

In the United States Court of Federal Claims
OFFICE OF SPECIAL MASTERS

No. 06-195V
Filed: January 13, 2009
(Reissued for Publication: January 16, 2009)

TO BE PUBLISHED

JESSICA KUTTNER, as the Legal *
Representative of her minor son *
CALVIN KUTTNER, *

* Attorney's Fees and Costs; Hourly Rate;
* Market Rate; Hometown Rule; Charges for
* Travel Time; Avera.
*

v. *
*

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

* Respondent. *

Curtis Webb, Webb, Webb & Guerry, Twin Falls, ID, for petitioner

Voris Johnson, U.S. Department of Justice, Washington, D.C., for respondent

ATTORNEY'S FEES AND COSTS DECISION¹

GOLKIEWICZ, Chief Special Master.

I. PROCEDURAL BACKGROUND

On March 13, 2006, petitioner, Jessica Kuttner, filed a petition on behalf of her son,

¹The undersigned intends to post this decision on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). As provided by Vaccine Rule 18(b), 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). Otherwise, the entire decision will be available to the public. Id.

Calvin Kuttner, pursuant to the National Vaccine Injury Compensation Program² (“the Act” or “the Program”) alleging that her son’s injuries were the result of his June 15, 2004 vaccination. On June 12, 2006 respondent filed respondent’s Rule 4(c) Report stating that based on “the existing record, petitioner has failed to provide preponderant evidence in support of the petition for compensation.” Rule 4(c) Report (hereinafter R.4 Report), filed June 12, 2006, at 10. After the submission of medical records and the parties’ expert reports, a Hearing was held on February 12, 2008, in Reno, NV. Subsequently, the undersigned issued a Ruling on Entitlement and Order Scheduling Damages on February 15, 2008. Petitioner was ordered to present petitioner’s claim for damages within thirty (30) days. Ruling on Entitlement and Order Scheduling Damages, filed February 15, 2008. The parties contacted the court on March 27, 2008 to inform the court that the parties reached a tentative agreement in the case. Accordingly, on March 28, 2008 a 15-Week Stipulation Order was filed. Order, filed March 28, 2008. The parties filed a Stipulation on July 16, 2008 and a Decision was issued on July 22, 2008 adopting the parties’ Stipulation. Stipulation, filed July 16, 2008; Decision, filed July 22, 2008. Judgment on the Decision filed July 22, 2008 was entered on August 8, 2008.

Prior to the parties filing their Stipulation petitioner filed petitioner’s Motion for Attorney Fees. Petitioner’s Motion for Attorney Fees (hereinafter P Fees), filed May 30, 2008. Petitioner requested \$40,341.00 in attorneys’ fees, \$8,645.05 in costs incurred by petitioner’s counsel and \$612.91³ in petitioner’s cost for a total request of \$49,598.96 in attorneys’ fees and costs. Id. at 1-2. Petitioner’s counsel’s request an hourly rate of \$200 for work performed in 2005-2006; \$220 for 2007; \$240 for January 1, 2008 through March 31, 2008; and \$325 for time after March 31, 2008. Id. at 3.

On June 16, 2008 respondent filed respondent’s Opposition to petitioner’s fee application objecting to hourly rates requested in excess of \$200 per hour. Respondent’s Opposition to Petitioner’s Petition for Attorney Fees and Costs (hereinafter R Opp.), filed June 16, 2008. On July 7, 2008 petitioner filed petitioner’s Reply to respondent’s Opposition. Reply to Respondent’s Opposition to Petition for Fees and Costs (hereinafter P Reply), filed July 7, 2008.

Petitioner filed an amended fee application on September 29, 2008. Amended Petition for Attorney Fees and Costs (hereinafter P Amended Fees), filed September 29, 2008. Counsel explained that the parties had been unable to reach an agreement on Mr. Webb’s hourly rate. Id. at 1. However, petitioner adjusted her request from \$325 per hour for Mr. Webb’s work after

² The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C.A. §§ 300aa-10 et seq. (West 1991 & Supp. 2002) (“Vaccine Act” or the “Act”). Hereinafter, individual section references will be to 42 U.S.C.A. § 300aa of the Vaccine Act.

³ Petitioner filed Petitioner’s Statement Concerning Costs on June 2, 2008, stating that petitioner incurred \$617.91 in costs (appears to be a clerical error) as petitioner’s expense report states petitioner’s cost at \$612.91, the amount quoted in P Fees. See Petitioner’s Statement Concerning Costs (hereinafter P Costs), filed June 2, 2008.

