

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS**

JAMES L. DOE 21,	*	
as best friend of his son,	*	
JAMES L. DOE, JR.,	*	No. 02-411V
	*	The Honorable Susan G.
	*	Braden
Petitioner,	*	Special Master Moran
	*	
v.	*	
	*	Filed: October 26, 2011
SECRETARY OF	*	
HEALTH AND HUMAN SERVICES,	*	Interim costs, reasonable
	*	compensation for expert,
	*	adequacy of documentation.
Respondent.	*	
	*	

John T. McHugh, New York, NY, for petitioner;
Michael P. Milmoie, United States Dep't of Justice, Washington, DC, for
respondent.

DECISION AWARDING COSTS ON AN INTERIM BASIS¹

¹ Because this published decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it 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).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the categories listed above, the special master shall

Mr. Doe seeks compensation pursuant to the National Childhood Vaccine Injury Compensation Program, for which the statutory basis is found at 42 U.S.C. § 300aa—10 et seq. (2006). Mr. Doe alleges that the diphtheria – tetanus – acellular pertussis vaccine caused an injury to his son. After a lengthy course, the Court of Federal Claims found that Mr. Doe is entitled to compensation. Doe 21 v. Sec'y of Health & Human Servs., 88 Fed. Cl. 178 (2009). The parties are presently litigating the amount of compensation to which Mr. Doe is entitled.

While the question of damages remains pending, Mr. Doe filed a motion requesting an award of attorneys' fees and costs on an interim basis. Mr. Doe's case is unusual because he (rather than his attorney) has incurred a large amount of costs. This decision resolves only Mr. Doe's request for interim costs.²

The Secretary opposes Mr. Doe's motion. The Secretary argues that any award on an interim basis is not appropriate. Additionally, the Secretary argues that even if an award on an interim basis were to be made, Mr. Doe has requested an amount that is excessive.

On the first topic, whether it is appropriate to award costs on an interim basis, special masters have rejected respondent's argument. In accord with the analysis in those decisions, Mr. Doe is awarded some amount of costs on an interim basis.

The amount awarded to Mr. Doe, however, is reduced from the amount that he requested. Mr. Doe has not supplied sufficient evidence to support an award for many costs. Mr. Doe is awarded **\$59,132.29**.

delete such material from public access. 42 U.S.C. § 300aa–12(d)(4); Vaccine Rule 18(b).

² The decision does not resolve Mr. Doe's request for an interim award for his attorney's fees and for his attorneys' costs. Determining a reasonable amount for attorneys' fees will involve evaluation of much more evidence, which will necessarily take additional time. Rather than allow the request for attorneys' fees to delay an award to Mr. Doe, the undersigned chooses to issue a separate decision solely for Mr. Doe.

PROCEDURAL HISTORY

The procedural course is lengthy and has been detailed in earlier decisions. See Doe 21, 88 Fed. Cl at 194-96; Doe 21 v. Sec'y of Health & Human Servs., No. 02-411, 2009 WL 3288295, at *5-8 (Fed. Cl. Spec. Mstr. Jan. 16, 2009). A brief summary follows.

Mr. Doe filed his petition in 2002. After he spent two years gathering medical records, a hearing was held in two locations in October 2005. At that hearing, five witnesses testified. One of the witnesses was Eugene Spitz, a pediatric neurosurgeon. As discussed below, Mr. Doe seeks reimbursement of the costs of retaining Dr. Spitz.

For various reasons, the October 2005 hearing did not conclude the evidentiary development of Mr. Doe's case. Instead, the presiding special master ordered the submission of additional information. Unfortunately, before another hearing could be scheduled, Dr. Spitz died. To replace Dr. Spitz, Mr. Doe retained another doctor, John Shane, in 2006. Dr. Shane testified at a hearing in July 2007. Mr. Doe also seeks reimbursement of the costs of retaining Dr. Shane.

In May 2008, the special master issued a decision denying compensation. Decision, 2008 WL 4679501. Mr. Doe filed a motion for review with the Court of Federal Claims. The Court vacated the special master's May 22, 2008 decision and remanded with instructions. 84 Fed. Cl. at 50.

