severely tainted like those of the Geiers. To the contrary, I note that Dr. Young does appear to have a background in the field of epidemiology. For example, one document indicates that she is an "assistant research professor" in the "Department of Epidemiology" at the George Washington University. (Petitioners' Application, Tab C, p. 4356.) As to Dr. Hirsch, for purposes of this opinion I also presume that he has reasonable qualifications to perform the specific services that he did perform with respect to the Young-Geier article.

However, no matter how good the general qualifications of Drs. Young and Hirsch may be, there are still strong reasons to decline to compensate their claimed services concerning the Young-Geier article in question. First, the Young-Geier article in fact turned out to be very flawed, devoid of any substantial probative value, as discussed in detail above (pp. 11-13).

Second, Dr. Young and Dr. Hirsch chose, for whatever reason, to collaborate on the project *with the Geiers*. And that choice of a collaborative project with the Geiers was a severely ill-advised choice. As set forth above, the Geiers had a prior history of attempts to produce epidemiologic studies concerning vaccine causation of autism, attempts which were uniformly rejected by the IOM as methodologically flawed. For Dr. Young and Dr. Hirsch to collaborate with the Geiers on *another* such study clearly entailed a grave risk that the project would be similarly flawed. And, in fact, the ensuing Young-Geier study *did* prove to be similarly flawed, and thus devoid of any probative value.

In these circumstances, given the Geiers' prior track record of flawed epidemiologic studies concerning the vaccine-causation issue, I find that it was *not* reasonable for the PSC to employ Dr. Young and Dr. Hirsch to work *with the Geiers* on the project. It thus would not be reasonable for me to compensate *any* of the costs of a collaborative project of this type that included the Geiers as co-authors. Accordingly, I will *not* award compensation for the services performed by

Dr. Young[15] and Dr. Hirsch on the flawed project, just as I will not award funds for the Geiers' participation.

I. Summary concerning the Young-Geier article

Any expert *testimony* presented in a Vaccine Act case, by either party, should ideally come from an expert who is *independent* and *objective*, and who has *special expertise* relevant to the issue at hand. By the same token, if a petitioner in a Vaccine Act case were ever to receive Program compensation for funding an *original medical study*, such study also would need to be authored by persons who were *independent* and *objective*, and who had appropriate *special expertise* in the subject matter area. The Young-Geier article certainly fails to live up to such a standard. As demonstrated above (pp. 16-19), the prior epidemiologic efforts of the Geiers in the area of the alleged vaccine causation of autism clearly demonstrates that the Geiers are the *very opposite* of independent, objective researchers. As also demonstrated (see pp. 19-20 above, 26-27 below), the Geiers do not have appropriate expertise to author epidemiologic studies. And as further demonstrated (pp. 22-23), adding Drs. Young and Hirsch to the project did *not* salvage the situation. Given the Geiers' history, it was quite unreasonable for the PSC to agree to fund a research project with *the Geiers as co-authors*, even if Drs. Young and Hirsch did have appropriate expertise themselves. And the resulting study in fact turned out to be severely flawed, in ways very similar to the deficiencies of the Geiers' previous studies in the vaccine-autism area.

Therefore, for these reasons, and for all the reasons set forth at pp. 8-24 above, I conclude that it was *not* reasonable for the PSC to agree to pay the experts in question to work on the Young-Geier article. I do not believe that a reasonable *hypothetical paying client* of the PSC would have agreed to fund the Young-Geier article as part of the cost of pursuing either the Omnibus Autism Proceeding as whole, or the *King* case itself. Thus, it would *not* be reasonable for me to compensate the costs of producing the article.[16]

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[15]The petitioners have also argued that Dr. Young should be compensated for her work on the Young-Geier article because Dr. Young allegedly "made herself available to testify, to be questioned by the special masters, and to be cross-examined" during the trial in this case. (PSC Reply, Tab 12, at 19.) I find this argument to be wholly unpersuasive. Petitioners do not cite to the record as to when their counsel allegedly informed the special masters that Dr. Young was "available" for questioning. But even assuming that petitioners' counsel did make such a representation during the trial, I do not see that as a persuasive reason for compensating Dr. Young's work on the Young-Geier article. The decision whether to have Dr. Young testify in favor of the petitioners' causation theory was solely that of the petitioners. The special masters played no role in calling witnesses, or in advising either party as to which witnesses to place on the witness stand. Had the petitioners elected to have Dr. Young testify and defend her study, I certainly would have considered compensating her time, at some reasonable hourly rate, for such testimony. But she did not testify, and whether or not she was "willing" to do so is not relevant, in my view, to the question of whether it is reasonable to compensate her for her work on the Young-Geier study.