March 31, 2008 to a rate of \$300 per hour. *Id.* at 5. Respondent filed respondent's Opposition to petitioner's amended fee application on October 14, 2008. Respondent's Opposition to Petitioner's Amended Petition for Attorney Fees and Costs (hereinafter R Opp. to Amended Fees), filed October 14, 2008. On October 23, 2008 petitioner filed petitioner's Reply to respondent's Opposition and petitioner's statement of costs from June 24, 2008 through September 2, 2008. Petitioner's Reply to Respondent's Opposition to Petitioner's Amended Petition for Attorney Fees and Costs (hereinafter P 2nd Reply), filed October 23, 2008; Petitioner's Statement of Fees and Costs June 24, 2008 through September 2, 2008 (hereinafter Statement of Fees), filed October 23, 2008.⁴ This attorney's fees issue is now ripe for decision.

II. DISCUSSION

After the parties extensive briefing it is evident that two key issues are critical for determining the appropriate award of Attorney's Fees and Costs: (1) what is the relevant community and the reasonable hourly rate within that community, and (2) the dispute over the amount of time requested in attorney's fees for petitioner's counsel for work on petitioner's Amended Petition for fees and subsequent filings. Finally, the undersigned will also briefly address the issue of whether travel time should be reimbursed at ½ the hourly rate.

The first issue is two-fold. The relevant community must first be determined to assess whether the requested hourly rate is a reasonable market rate for the community. Petitioner argues that the relevant community is the State of Idaho and respondent argues that the relevant community is Twin Falls, Idaho or comparably-sized Idaho cities. The undersigned finds the relevant community to be Twin Falls, Idaho where Mr. Webb practices law, maintains an office, and where a substantial portion of the work was performed. The other prong requires determining whether the rate of \$300 per hour is reasonable for the community of Twin Falls, Idaho.⁵ Petitioner has not provided convincing evidence that a market rate of \$300 per hour is a reasonable market rate in Twin Falls, Idaho for similar services by lawyers of reasonably comparable skill, experience, and reputation. *See Avera v. Sec'y HHS*, 515 F.3d 1343, 1347-48 (Fed. Cir. 2008). Petitioner's counsel has been compensated at his requested rate of \$240 per hour in a recent decision issued by the undersigned. *Bowman v. Sec'y of HHS*, 06-394V, (Sp. Mstr. Fed. Cl. Dec. 10, 2008)(Respondent had no objection to petitioner's request for attorney's

⁴In response to concerns regarding billing records, petitioner asserts that a clerical error resulted in petitioner's Statement of Fees not being filed with the Amended Petition for fees. *Id.* Petitioner's Statement of Fees, which is an itemized statement of attorney fees incurred between June 24 and September 2, 2008, was filed with petitioner's second Reply. *See* Statement of Fees.

⁵Given petitioner's reduced request for \$300 per hour, the undersigned will not go into depth on the reasonableness of petitioner's initial request for an hourly rate of \$325 per hour, except to address respondent's concern regarding whether petitioner should be awarded any compensated for work done on Petitioner's Amended Petition for fees.

fees and costs utilizing an hourly rate of \$240)(Westlaw cite not yet available). For reasons that will be discussed the undersigned finds the rate of \$240 per hour reasonable for work performed in 2008.

In addressing the second main issue, the dispute over hours, respondent argues that petitioner should not be compensated for fees incurred on petitioner's amended fee petition. R. Opp. to Amended Fees at 4. Petitioner responds stating, "Mr. Webb's work on the attorney fee issues ...are part of [the] petitioner's claim and should be compensated as such." P 2nd Reply at 5. The undersigned's analysis will focus on the amount of hours requested for work performed on both petitioner's original and amended fee applications. For reasons that will be discussed the undersigned finds for a reduction of 8.8 hours for work on petitioner's Amended Petition for fees.

With regard to travel time respondent objects to petitioner's counsel's request for travel time at his full hourly rate as unreasonable and argues that the rate should be reduced. R. Opp. at 8. Petitioner acknowledges that the "traditional practice" under the Program is to award petitioner's counsel 1/2 the hourly rate for travel time. P Reply at 8. Petitioner, while disagreeing with the practice, is willing to accept it in this case. *Id.* The undersigned will briefly discuss this issue and conclude that petitioner's counsel should be reimbursed at 1/2 petitioner's counsel's hourly rate for travel time.