On remand, Mr. Doe obtained another report from Dr. Shane. Mr. Doe also obtained a report from a pediatrician, Mary Megson. The cost for Dr. Megson's services is another item for which Mr. Doe seeks compensation. Dr. Shane and Dr. Megson testified at a hearing in December 2008. Mr. Doe also presented the testimony of his son's pediatrician, Victor Turow. Mr. Doe seeks reimbursement for the cost of Dr. Turow's testimony.

After the parties filed briefs, the special master issued a second decision, which also denied compensation. Again, Mr. Doe filed a motion for review. On this record, the Court reversed the special master's decision and found that Mr. Doe was entitled to compensation. The Court also remanded the case to determine the amount of compensation to which Mr. Doe is entitled. 88 Fed. Cl. at 202.

Since the Court's decision, the parties have been attempting to determine an appropriate amount of compensation. For this process, Mr. Doe has retained a life

care planner and other experts. He seeks compensation for the costs of these specialists.

On March 29, 2011, Mr. Doe filed a motion seeking an award of attorneys' fees and costs on an interim basis. The attorneys' fees portion includes a claim that Mr. Doe's attorney, John McHugh, should be compensated at a rate of at least \$350 per hour. To this specific claim, the Secretary objected vigorously. This objection, in turn, prompted the submission of more evidence and more argument. A portion of the ensuing brief was relevant to the costs requested by Mr. Doe. As noted above, this decision does not resolve the claim for attorneys' fees.

The present decision adjudicates only Mr. Doe's motion for an award of costs to which the Secretary has interposed some objections. The Secretary's initial objection was that the fee application did not provide enough information. Resp't Resp., filed April 29, 2011, at 12-14.

In reply, Mr. Doe submitted some additional information. Exhibits 227-31. Mr. Doe also responded briefly to the Secretary's arguments, although most of his reply was directed to the question of his attorney's hourly rate. See Pet'r Reply, filed June 12, 2011, at 5-6.

Because Mr. Doe presented new information in his reply, the Secretary was permitted to file another response. Again, the Secretary questioned the amount of information submitted. See Resp't Sur-Reply, filed July 25, 2011, at 6-8.

Mr. Doe replied again, this time on July 29, 2011. This untitled pleading solely addressed the Secretary's challenge to Mr. McHugh's hourly rates by submitting approximately 20 new exhibits. The Secretary addressed this material in another document. But, like Mr. Doe's July 29, 2011 reply, the Secretary's August 30, 2011 response does not relate to Mr. Doe's costs. Mr. Doe filed one more brief about his attorney's fees on September 14, 2011.

ANALYSIS

Broadly speaking, there are two issues. The first is whether Mr. Doe should receive any costs at this time. The second question is assuming that some award is appropriate, what is a reasonable amount.

I. Should Mr. Doe Be Awarded Costs on an Interim Basis?

In Avera v. Sec'y of Health & Human Servs., the Federal Circuit stated that awards of attorneys' fees and costs on an interim basis are permitted in the Vaccine Program. 515 F.3d 1343, 1352 (Fed. Cir. 2008). For some period of time, there was almost no litigation over the meaning of Avera.

However, more recently, the Secretary has started to oppose interim awards, maintaining either that Avera was wrongly decided or that Avera should be limited to a narrow set of facts. The first decision of a special master to address the Secretary's position rejected it. Hibbard v. Sec'y of Health & Human Servs., No. 07-446, 2011 WL 1135894 (Fed. Cl. Spec. Mstr. March 7, 2011). Since that decision, other special masters have considered the Secretary's position and also found the Secretary's arguments lack merit. See Hirmiz v. Sec'y of Health & Human Servs., No. 08-371, 2011 WL 2680721 (Fed. Cl. Spec. Mstr. June 13, 2011) (collecting cases).³

For the reasons set forth in those decisions, there is authority for special masters to award attorneys' fees and costs on an interim basis. A subsidiary question is whether an interim award should be made in Mr. Doe's case, which is a matter of discretion. This question turns on the circumstances of Mr. Doe's case.