[16]Because I conclude that it would not be reasonable to compensate *any* of the costs of the Young-Geier article, I do *not* address the issues of whether the hourly rates charged were reasonable,

VII

OTHER WORK OF THE GEIERS

A. Introduction

As noted above (p. 8), there is a *second* component to the PSC claim that I am dealing with in this Decision. In addition to the nearly $500,000 claimed for the four experts for work on the Young-Geier article, petitioners also seek about $167,000 for *additional* work performed by Mark Geier and David Geier. This work did not relate to the *King* trial, but is said to be general work performed for the PSC between 2003 and 2008. (See PSC Reply, Tab 12, p. 9; see also fn. 8 above.)

In the briefs and memoranda filed concerning this interim fees and costs claim, there is remarkably little discussion concerning this approximately $167,000 claimed for the Geiers. In one brief, the petitioners describe the work in question by the Geiers as follows (PSC Reply, Tab 12, p. 9):

> That portion of Dr. Geier's time not devoted to the research for the published study is time he spent over the course of six years consulting with the PSC. It is perfectly reasonable for petitioners generally to employ expert consultants, and particularly so in this proceeding involving a tremendous body of complex medical and scientific evidence. Dr. Geier reviewed and analyzed hundreds of science journal articles for the PSC; he summarized articles as they appeared, and searched for older, relevant articles. He consulted with other experts and reported his impressions to the PSC. He appeared at PSC meetings to make presentations about the science, explaining the literature and assisting the PSC in its evaluation of the evidence in preparing for trial of these cases. His time consulting with the PSC was time reasonably spent working on a compensation claim (in fact, indirectly on 5000 claims) and is compensable.
>
> David Geier's billed time largely of the work he did as a research assistant, and providing technical and logistical support for Dr. Geier, relating to both Dr. Geier's VSD research and his consulting work. David Geier's work did not require someone with an advanced or professional degree, and the PSC does not claim compensation for work David Geier performed that he was not qualified to do. His research, technical, and logistical support services were necessary to supporting

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whether any of the individual charges that made up the overall total were reasonable, whether the very large overall amount billed for the production of the article was excessive, etc. (I note, for example, that even if I were to afford *some* compensation for the article's production, I would certainly *not* award the unexplained, apparently excessive hourly rates claimed by the Geiers, and would not award fees to both Geiers for apparently duplicative work.)

Dr. Geier's work on behalf of petitioners and the PSC, and therefore his time was reasonably incurred on behalf of a compensation claim.

Respondent, on the other hand, provides just a few pages of discussion, arguing that I should *deny* most, if not all, of these amounts claimed for the Geiers' work. (Respondent's Memorandum of Law filed February 6, 2009, pp. 163-167.) Respondent argues that no compensation should be afforded for the services of David Geier, since he has not been shown to be qualified to provide expert or consultant services (*id*. at 163); that petitioners have afforded no evidentiary support for the claimed hourly rates for either Geier (*id*. at 164); that the Geiers should be not compensated for their extensive time claimed for travel, attending conferences, and meetings with legislators and/or legislative staff (*id*. at 164-65); and that the Geiers' billing practices were defective in a variety of ways (*id*. at 165-67).

B. David Geier

I am not persuaded that it would be reasonable to provide any compensation for the claimed services of David Geier. His only academic degree is a Bachelor of Arts with a major in biology. (Pet. Supp. Brief filed 7-28-10, Ex. 1, p. 12.) He has no medical degree or other graduate degrees. It is the *petitioners' burden* to demonstrate that it would be reasonable to pay David Geier at his claimed hourly rates of $200 or $250, or at any other rate, but they have *failed* to demonstrate that he is qualified to provide valuable expert or consultant services to the PSC.

In this regard, I note that in *Riggins v. Secretary of HHS*, No. 99-382V, 2009 WL 3319818, at *6-7 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff'd by unpublished order* (Dec. 10, 2009), Chief Special Master Golkiewicz was also presented with a bill for services by David Geier. The special master, however, found that David Geier "was not qualified to serve as a consultant on the medical issues presented in the Vaccine Program." (*Id*. at *7.) He declined to award any compensation for David Geier's services.