Relevant Case Law

Pursuant to §15(e), special masters may award "reasonable" attorney's fees as part of compensation. This is true even if petitioner was unsuccessful on the merits of the case. §15(e)(1). To determine reasonable attorney's fees, this court has traditionally employed the lodestar method which involves "multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." Blanchard v. Bergeron, 489 U.S. 87, 94 (1989) quoting Blum v. Stenson, 465 U.S. 886, 888 (1984); see also Avera v. Sec'y HHS, 515 F.3d 1343, 1347-48 (Fed. Cir. 2008), Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) and Saxon v. Sec'y HHS, 3 F.3d 1517, 1521 (Fed. Cir. 1993). The resulting lodestar figure is an initial estimate of reasonable attorney's fees which may then be adjusted if the fee is deemed unreasonable based upon the nature of the services rendered in the case. Blanchard, 489 U.S. at 94; Pierce v. Underwood, 487 U.S. 552, 581 (1988) (Brennan, J. et al., concurring); Blum, 465 U.S. at 897, 899; Hensley, 461 U.S. at 434. See also, Ceballos v. Sec'y of HHS, No. 99-97V, 2004 WL 784910 (Fed. Cl. Spec. Mstr. Mar. 25, 2004).

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). In making reductions, the special master is not necessarily required to base his or her decisions on a line-by-line evaluation of the fee application. Wasson v. Sec'y of HHS, 24 Cl. Ct. 482, 484 (1991) (affirming the special master's general approach to

petitioner's fee request where the entries and documentation contained in the 82 page fee petition were organized in such a manner that specific citation and review were rendered impossible), aff'd, 988 F.2d 131 (Fed. Cir. 1993). Moreover, special masters may rely on their experience with the Vaccine Act and its attorneys to determine the reasonable number of hours expended. Wasson, 24 Cl. Ct. at 486, aff'd, 988 F.2d 131 (Fed. Cir. 1993). Just as "[t]rial court courts routinely use their prior experience to reduce hourly rates and the number of hours claimed in attorney fee requests . . . [v]accine program special masters are also entitled to use their prior experience in reviewing fee applications." Saxton v. Sec'y of HHS, 3 F.3d 1517, 1521 (Fed. Cir. 1993) (citing Farrar v. Sec'y of HHS, 1992 WL 336502, at * 2-3 (Fed. Cl. Spec. Mstr. Nov. 2, 1992) (requested fees of \$24,168.75 reduced to \$4,112.50); Thompson v. Sec'y of HHS, No. 90-530V, 1991 WL 165686, at * 2-3 (Cl. Ct. Spec. Mstr. Aug. 13, 1991) (requested fees of \$18,039.75 reduced to \$9,000); Wasson, 24 Cl. Ct. at 483 (1991), on remand, No. 90-208V, 1992 WL 26662 (Fed. Cl. Spec. Mstr. Jan. 2, 1992), aff'd, 988 F.2d 131 (Fed. Cir. 1993) (hourly rates reduced, and requested fees of \$151,575 reduced to \$16,500; special master disregarded the claim for 698.5 hours and estimated what, in her experience, would be a reasonable number of hours for a case of that difficulty). "It is well within the special master's discretion to reduce the hours to a number that, in his experience and judgment, was reasonable for the work done." Saxton, 3 F.3d at 1521.⁶

A. The Relevant Community and Reasonableness of Requested Hourly Rate

First the undersigned will discuss the Avera decision and its affect on the law. The undersigned will specifically address the issue of the forum rule versus the hometown rule for purposes of determining the relevant community for defining market rates. After interpreting and applying Avera it will be clearly demonstrated that petitioner misapplies the law when arguing that the forum rule applies under the Davis exception of Avera and that the forum is the District Court of Idaho. After discussing petitioner's argument the undersigned will evaluate petitioner's evidence in support of petitioner's counsel's hourly rate under the applicable hometown rule and determine if petitioner has provided convincing evidence that \$300 is a reasonable market rate for the relevant community of Twin Falls, Idaho. The undersigned will apply the lodestar analysis, "a reasonable hourly rate is 'the prevailing market rate,' defined as the rate 'prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" Avera, 515 F.3d at 1348, *quoting* Blum v. Stenson, 465 U.S. 886, 895-96 n.11 (1984). Though not binding authority the analysis in Rupert ex rel. Rupert v. Sec'y of HHS, 55 Fed. Cl. 293 (2003), provides factors that can be applied to assess the reasonableness of a fee