An interim award is appropriate. The Court has found that Mr. Doe is entitled to compensation for his son's injury and this finding makes him entitled to an award of costs. See 42 U.S.C. § 300aa—15(e). There appears to be little reason to delay all payment to wait for the damages phase to conclude. Although Mr. Doe's case has not proceeded smoothly for various reasons, the case has been

³ Although the Secretary did not file a motion for review in the cases cited in the text, the Secretary has sought review of another special master's decision awarding attorneys' fees and costs on an interim basis. McKellar v. Sec'y of Health & Human Servs., No. 09-841V, 2011 WL 3425606 (Fed. Cl. Spec. Mstr. June 3, 2011), motion for review filed (July 5, 2011).

pending for more than nine years. Thus, Mr. Doe will be awarded some amount of costs on an interim basis.

II. What Is A Reasonable Amount of Costs?

A. Standards for Adjudication

Special masters are authorized to award compensation to cover

- (A) reasonable attorneys' fees, and
- (B) other costs.

42 U.S.C. § 300aa—15(e). In this context, “The conjunction ‘and’ conjoins both ‘attorneys' fees' and ‘other costs' and the word ‘reasonable’ necessarily modifies both. Not only must any request for attorneys' fees be reasonable, so must any request for reimbursement of costs.” Perreira v. Sec'y of Health & Human Servs., 27 Fed. Cl. 29, 34 (1992), aff'd, 33 F.3d 1375 (Fed. Cir. 1994); accord Riggins v. Sec'y of Health & Human Servs., No. 99-382V, 2009 WL 3319818, at *3 (Fed. Cl. Spec. Mstr. June 15, 2009) (quoting Perreira), motion for review denied in an unpublished opinion (Fed. Cl. Dec. 10, 2009), aff'd, No. 2010-5078, 406 Fed. Appx. 479 (Fed. Cir. Jan. 4, 2011). The party requesting an award of costs bears the burden of establishing that an item of cost is reasonable. Presault v. United States, 52 Fed. Cl. 667, 670 (2002); see also Morse v. Sec'y of Health & Human Servs., 89 Fed. Cl. 683, 687 (2009); Sabella v. Sec'y of Health & Human Servs., 86 Fed. Cl. 201, 215 (2009) (stating that petitioners bear the burden of establishing the reasonableness of attorneys' fees and collecting cases).

When the item of cost pertains to the services rendered by an expert, the compensation reflects the reasonable number of hours multiplied by the reasonable hourly rate. Miyake v. Sec'y of Health & Human Servs., No. 06-459V, 2009 WL 959563, at *19 (Fed. Cl. Spec. Mstr. March 19, 2009); Simon v. Sec'y of Health & Human Servs., No. 05-941V, 2008 WL 623833, at *1 (Fed. Cl. Spec. Mstr. Feb. 21, 2008); Kantor v. Sec'y of Health & Human Servs., No. 01-679V, 2007 WL 1032378, at *4-8 (Fed. Cl. Spec. Mstr. Mar. 21, 2007); see also Valdes v. Sec'y of Health & Human Servs., 89 Fed. Cl. 415, 424 (2009) (reviewing a special master's decision to award reduced amounts to petitioner's experts). Because special masters may award only those costs that are reasonable, petitioners have the responsibility to oversee and to supervise what an expert is doing. “This court has continuously warned counsel of their obligation to monitor expert fees.” Perreira

v. Sec'y of Health & Human Servs., No. 90-847V, 1992 WL 164436, at *4 (Cl. Ct. Spec. Mstr. June 12, 1992), aff'd, 27 Fed. Cl. 29, 33-34 (1992), aff'd, 33 F.3d 1375 (Fed. Cir. 1994); accord Kuperus v. Sec'y of Health & Human Servs., No. 01-60V, 2006 WL 3499516, at *3 (Fed. Cl. Spec. Mstr. Nov. 17, 2006).