In contrast, the petitioners have *not* pointed to any Vaccine Act case in which a special master has awarded compensation for services provided by David Geier.

Further, I note that in *Riggins*, the special master concluded, after studying the Geiers' billing records, that for many meetings or consultations, Mark Geier and David Geier seemed to have billed the same hours; the master found that this amounted to unjustified duplication of effort. 2009 WL 3319818 at *7. I have detected the same phenomenon again and again in the billing records submitted in this case, and I find it to be another reason to deny compensation for the hours billed by David Geier.

Finally, I note that the petitioners have failed completely to offer any *evidence* as to what might be a *reasonable hourly rate* for David Geier's services. This is yet another reason for denying compensation for his services.

In short, it is the *petitioners' burden* to demonstrate that it would be reasonable to compensate then for the services provided by David Geier, but they have failed to shoulder that burden in this case.

C. Mark Geier as a medical "consultant"

As noted above, many judges and special masters have concluded that Dr. Mark Geier is not qualified to serve as an "expert witness" in medical areas outside of his specialty of genetics. (See cases cited at pp. 14-15 above.) However, in this case, he has been employed by the PSC not as an "expert," but rather as a medical "consultant." The concept of a Vaccine Act attorney utilizing a medical doctor as a "consultant," rather than an "expert," has been recognized in a number of Vaccine Act cases, several of them involving Dr. Geier. A medical doctor is sometimes used by a petitioner's attorney, during the initial stages of a Vaccine Act case, to assist the attorney in determining the proper approach to a case, and in obtaining an expert witness to actually testify at trial. The medical consultant is qualified to analyze the medical records of the case, to search for medical articles concerning the type of medical condition in question, and to read and analyze such articles. The consultant may then seek an appropriate expert in the medical field in question, interview candidate experts, and recommend to the attorney which expert to retain.

Cases in which such a use of a medical consultant has been approved in Vaccine Act cases include *Densmore v. Secretary of HHS*, No. 99-588V, 2006 WL 5668063, at *5 (Fed. Cl. Spec. Mstr. Aug. 14, 2006); *Simon v. Secretary of HHS*, No. 05-941V, 2008 WL 623833, at *5 (Fed. Cl. Spec. Mstr. Feb. 21, 2008); *Ray v. Secretary of HHS*, No. 04-184V, 2006 WL 1006587 at *11-12 (Fed. Cl. Spec. Mstr. Mar. 30, 2006); *Lamar v. Secretary of HHS*, No. 99-584, 2008 WL 3845157, at *12-15 (Fed. Cl. Spec. Mstr. July 30, 2008); *Riggins v. Secretary of HHS*, No. 99-382V, 2009 WL 3319818, at *9-10 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff'd by unpublished order* (Dec. 10, 2009); *Sabella v. Secretary of HHS*, No. 02-1627V, 2008 WL 4426040, at *31-32 (Fed. Cl. Spec. Mstr. Aug. 29, 2008), *aff'd on this point and rev'd on other point*, 86 Fed. Cl. 201, 218-19 (2009); *Schrum v. Secretary of HHS*, No. 04-210V, 2007 WL 1772056, at *3-4 (Fed. Cl. Spec. Mstr. May 31, 2007); *Doe/14 v. Secretary of HHS*, 2008 WL 982929, at *4-5 (Fed. Cl. Spec. Mstr. Mar. 28, 2008). Many of those cases have involved Dr. Geier himself as the consultant. See *Ray*, *Riggins*, *Sabella*, *Schrum*, *Densmore*, *Lamar*, and *Doe/14*.

As noted above, in this case the PSC has described the services that Mark Geier performed for the PSC, in addition to his work on the Young-Geier article, as follows (PSC Reply, Tab 12, p. 9):

> Dr. Geier reviewed and analyzed hundreds of science journal articles for the PSC; he summarized articles as they appeared, and searched for older relevant articles. He consulted with other experts and reported his impressions to the PSC. He appeared at PSC meetings to make presentations about the science, explaining the literature and assisting the PSC in its evaluation of the evidence in preparing for trial of these cases.

It seems to me that the services described in those sentences fall squarely within the type of "medical consultant" services described in the cases that I have set forth above. Accordingly, I conclude that when Dr. Geier performed the *specific tasks* cited above for the PSC, it is reasonable to compensate him as a *consultant* for those hours.