⁶The Federal Circuit noted that "The Court of Federal Claims erred in prohibiting the special master from considering his past experiences with attorneys in the vaccine program -- this past experience is a relevant factor and should be taken into account." Saxton, 3 F.3d at 1521, citing Hensley, 461 U.S. at 430, n.3 (awards in similar cases and counsel's experience and ability are two of twelve factors relevant to a fee determination); Slimfold Mfg. Co. v. Kinkead Indus., Inc., 932 F.2d 1453, 1459 (Fed. Cir. 1991) (district court may rely on its prior experience and knowledge in determining reasonable hours and fees).

request. See Barber v. Sec’y of HHS, 2008 WL 4145653, (Fed. Cl. Spec. Mstr. August 21, 2008). The undersigned will apply these factors to analyze the evidence presented both by petitioner in support of petitioner’s fee request and also by respondent in opposition to the fee request. As a result of the undersigned’s analysis the hourly rate for work completed in 2008 will be awarded at a rate of **\$240** per hour.

Discussion of Avera

In Avera the Federal Circuit held that as a general rule reasonable hourly rates are to be based on the "forum rule." Avera, 515 F.3d 1343, 1348. For cases in the Vaccine Program the forum is "the District of Columbia, where the Court of Federal Claims, which has exclusive jurisdiction over cases arising under the Vaccine Act, is located." Id. The court recognized an exception to the generalized application of the forum rule "where the bulk of [an attorney’s] work is done outside the jurisdiction of the court and where there is a very significant difference in compensation favoring D.C." Avera, 515 F.3d at 1349, citing Davis County v. EPA, 169 F.3d 755 at 758 (D.C. Cir. 1999). In this case, petitioner does not request forum rates, and the undersigned agrees. The question presented is what is the relevant community under the Davis exception. Petitioner argues that the forum rule applies and the relevant community is the United States District of Idaho, which includes the entire state of Idaho or, alternatively nationwide under the National Vaccine Injury Compensation Program. Respondent argues that the relevant community is Twin Falls, Idaho or another Idaho city of comparable size.

The problem with petitioner’s argument is petitioner’s misapplication of the forum rule. Avera states that "a court in general should use forum rates in the lodestar calculation." Id. at 1349. As stated earlier, in the event that the forum rule applies to Vaccine cases under the Program, the applicable forum is Washington D.C. Id. at 1348. If the forum rule was adhered to in this case, the Davis exception would not apply. Petitioner is not arguing for forum rates, thus the forum rule is not applicable for determining the relevant community. Further, petitioner does not dispute that the Davis exception applies.

The question remains that if the forum rule does not apply, what is the applicable rule for determining the relevant community under the Davis exception? In addressing this question the undersigned finds it important to note that the "hometown rule" has been consistently applied in the Vaccine Program for the last twenty years. Id. at 1353 (J. Rader, concurring)(acknowledging the "longstanding application of the "hometown rule" approach to attorneys’ fee awards under the Vaccine Act," and referring to the "hometown rule" as part of the "established doctrines for fees in vaccine cases"). Under the "hometown rule" the proper rate to apply is "the market rate of the geographical location where the attorney maintains an office and practices law." Id. at 1348. While Avera does not directly discuss the applicability of the "hometown rule" when the Davis exception applies, the court did award fees based on where petitioner’s counsel’s office is located and where the work was performed. Id. at 1350 (the Davis exception applies where the attorneys performed the entirety of work in Cheyenne, Wyoming, further the court held that the "special master did not err in awarding attorneys’ fees at lower Cheyenne rate"); see also Davis,

169 F.3d at 760 (court looked to where attorneys performed bulk of work, specifically Salt Lake City, a less expensive legal market). In this case, it is not disputed that the Davis exception applies. In determining the reasonable hourly rate under the Davis exception, the “hometown rule” applies. See Avera at 1350. Therefore, the relevant community for determining a reasonable market rate is that of Twin Falls, Idaho, the geographic location where petitioner’s counsel performed the bulk of the work, maintains his office and practices law.

Petitioner’s “Adjusted” Hourly Rate

It is petitioner’s burden to provide evidence that the hourly rates requested are reasonable and comport with the market rates in the “community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” Rupert v. Sec’y of HHS, 52 Fed. Cl. 684, 687 (2002), quoting Blum v. Stenson, 465 U.S. 886, 895-96 n.11 (1984). Respondent argues that petitioner’s counsel’s “adjusted rate” of \$300 per hour is unreasonably high for the applicable market and not supported by evidence. R Opp. to Amended Fees at 1. Arguing that the applicable market is smaller Idaho cities like Twin Falls, where petitioner’s counsel is located, respondent relies on Goff, 2006 WL 1128222, and Monsanto, 2–6 WL 1128226, as evidence that attorneys with similar experience, at comparably sized-firms in Idaho cities of comparable size to Twin Falls charge around \$200 per hour. R Opp. to Amended Fees at 2. Respondent also relies on Goff and Monsanto to suggest that petitioner’s counsel should not be awarded at a rate higher than \$200 per hour, despite the fact that the court has previously awarded Mr. Webb an hourly rate greater than \$200 per hour. R Opp. at 8 (“Respondent must object to the hourly rates requested by petitioner’s counsel in excess of \$200 per hour.”).

