

**Updated for the December 6, 2012 ACCV Meeting
Prepared by the U.S. Department of Justice (DOJ)
U.S. Court of Appeals for the Federal Circuit (CAFC)**

Entitlement

CASE NAME CITATION	HOLDING
<p><u>STONE</u> and <u>HAMMITT</u> 676 F.3d 1373 (Fed. Cir. 2012)</p>	<p>In a consolidated appeal, the CAFC reiterated prior precedent and held that the special master was not precluded from considering respondent’s evidence of a genetic mutation as part of examining the record as a whole to determine whether or not petitioners met their burden of proof in establishing a prima facie case merely because that evidence was also relevant as to whether or not respondent had satisfied her burden of showing an alternate cause. Because the special master found that the genetic mutation was the sole cause of the children’s condition, there was no need to analyze the question of superseding causes. The CAFC also found that the special master was not arbitrary or capricious in his fact finding and that petitioners failed to show that the DTaP vaccine was the more likely cause of the children’s seizure disorder.</p>
<p><u>ROTOLI</u> and <u>PORTER</u> 663 F.3d 1242 (Fed. Cir. 2011)</p>	<p>The CAFC found that the Claims Court judge incorrectly read <u>Andreu</u> to prohibit a special master from using credibility determinations to reject a petitioner’s theory of causation. Rather, in <u>Moberly</u>, <u>Broekelschen</u>, and <u>Doe 11</u>, the CAFC had “unambiguously explained” that special masters are expected to consider credibility of expert witnesses in evaluating vaccine claims. Further, the Claims Court’s blanket approach of setting aside the special master’s findings of fact without ever determining whether the findings were arbitrary and capricious was legal error. Because the special master’s decision contained a thorough and careful evaluation of all of the evidence, including records, tests, reports, medical literature, and expert’s opinions and their credibility, the CAFC found that the special master’s decision was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. The CAFC reversed the findings of the Claims Court and remanded with instructions that a decision be entered affirming the special master’s denial of compensation.</p>

<p><u>CEDILLO</u> 617 F.3d 1328 (Fed. Cir. 2010)</p>	<p>The CAFC affirmed the Court of Federal Claims' decision sustaining the special master's determination that thimerosal containing vaccines combined with the measles-mumps-rubella (MMR) vaccine do not cause autism. In this appeal, appellants argued that the special master improperly based his decision on evidence derived from litigation in the United Kingdom that should have been excluded, and disregarded other evidence that should have been considered. The CAFC disagreed and found that the special master committed no legal error, properly considered all relevant and reliable evidence, and appropriately exercised his discretion in weighing that evidence. Of particular note, the CAFC held that the special master's use of <u>Daubert v. Merrell Dow Pharms., Inc.</u>, 509 U.S. 579 (1993), was an appropriate tool to assess the reliability of the parties' evidence, particularly the expert testimony.</p>
<p><u>HAZLEHURST</u> 604 F.3d 1343 (Fed. Cir. 2010)</p>	<p>The CAFC found that the special master acted consistent with principles of fundamental fairness by admitting and considering respondent's expert's testimony and reports criticizing petitioners' evidence and offered petitioners ample time and opportunity to rebut respondent's evidence. Further, the special master did not commit legal error by according little weight to petitioners' evidence from a research facility, which the special master found to be unpublished, preliminary, and incomplete. The special master further committed no error in discounting testimony by petitioners' expert regarding causation because that opinion was based on studies that were unreliable.</p>
<p><u>DOE 11</u> 601 F.3d 1349 (Fed. Cir. 2010)</p>	<p>The CAFC found that the special master correctly considered "the record as a whole" in determining whether compensation is warranted, and that the Government is not restricted by proving a "factor unrelated" as the burden never shifted from petitioner to establish a prima facie case. The Government may present evidence of an alternate cause and the special master is not limited or precluded from considering such evidence when deciding whether petitioner has established a prima facie case. Petitioners' failure to meet his burden of proof as to the cause of an injury or condition is different from a requirement that he affirmatively disprove an alternate cause.</p>
<p><u>MOBERLY</u> 592 F.3d 1315 (Fed. Cir. 2010)</p>	<p>The CAFC found that the special master correctly interpreted and applied the traditional tort "preponderance" standard applicable in Vaccine Act cases, and that the petitioners' argument for a more relaxed standard was not consistent with the Act. The Court also held that a close temporal association and the lack of an identifiable alternative cause, standing alone, are insufficient to prove causation. The Court further held that when evaluating an expert's medical theory, a special master is expected to evaluate both the reliability and credibility of the expert's testimony.</p>