Petitioner's counsel is also responsible for supplying material that accurately describes the expert's work. Morse, 89 Fed. Cl. at 688-89 (finding that the special master did not err in reducing number of hours requested by an expert when that expert's invoice was only three lines long and counsel's attempt to explain expert's work was confusing). When petitioners fail to submit appropriate documentation, special masters have refrained from awarding compensation. See, e.g., Gardner–Cook v. Sec'y of Health & Human Servs., No. 99–480V, 2005 WL 6122520, at *4 (Fed. Cl. Spec. Mstr. June 30, 2005). This practice is consistent with how the Federal Circuit and the Court of Federal Claims, two courts that review decisions of special masters, have interpreted other fee-shifting statutes. See Naporano Iron and Metal Co. v. United States, 825 F.2d 403, 404 (Fed. Cir. 1987) (the Equal Access to Justice Act); Presault, 52 Fed. Cl. at 679 (the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970).

B. Analysis

Mr. Doe seeks reimbursement of costs that he has incurred, which total \$109,787.29. Exhibit 43 at 1-2. The bulk of the costs is for amounts paid to Dr. Spitz, Dr. Shane, Dr. Megson, and the life care planner. For purposes of evaluation, Mr. Doe's claims for costs fall into four categories. First, there are people whose hourly rate and/or number of hours are disputed. Second, there are costs that cannot be adjudicated because the submitted information is not sufficient. Third, there are two items relating to guardianship for which the Secretary has objected. Fourth, there are undisputed items.

1. Costs for Experts Whose Hourly Rate and/or Number of Hours Is Disputed

a) Dr. Shane

John Shane graduated from the Pennsylvania State University College of Medicine. His medical career has been spent working as a pathologist, with a special competence in neuropathology. See Doe 21, 84 Fed. Cl. at 40.

Mr. Doe retained Dr. Shane to review his child's MRIs after Dr. Spitz, Mr. Doe's first expert who had reviewed Child Doe's MRIs, died. Dr. Shane testified at the July 20, 2007 hearing about his opinion that the MRIs do not support the Secretary's theory that a Chiari I malformation caused Child Doe's brain damage. Mr. Doe also attempted to introduce testimony from Dr. Shane as to whether Child Doe suffered an encephalopathy within 72 hours of the vaccination. However, the special master ruled that testimony about encephalopathy was beyond the scope of Mr. Doe's rebuttal case and prevented additional testimony on this topic. The Court, in turn, ruled that the special master's evidentiary ruling was erroneous and remanded the case with instructions to permit Dr. Shane to complete his testimony. Doe 21, 84 Fed. Cl. at 41-43 and 48-49.

On remand, Dr. Shane testified about Child Doe's developmental progress. The special master found Dr. Shane's opinion not to be persuasive primarily because he was not as experienced in caring for infants as other medical professionals, such as Child Doe's pediatrician, and because he assumed facts not consistent with either the underlying medical records or the Court's findings of fact. Doe 21, 2009 WL 3288295, at *11-21. When the Court reviewed this special master's decision, the Court did not rely upon Dr. Shane's testimony, although his testimony was mentioned. See Doe 21, 88 Fed. Cl. 178, *passim*.

For his work, Dr. Shane submitted a series of invoices. In short, Dr. Shane seeks compensation for 26.5 hours of work at rates ranging from \$250 per hour to \$400 per hour. He also seeks \$295 in travel expenses. Dr. Shane seeks a total of \$14,082.50 Exhibit 227 (Dr. Shane's invoice).⁴

Dr. Shane's time is reasonable. He essentially was required to perform work twice. He prepared a report in 2006 and testified at a hearing in July 2007. He also prepared a report in 2009 and testified at a hearing in December 2009. Thus, he will be credited for all of his time.

Dr. Shane's hourly rate, however, requires a small modification. For his work in 2006 and 2007, Dr. Shane charged \$250 per hour. This rate is reasonable. For his out-of-court work in 2009, Dr. Shane charged \$275 per hour. This rate is also reasonable. However, for his time traveling to the hearing and for his time attending the hearing, Dr. Shane charged \$400 per hour for 15.5 hours of work.