Petitioner provides petitioner’s counsel’s affidavit along with two additional affidavits as evidence in support of Mr. Webb’s rate of \$300 per hour. See P Amended Fees. Petitioner also relies on a decision of the United States District Court for the District of Idaho in which attorney’s fees were awarded at what appeared to be \$360 per hour for a Partner at the law firm of McDermott, Will and Emery, LPP. U.S. ex rel. Suter v. National Rehab Partners Inc., 2007 WL 2790397 (D.Idaho, Sept. 24, 2007) (rather than assigning a specific billing rate to each attorney the court reduced the entire attorney bill in half, the partner’s hourly rate charged was \$720 per hour). In that case, the Court relied on a rate of \$325 per hour for a Partner at Holland & Hart law firm located in Boise to assess the market rate for Boise, Idaho. Id.

Evaluating Petitioner’s Evidence in Support of \$300 per hour

a. Petitioner’s Counsel’s Affidavit

Mr. Webb submitted an affidavit in support of petitioner’s Amended Petition for fees, specifically for an hourly rate of \$300 per hour for work done after March 31, 2008. P Amended Fees, 1st attachment, Affidavit of Curtis Webb. Mr. Webb acknowledges that after further investigation the hourly rate of \$325 sought in petitioner’s fees application is on the upper end of the range of what is reasonable. Id. at 2 (emphasis added). Mr. Webb states that \$300 per hour

more accurately reflects the market rate in the relevant community. Id. For purposes of determining the relevant community Mr. Webb relies on Mr. Huntley's and Mr. Belodoff's opinion that the relevant community for determining market rate should be either the State of Idaho or attorneys representing petitioners in the National Vaccine Compensation Program (nationwide). Id. Mr. Webb's affidavit briefly summarizes the background of the two attorneys providing affidavits. Id. The problem is Mr. Webb's reliance on the relevant community encompassing either the entire state of Idaho or a nationwide community.

b. Affidavit of Robert Huntley

Mr. Robert Huntley is an attorney licensed to practice in Idaho who has practiced law for 49 years. P Amended Fees, 2nd attachment, Affidavit of Robert Huntley. He is a 1959 graduate of the University of Idaho College of Law and received a Masters of Law in the Judicial Process from the University of Virginia in 1988. Id. He served as a Justice of the Idaho Supreme Court from 1982 to 1989. Id.

Mr. Huntley maintains his office on Boise, Idaho and currently bills his time at \$350 per hour as a senior partner at The Huntley Law Firm, PLLC. Id. The Huntley Law Firm, PLLC consists of ten attorneys and three lawyers of counsel. Id. According to Mr. Huntley, his firm competes with larger firms such as Holland and Hart for clients and "charge comparable hourly rates". Id. Mr. Huntley supports the idea that "experience and expertise permit lawyers and small law firms to compete with larger firms." Further, he adds that the market rate of Mr. Webb's services would not be significantly less because he works at a small firm. He states that a rate of \$300 per an hour is within the range of hourly rates charged by lawyers with 20+ years of experience in Idaho. He does not define what type of experience or the size of the practice he is referring to. This appears to be a very general statement that \$300 per hour is within the market rate for attorneys practicing in Idaho. As stated previously, the relevant community in this case is not the entire state of Idaho, but rather is Twin Falls, Idaho, a small town in Idaho. Mr. Huntley's affidavit simply does not address specifically the community at issue and one cannot extrapolate from Mr. Huntley's generalized statement a market rate for Twin Falls.