<p><u>ANDREU</u> 569 F.3d 1367 (Fed. Cir. 2009)</p>	<p>The CAFC found that if a petitioner satisfies the first and third prongs of <u>Althen</u>, the second prong (whether there exists a logical sequence of cause and effect between the vaccination and the injury alleged) can be met through the testimony of a treating physician. The CAFC further found that the special master's determinations regarding the credibility of witnesses are distinct from determinations of the reliability of scientific evidence, and the special master must clearly differentiate between these determinations to allow appropriate review on appeal.</p>
<p><u>DE BAZAN</u> 539 F.3d 1347 (Fed. Cir. 2008)</p>	<p>The CAFC found that as part of petitioner's evidence in establishing a prima facie case of actual causation, petitioner has the burden of proving a medically appropriate time frame between vaccination and the onset of injury. The Government, like any defendant, may offer evidence to demonstrate the inadequacy of the petitioner's evidence on a requisite element of the petitioner's case-in-chief, and a special master is obliged to consider all evidence when deciding whether or not petitioner has met his burden of proof.</p>
<p><u>WALTHER</u> 485 F.3d 1146 (Fed. Cir. 2007)</p>	<p>The CAFC found that the Vaccine Act does not require petitioners to bear the burden of eliminating alternative causes where the other evidence on causation-in-fact is sufficient to establish a prima facie case.</p>
<p><u>PAFFORD</u> 451 F.3d 1352 (Fed. Cir. 2006)</p>	<p>The CAFC found that petitioners must prove by a preponderance of the evidence that the vaccine, and not some other agent, was the actual cause of the injury, when petitioners' other evidence of causation-in-fact is insufficient to establish a prima facie case.</p>
<p><u>CAPIZZANO</u> 440 F.3d 1317 (Fed. Cir. 2006)</p>	<p>The CAFC found that a claimant could satisfy prongs one and two of the three-prong <u>Althen</u> test but fail to satisfy prong two when medical records and medical opinions do not suggest that the vaccine caused the injury or where the evidence shows that the probability of coincidence or another cause prevents petitioner from establishing causation by a preponderance of the evidence. The CAFC found that statements in the medical records by treating physicians are relevant and should be afforded significant evidentiary weight.</p>
<p><u>ALTHEN</u> 418 F.3d 1274 (Fed. Cir. 2005)</p>	<p>The CAFC found that in order to prove causation-in-fact, a petitioner must prove by a preponderance of the evidence: (1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury. Lack of peer reviewed literature does not, in and of itself, preclude a finding of causation-in-fact.</p>

Statute of Limitations

CASE NAME CITATION	HOLDING
<p><u>CLOER</u> 654 F.3d 1322 (Fed. Cir. 2011)</p>	<p>On August 5, 2011, the CAFC, in an 8-4 en banc decision, held that the Vaccine Act does not contain a discovery rule, nor can a discovery rule be read by implication into the Act. Rather, the statute of limitations begins to run on a specific statutory date: the date of the occurrence of the first symptom or manifestation of onset of the injury for which a claimant seeks compensation. In addition, the Court overruled its prior precedent and further held that equitable tolling applies to the Vaccine Act, although it determined that the statute of limitations is not tolled due to unawareness of a causal link between an injury and administration of a vaccine.</p>
<p><u>WILKERSON</u> 593 F.3d 1343 (Fed. Cir. 2010)</p>	<p>The CAFC found that, consistent with its holding in <u>Markovich</u>, the 36 month statute of limitations period under 42 U.S.C. § 300aa-16(a)(2) begins to run with either the occurrence of the first symptom of or the manifestation of onset of an alleged vaccine-related injury, whichever is first. The Court held that the Act's time for filing runs from "the date of the occurrence of the first symptom or manifestation of onset," not the date the medical profession recognizes that a symptom is related to an alleged vaccine-related injury, and the Court held that an expert's determination of the first symptom or manifestation of onset may be made in "hindsight," i.e., a medical professional need not have appreciated the significance of the symptom at the time it occurred.</p>
<p><u>MARKOVICH</u> 477 F.3d 1353 (Fed. Cir. 2007)</p>	<p>The CAFC found that the determination of when the 36 month statute of limitations period under 42 U.S.C. § 16(a)(2) begins to run is made by an objective standard, that is, even if the petitioner reasonably would not have known at the time that the vaccine had caused injury.</p>

Death Benefits/Survivorship

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<p><u>ZATUCHNI</u> <u>(SNYDER)</u> 516 F.3d 1312 (Fed. Cir. 2008)</p>	<p>The CAFC found that a petitioner who establishes vaccine-related injuries and a vaccine-caused death is entitled to recover the compensation for vaccine-related injuries and vaccine-related death benefits under 42 U.S.C. § 300aa-15(a)(1)(B), (a)(3), (a)(4), <u>and</u> the death benefit provided under Section 15(a)(2). This applies where petitioner filed a claim for vaccine-related injuries, received a favorable ruling that the injuries were vaccine-related, and then died before receiving compensation for those injuries.</p>