When a medical doctor has been used as a consultant, rather than as an expert witness, in Vaccine Act cases, the doctor has been compensated at a substantially *lower* hourly rate than he or she might have received as the petitioners' primary *expert* testifying in his or her own specialty area. *E.g.*, *Simon*, 2008 WL 623833 at *5. When special masters have compensated *Dr. Geier's* services as a *consultant* in past cases, they have awarded hourly rates of $175 (*Schrum*, 2007 WL 1772056 at *3-4; *Densmore*, 2006 WL 5668063 at *5), $200 (*Sabella*, 2008 WL 4426040 at *32; *Riggins*, 2009 WL 3319818 at *14), or $250 (*Lamar*, 2008 WL 3845157 at *15; *Ray*, 2006 WL 1006587 at *11-12; *Doe/14*, 2008 WL 982929 at *4-5). I conclude that $225 per hour is a reasonable rate to utilize in this case for the consultant services of Mark Geier that fall within the description above.

D. Analysis of Mark Geier hours

I have closely studied the part of Petitioners' Application that contains the billing documentation pertaining to the Geiers, *i.e.*, Tab C, pp. 3888-90, and pp. 3972-4056. Tab C, at pp. 3888-89, contains a summary of payments made to, or bills received from, "Mark Geier," totalling $355,431.05. Tab C, at p. 3990, shows disbursements to "Medcon, Inc.," totaling $9,165.00.[17] "Medcon" seems to be an alternative billing vehicle for the Geiers, under which work by *either* Geier may be billed. (See, *e.g.*, Tab C, pp. 3978-80, 3983.) The PSC in its billing records intermingled bills for "Mark Geier" and "Medcon." (Tab C, pp. 3973-4056.) Both the bills from "Mark Geier" and the bills from "Medcon" bill the PSC for the work of *both* Mark Geier and David Geier.

I have looked at *each and every individual billing entry*--several different entries are contained on most pages--located at pp. 3973-4056. Most of those entries clearly indicate that they are related to the Young-Geier study. For the reasons set forth above (pp. 8-24), I award no compensation for those entries.

Other entries indicate that *David Geier* was billing the PSC for work that does not appear to be directly related to the Young-Geier study. I decline to award compensation for any of those entries, for the reason set forth at pp. 26-27 above.

Other billing entries indicate work performed by *Mark Geier* for the PSC that appears *not* to be directly related to the Young-Geier study. Some of these entries seem to fit within the PSC's description, quoted above, concerning tasks that Mark Geier performed for the PSC that should be

[17]In Tab C, pp. 3961-64 also contain the Geiers' names, but seem to detail certain expenses that the PSC paid directly to the Department of Health and Human Services ("DHHS"), rather than to the Geiers, involving payments related to the Young-Geier study. I do not award the PSC any compensation for the payments listed at Tab C, pp. 3961-64.

compensated. As quoted above, the PSC stated that Dr. Geier should be compensated for general work that was helpful to the PSC in developing its causation theories, specifically consisting of the following tasks (PSC Reply, Tab 12, p. 9):

> Dr. Geier reviewed and analyzed hundreds of science journal articles for the PSC; he summarized articles as they appeared, and searched for older, relevant articles. He consulted with other experts and reported his impressions to the PSC. He appeared at PSC meetings to make presentations about the science, explaining the literature and assisting the PSC in its evaluation of the evidence in preparing for trial of these cases.

I find the PSC to be persuasive in arguing that when Dr. Geier performed the *specific tasks* cited above for the PSC, it is reasonable to compensate him as a *consultant* for those hours.

After carefully studying the billing records at Tab C, pp. 3973-4056, I find that Dr. Geier likely performed such tasks on a number of specific occasions, as documented in the following billing entries (all pages are at Tab C):

p. 3976	6.5 hours	literature search
p. 3984	2 hours	review of medical study
p. 3985	6.5 hours	obtaining and reviewing studies
p. 3991	.75 hours	consulting with neurologist
p. 3995	11 hours	medical literature review
p. 3996	8 hours	meeting with experts
p. 3997	10 hours	medical literature search
p. 3997	4 hours	preparation for expert meeting
p. 3999	4 hours	medical literature search
p. 4001	7.5 hours	meeting with experts
p. 4003	24 hours	meeting with experts
p. 4003	1.5 hours	document review
p. 4005	6.5 hours	review medical articles
p. 4011	10.75 hours	meeting with experts
p. 4015	3 hours	reviewing prevalence data
p. 4017	1 hour	meeting with expert
p. 4019	2.5 hours	consult with expert *re* literature
p. 4022	1.5 hours	pursue study documents
p. 4023	.75 hours	document review
p. 4023	.166 hours	document review
p. 4025	3.33 hours	meet with experts
p. 4025	3.5 hours	pursue study documents
p. 4026	.5 hours	pursue study data
p. 4027	2 hours	review materials
p. 4028	1.5 hours	review study documents
p. 4029	1.5 hours	pursue government documents