Mr. Huntley's statements also seem to indicate that he does not find any significant distinction between hourly rates charged by an attorney working for a large firm versus a small firm. The undersigned disagrees with Mr. Huntley's view that the size of a firm is relatively insignificant for determining a reasonable market rate. Attorneys at larger firms often charge a higher rate than solo practitioners. This is logical given that larger firms command greater overhead and in contrast smaller firms have lower operating costs and thus lower hourly rates. Any survey the undersigned has reviewed is structured based on firm size and notes significant differences in hourly rates based on firm size, *i.e.*, the number of lawyers. Petitioner relies on the hourly rate billed by a partner with 24 years of experience at Holland & Hart in Boise, Idaho. Mr. Webb has over twenty years of experience and practices in a small firm in Twin Falls, Idaho. The firm of Holland & Hart touts itself as "the largest law firm in Rocky Mountain West with over 400 attorneys in 15 offices in seven states." Holland & Hart Home Page,

<http://www.hollandhart.com> (Last visited Nov. 13, 2008). The Boise office in particular has over 30 attorneys. Id. Clearly, the size of the firm affects the hourly rate charged, and thus deserves some consideration when determining a reasonable market rate. Since the affidavit does not address specifically the reasonable rates for Twin Falls or cities in Idaho of comparable size, it is not helpful to determining Mr. Webb's rate.

c. Affidavit of Mr. Belodoff

Mr. Howard A. Belodoff has been a member of the bar of the State of Idaho since September 1978. P Amended Fees, attachment 3, Affidavit of Howard A. Belodoff. Mr. Belodoff has specialized in representing plaintiffs in complex civil rights cases since 1978. Id. Mr. Belodoff notes that while his office is located in Boise, the scope of his work often extends to eastern Idaho. Id. He states that the location of where the claim arose, the location of his office and the fact that he is a solo practitioner does not have an effect on the hourly rate he charges and the rate he has been awarded by the Court. Id. Mr. Belodoff also remarks that from his experience, the United States District Court for the District of Idaho awards attorneys' fees incurred in a case at the attorney's current hourly rate due to the delay in payment of compensation. Id. at para.12.⁷

Interestingly, Mr. Belodoff comments that Mr. Webb's reputation, experience, expertise and specialization in his opinion "allow Mr. Webb to charge an hourly rate comparable to that billed by similarly experienced lawyers in firms in Boise, Idaho **not** Twin Falls, Idaho." Id. at para.10 (emphasis added). Petitioner relies on the affidavits submitted in support of the hourly rate that petitioner asserts is charged in the "relevant community" of Boise, Idaho. This rate is presumably a higher rate than that charge by similar attorneys in Twin Falls, Idaho, a smaller city. Boise is the state capital and has a population of roughly 202,832 inhabitants, while Twin Falls has 41, 510 inhabitants. See [Http://citypopulation.de/USA-Idaho.html](http://citypopulation.de/USA-Idaho.html) (Last visited Nov. 13, 2008). Mr. Belodoff's statement seems to indicate Twin Falls, Idaho would not be considered a "relevant community" for determining market rates. Following this line of reasoning it appears that Mr. Belodoff's opinion indicates the community where Mr. Webb's office is located and where a substantial portion of the work was performed does not constitute the "relevant community." Once again, this affidavit is not probative of the hourly rates for Twin Falls since it is premised on or argues for Boise, Idaho as the relevant community. As discussed earlier, the "hometown rule" established counsel's geographic location, Twin Falls, as the relevant community.

d. Discussion of U.S. ex rel. Suter v. National Rehab Partners Inc.

Petitioner cites to U.S. ex rel. Suter v. National Rehab Partners Inc. in petitioner's

⁷The undersigned notes that Avera provides for the award of interim fees in certain circumstances. Avera at 1352 ("interim fees are particularly appropriate in cases where proceedings are protracted and costly experts must be retained.").

original Petition for fees to support petitioner's request for \$325 per hour. U.S. ex rel. Suter v. National Rehab Partners Inc., 2007 WL 2790397 (D.Idaho, Sept. 24, 2007). Petitioner relies on the court's award of attorney's fees to a specialized attorney for the equivalent of \$360 per hour for work performed in a case that arose in Twin Falls, Idaho. The case is distinguishable from this matter as the attorney involved was a partner at a large international firm as opposed to a small firm attorney. This case, while providing guidance on the reasonableness of an attorney practicing in a large regional firm in Boise, Idaho⁸, is not support for the reasonableness of the rate of \$300 or greater per hour for an attorney in a small firm in Twin Falls, Idaho participating in the Vaccine Program. See supra p. 7. For reasons stated earlier the size of the firm does have some bearing on the reasonableness of the rate requested. See supra p. 8.

Analysis

The problems with petitioner's evidence are that (1) petitioner does not rely on the appropriate relevant market of Twin Falls, Idaho and (2) petitioner's affidavits do not focus on the relevant market. Petitioner argues that respondent has submitted no evidence of a reasonable rate for an attorney of Mr. Webb's skill, experience or reputation in Twin Falls, Idaho. P 2nd Reply at 4. As previously noted the burden is on the fee applicant to produce evidence that the rates requested are reasonable. See Rupert v. Sec'y of HHS, 52 Fed. Cl. 684, 687 (2002).