Attorneys' Fees and Costs/Interim Fees Requests

CASE NAME CITATION	HOLDING
<p><u>CLOER</u> 675 F. 3d 1358 (Fed. Cir. 2012), <i>cert. granted</i>, 2012 WL 5851844 (U.S. Nov. 20, 2012) (No. 12-236)</p>	<p>In a 7-6 <i>en banc</i> decision, the CAFC held that a petitioner who asserts an untimely but non-frivolous claim is eligible to apply for an award of reasonable attorneys' fees and costs incurred in proceedings related to the petition, provided that the petition was deemed to be brought in good faith and with a reasonable basis. CAFC remanded to CFC for a determination as to whether the claim, even though untimely under an equitable tolling analysis, was brought in good faith and with a reasonable basis. <u>Dissent</u>: a petitioner who files a petition that is deemed untimely should not be entitled to an award of attorneys' fees and costs as such an award in the context of this fee shifting statute is contrary to the Vaccine Act, legislative intent, and sovereign immunity.</p>
<p><u>RODRIGUEZ</u> 632 F.3d 1381 (Fed. Cir. 2011)</p>	<p>The CAFC affirmed the special master's decision rejecting the <u>Laffey</u> matrix as prima facie evidence of a forum rate for petitioners' counsel. The issue was whether the reasonable hourly rate for attorneys handling Vaccine Act cases should be determined by applying the <u>Laffey</u> matrix, a schedule of rates maintained by DOJ to compensate attorneys prevailing in "complex federal litigation," or whether the rate should be determined by considering a variety of factors, which may or may not include the <u>Laffey</u> matrix. The CAFC held that Vaccine Act litigation, while potentially involving complicated medical issues and requiring highly skilled counsel, is not analogous to "complex federal litigation" as described in <u>Laffey</u>, so as to justify use of the matrix. Distinguishing between the type of litigation the <u>Laffey</u> matrix is designed to compensate, the CAFC stated that a party need not prevail under the Vaccine Act in order to receive an attorneys' fees award, that attorneys are practically assured of compensation in every case without regard to whether they win or lose and the skill with which they presented their clients' cases, and that the attorneys' fees provisions under the Act "were not designed as a form of economic relief to improve the financial lot of lawyers." Further, the CAFC noted that Vaccine Act proceedings are an alternative to the traditional civil forum, apply relaxed legal standards of causation, have eased procedural rules compared to other federal civil litigation, do not have formal discovery and thus avoid discovery disputes, do not apply the rules of evidence, and are tried in informal, streamlined proceedings before special masters well-versed in the issues commonly repeated in Vaccine Act cases.</p>

<p><u>RIGGINS</u> 406 Fed. App'x. 479 (Fed. Cir. 2011)</p>	<p>The CAFC found that the special master appropriately reduced the amount of attorneys' fees and costs sought by petitioner's counsel for the general development of Hepatitis B vaccine cases from the requested sum of \$204,619.18 to an award of \$79,782.81. In doing so, the CAFC affirmed the special master's decision to reduce the \$97,443.43 in fees and costs associated with the consulting work of two experts to \$10,000.00. Among other things, the CAFC agreed with the special master's finding that a hypothetical client would not pay for costly travel by petitioner's counsel and his consultants to France for personal consultation with foreign experts and lawyers, or for time and expenses related to the consultants' attendance at a professional conference in Italy.</p>
<p><u>KAY</u> 298 Fed. App'x. 985 (Fed. Cir. 2008) <u>per curiam</u>, <u>affirmance</u>, Nov. 10, 2008</p>	<p>The CAFC denied an award of attorneys' fees and costs where the petition was found to be time-barred under <u>Markovich</u> and dismissed for lack of jurisdiction, precluding an award of attorneys' fees in a case that was untimely filed.</p>
<p><u>AVERA</u> 515 F.3d 1343 (Fed. Cir. 2008)</p>	<p>The CAFC affirmed that, in general, the forum rule should be used to calculate reasonable hourly rates for petitioners' attorneys in claims brought under the Vaccine Act, and found that Washington, DC is the forum for vaccine cases because it is where the CFC, which has exclusive jurisdiction over vaccine cases, is physically located. In applying the forum rule, the CAFC recognized and applied an exception derived from <u>Davis v. U.S. E.P.A.</u>, 169 F.3d 755 (D.C. Cir. 1999). Applying <u>Davis</u>, the CAFC found that an exception to the forum rule applies where 1) the bulk of the work was done outside DC and 2) there is a very significant difference between the DC rates and the attorneys' hometown rates. The CAFC found that the appellants' vaccine attorneys hailing from Cheyenne, Wyoming were not entitled to forum rates in this case. The CAFC also held that interim attorneys' fees are permitted under the Vaccine Act. The CAFC considered an award of interim fees particularly appropriate when cases are protracted and costly experts must be retained. The CAFC found that there was no basis for an award of interim fees here because the petitioners only sought an award of interim fees pending an appeal; made no showing of undue hardship; the amount of fees was not substantial; no experts had been employed; and there was only a short delay in the award pending the appeal.</p>