p. 4029	1.25 hours	review study
p. 4030	.5 hours	pursue study documents
p. 4030	.75 hours	discuss study with PSC attorney
p. 4035	.5 hours	pursue study data
p. 4039	3.5 hours	literature search
p. 4051	16.5 hours	document search and review

These entries total to 147.246 hours of compensable time for Dr. Geier.[18]

Finally, I note that some billing entries mention work that is *neither* obviously part of the Young-Geier study effort, *nor* falls into one of the categories described in the paragraph above. For example, a few entries simply state that Dr. Geier had a meeting with a PSC lawyer, providing no details whatsoever concerning the topic of the meeting, etc. (See, *e.g.*, entries at Tab C, pp. 3978, 3979, 3980, 3981.) As noted previously, it is the *petitioners'* burden to demonstrate the reasonableness of each element of a claim for costs. As to such unexplained entries, petitioners have *not* met that burden, and, therefore, I will *not* compensate the time of Dr. Geier billed at such entries.

E. Summary concerning amount awarded for Mark Geier's services

As noted above, I have found that $225 per hour is a reasonable amount to award for the compensable consultant services of Dr. Mark Geier in this case. (See p. 28 above.) I have also found that the billing records contain 147.246 hours of compensable time of Dr. Geier at a consultant rate. (See pp. 28-30 above.) Accordingly, I will award $33,130.35 (147.246 hours times $225 per hour) for the services of Dr. Geier.[19]

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[18]I note that in some past cases, Dr. Geier has been found to bill excessive hours, or to fail to use appropriate "billing judgment." For example, in one case, Chief Special Master Golkiewicz found that the number of hours billed by Dr. Geier was "grossly unreasonable." *Riggins v. Secretary of HHS*, No. 99-382V, 2009 WL 3319818, at *6 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff'd by unpublished order* (Fed. Cl. Dec. 10, 2009). In this case, in granting the hours exactly as claimed at each of the 31 separate billing entries listed above, I am in fact giving Dr. Geier the "benefit of the doubt" that the billing entries in question are accurate and reasonable.

[19]I note that it is not an easy judgment whether to award *any* funds for the services of Dr. Mark Geier in this case. On balance, I conclude that, in light of the cases awarding funds to Dr. Geier as a *consultant* (see p. 27 above), it was not unreasonable *in this instance* (several years ago) for the PSC to employ Dr. Geier for consultant services. However, reasonable minds could differ on that issue. As explained above, some special masters and judges have stated doubts about Dr. Geier's honesty (see cases cited at p. 15, above), and, given his reputation, some special masters have found it unreasonable in recent years to award *any* funds for Dr. Geier's services (see cases cited at pp. 15-16, above).

VIII

SUMMARY OF INTERIM FEES AND COSTS AWARDED IN THIS KING CASE

As noted above, I have filed a *series* of interim fees decisions in this case, each decision resolving a part of the "interim fees and costs" overall claim filed in November of 2008. On July 10, 2009, I issued an award for fees and costs in the amount of $2,300,000. On July 27, 2009, I issued an award for fees and costs in the amount of $3,594. On September 28, 2009, I issued an award for fees and costs in the amount of $1,550,000. On January 7, 2010, I issued an award of costs in the amount of $500,000. Finally, in this Decision I award the petitioners an additional $33,130.55 in costs.

I believe that I have now resolved all of the various elements of the petitioners' interim fees and costs claim. I conclude that, on an overall basis, I have awarded the amount justified by the evidence presented by the petitioners.

IX

CONCLUSION

For the reasons set forth above, I conclude that it is reasonable to award at this time the amount of $33,130.35 for petitioners' interim costs. Pursuant to 42 U.S.C. § 300aa-15, I hereby award a lump sum of $33,130.35, to be awarded in the form of a check payable jointly to petitioners and their counsel of record.

In the absence of a timely-filed motion for review of this Decision, the Clerk of this court shall enter judgment accordingly.

/s/ George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master