Respondent presents cases that demonstrate an award of attorney's fees at rates lower than \$240 per hour as indicative of reasonable rates for Twin Falls, Idaho. R Opp. at 6-7. For example an attorney in Nampa, Idaho, began billing at \$175 per hour as early as 2003.⁹ Goff v. Washington, No. CV-03-268-S-MHW, 2006 WL 1128222 (D. Idaho Apr. 24, 2006). In another instance, the court set a rate of \$150 per hour up to the end of February 2003 and a rate of \$175 per hour afterward. Monsanto Co. V. Pacificorp, No. CV-01-607-E-LMB, 2-6 WL 1128226 (D. Idaho Apr. 24, 2006). This information, while helpful, does not preclude the reasonableness of a rate of \$240 per hour. As recognized in Rupert, evidence presented regarding what are reasonable hourly rates generally establish a range of reasonable rates. Rupert v. Sec'y of HHS, 55 Fed. Cl. 293, 303-304, 306 (2003)(emphasizing importance of determining a range of rates and making adjustments as necessary to reach a reasonable rate). The evidence submitted here establishes a range of \$200 (respondent's citations to probative decisions finding \$200 per hour reasonable for attorneys in Idaho) to \$240 (the rate awarded Mr. Webb one month ago with no government objection (Bowman v. Sec'y of HHS, 06-394V, (Sp. Mstr. Fed. Cl. Dec. 10, 2008)(Westlaw cite not yet available)). While respondent's evidence is probative, for reasons

⁸The court relied on rates charged by attorneys at Holland and Hart, LPP, a large regional law firm.

⁹The attorney began billing in December 2003 at \$175 per hour, though her affidavit stated she started billing at \$175 per hour after September 2005. Id. The court awarded her a rate of \$150 per hour for hours charged prior to September 2005 "so that her hourly rate accords with the statements made in her affidavit." Id. at 2.

that will be explained Mr. Webb deserves to be awarded rates on the upper end of the range of reasonable rates, i.e., \$240 per hour.

In evaluating the range of rates the undersigned is compelled to note that petitioner's counsel is billing for work performed in 2008. Thus, the example rate of \$175 per hour awarded for work performed in 2003 can be utilized for guidance in determining the lower end of the range of what is reasonable five years later in 2008. Petitioner's counsel has previously sought and been awarded fees at the requested rate of \$240 per hour for work performed in 2008, thus this is meaningful evidence of a reasonable rate. See Bowman v. Sec'y of HHS, 06-394V, (Sp. Mstr. Fed. Cl. Dec. 10, 2008)(respondent does not object to award of \$1,374.42, which represents 5.7 hours at a rate of \$240 per hour and \$6.42 in postage costs) (Westlaw cite not yet available). The rate of \$240 per hour represents evidence of a higher figure on the range of rates. Respondent specifically objected to the award of a rate higher than \$200 per hour on June 16, 2008. R Opp. at 8. Respondent acknowledges in respondent's Opposition that respondent has not always objected to hourly rates above \$200 per hour in the past, but states that "respondent was not aware of the Goff and Monstanto cases at the time." Id. at n.6. The undersigned notes that petitioner's Petition for Attorney Fees and Costs in Bowman was filed on Nov. 7, 2008, more than four months after respondent filed his objections to a rate over \$200 per hour in this case, at which time respondent did not object to the request for fees at a rate equal to \$240 per hour for work performed in 2008. Bowman v. Sec'y of HHS, 06-394V, (Sp. Mstr. Fed. Cl. Dec. 10, 2008) (Westlaw cite not yet available). The undersigned sees no distinguishing reason why in the instant case petitioner's counsel should not be awarded a rate of \$240 per hour for work performed in 2008 based on Goff and Monsanto, when respondent did not object to a rate of \$240 per hour for Mr. Webb as recently as two months ago in Bowman. Id. Clearly, respondent determined that \$240 per hour was on the range of reasonable rates for Mr. Webb. Therefore, respondent's arguments that a rate no higher than \$200 per hour be awarded is unconvincing. R Opp. at 8.

After determining a range the next step is determining where Mr. Webb falls on the range. Mr. Webb has excelled as an advocate for twenty years in the Program. He deserves to be paid at the top of the range. Given Mr. Webb's past award at \$240 per hour the undersigned sees no reason to adjust downward. Based on Mr. Webb's demonstrated experience, performance, and efficiency in the Program the undersigned is comfortable that the rate of \$240 per hour awarded in Bowman, which was not objected to by the government, represents a reasonable hourly rate for Mr. Webb. See Bowman v. Sec'y of HHS, 06-394V, (Sp. Mstr. Fed. Cl. Dec. 10, 2008). Accordingly, based on the evidence submitted and the undersigned's experience a rate of \$240 per hour for work performed in 2008 is reasonable.

B. Dispute Over Number of Hours

The hours billed for 2008 will be reduced by **8.8 hours** to account for time spent preparing petitioner's Amended Petition for fees and affidavits. See Statement of Fees and Costs at 1. Petitioner's counsel will be compensated for petitioner's original fee petition for which 2.2

hours were billed to review the file, prepare the fee petition and file. P Fees, filed May 30, 2008 (Appendix A , entries dated 04/24/08 1.10 hours (review file, prepare Fee Petition), 04/25/08 .60 hours (draft Fee Petition), 05/23/08 .50 hours (prepare court pleadings- Fee Petition)). While the undersigned awards petitioner's counsel for time spent on the original fee petition, the undersigned does not find it reasonable to award petitioner's counsel for work on petitioner's Amended Petition for fees. Petitioner's counsel's investigation into the reasonableness of petitioner's counsel's requested rate should have been performed prior to filing the original Petition for fees. The failure to perform such an investigation prior to the original filing should not result in compensation for work on an additional Amended Petition for fees, which concludes that petitioner's hourly rate of \$325 per hour requested in the original Petition for fees is "at the upper end of what is reasonable." See R Opp. to Amended Fees at 4 ("Petitioner's counsel should not be compensated for amending what was an unreasonable request to begin with..."). Petitioner's counsel will otherwise be awarded the requested hours for time spent preparing petitioner's replies to respondent's oppositions and other work performed.

C. Travel Time

The undersigned finds there is no need for a lengthy discussion relating to petitioner's initial request for reimbursement of travel time at the full hourly rate as petitioner adjusted petitioner's request to reflect billing at ½ of Mr. Webb's hourly rate for travel time. See P Amended Fees at 4. However, the undersigned notes that whether travel should be billed at ½ time or full time depends on whether counsel is working while traveling, the fact of traveling by itself is not determinative. The undersigned previously addressed the practice of awarding half the hourly rate for travel time stating "[i]n the future, in the absence of a statement or some other evidence that work was being performed on the case at issue during travel, the undersigned will continue to award one half of the hourly rate." Carter v. Sec'y of HHS, No. 04-1500V, 2007 WL 2241877 at 6, (Fed.Cl.Spec.Mstr. July 13, 2007); see also Scoutto v. Sec'y of HHS, No. 90-3576, 1997 WL 588954 at 5 (Fed.Cl.Spec.Mstr. Sept. 5, 1997) ("In vaccine cases, travel time is typically awarded at a rate which is 50% that of the hourly rate charged by the attorney."). Thus, if counsel can establish how much of the travel time is devoted to working, those hours will be compensated fully.

III. CONCLUSION

Petitioner shall be awarded attorney's fees for 60.9 hours at a rate of \$240 per hour (\$14,616.00) for work performed in 2008. Petitioner requested 81.7 hours for work performed in 2008. After deducting the 8.8 hours for work on the Amended Petition petitioner's request is reduced to 72.9 hours. The number of hours (60.9) results after reducing 72.9 by the 12 hours compensated at ½ of petitioner's hourly rate for a rate of \$120 per hour (\$1,440.00), for travel time in 2008. Petitioner's request for 102.00 hours at \$200 per hour (\$20,400.00) and 21.5 hours at \$220 per hour (\$4,730.00) shall also be granted. Petitioner incurred \$612.91 in petitioner's costs. Additionally petitioner's counsel incurred \$8,645.05 in costs. In sum the undersigned finds an award in the amount of \$50,443.96 in attorney's fees and costs to be reasonable.

Accordingly, pursuant to Vaccine Rule 13, petitioner is hereby awarded a **total of \$50,443.96 in attorney's fees and costs.**¹⁰ The judgment shall reflect that petitioner is awarded \$612.91 for her costs in a check made payable to petitioner; petitioner is awarded \$8,645.05 for her counsel's costs in a check made payable jointly to petitioner and her counsel; and, petitioner is awarded \$41,186.00 for her counsel's fees in a check made payable jointly to petitioner and her counsel. The Clerk is directed to enter judgment according to this decision.¹¹

IT IS SO ORDERED.

Gary J. Golkiewicz
Chief Special Master

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

¹¹Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.