⁴ Dr. Shane's invoices contain mathematical mistakes. The figure presented in the text is derived from the number of hours charged by Dr. Shane multiplied by the hourly rate charged by him.

The Secretary particularly noted this objection. Resp't Response, filed April 29, 2011, at 13.⁵

Mr. Doe has not presented any justification for an increase in hourly rates. Thus, Dr. Shane will be compensated at the same rate, \$275.00 per hour, for his work on the hearing date. This rate of compensation will also be used for the time spent travelling. It appears that Dr. Shane drove to the hearing. Because he was driving, he could not perform any other task. The change from \$400 per hour to \$275 per hour for 15.5 hours of work causes a total decrease of \$1,937.50 ($\125×15.5 hours).

Dr. Shane also requested \$295 in travel expenses. After the Secretary received Dr. Shane's invoice, the Secretary stated that Dr. Shane's "request is vague and not adequately documented." Resp't Sur-reply at 6. Mr. Doe did not address this issue.

Without any explanation from Mr. Doe or Dr. Shane, it is difficult to compensate Dr. Shane for this expense. Nevertheless, the undersigned has attempted sua sponte to investigate a reasonable expense for Dr. Shane. The distance from Allentown, Pennsylvania to New York, New York is approximately 95 miles (190 miles round trip). In 2009, the Internal Revenue Service set a standard mileage rate for business expenses of 55 cents per mile. This results in \$104.50 ($190 \times \0.55). The basis for the remainder of Dr. Shane's charges is not given. Thus, Mr. Doe has failed to meet his burden of proof. Dr. Shane's expenses are reduced by \$190.50 ($\$295.00 - \104.50).

Mr. Doe is awarded **\$11,954.50** ($\$14,082.50 - \$1,937.50 - \190.50) for Dr. Shane's work.

b) Dr. Spitz

Eugene Spitz was, before he died, a pediatric neurosurgeon. He testified during the October 28, 2005 hearing. Doe 21, 84 Fed. Cl. at 33-35 and 39-40. He

⁵ In reply, Mr. Doe did not respond to this objection. Pet'r Reply at 5-6. Consequently, the Secretary maintained this objection. Resp't Sur-reply at 6.

submitted invoices requesting compensation for \$13,000. Exhibit 43 at pdf 4 and pdf 8.⁶

The Secretary objected to the request for compensation for Dr. Spitz, stating that his invoices “give no indication of how many hours were expended nor the hourly rate charged.” Resp’t Resp. at 12. Mr. Doe did not provide any additional information, which is understandable because Dr. Spitz has died.

On Dr. Spitz’s April 1, 2004 invoice, he charged \$300 per hour. This amount is reasonable. See Chen Bou v. Sec’y of Health & Human Servs., No. 04-1329V, 2007 WL 924495, at *7 (Fed. Cl. Spec. Mstr. March 09, 2007) (awarding a neurologist \$350 per hour for work in 2004 and 2005); see also Baker v. Sec’y of Health & Human Servs., No. 99-653V, 2005 WL 589431, at *5 (Fed. Cl. Spec. Mstr. Feb. 24, 2005) (noting hourly rates for various experts). This hourly rate will be used to compensate Dr. Spitz.

Dr. Spitz submitted two invoices. The April 1, 2004 invoice includes 10 hours of work, which is reasonable. The problem with Dr. Spitz’s October 28, 2005 invoice is that Dr. Spitz has not included the number of hours worked. Instead, Dr. Spitz has billed a flat \$10,000. Exhibit 43 at pdf 8. Mr. Doe’s briefs provide no support for accepting a flat rate. In the absence of any argument from Mr. Doe on this point, the undersigned will use the traditional method.

Dr. Spitz attended only the October 28, 2005 hearing, which was held in Philadelphia, Pennsylvania. He did not attend the previous day’s hearing, which was held in New York, New York. See transcript 5. For October 28, 2005, the transcript indicates that the hearing started at approximately 10:00 AM and concluded at approximately 3:00 PM, which is five hours. This time is credited and an additional two hours for commuting will also be credited.

In addition, Mr. McHugh’s timesheets have been reviewed, although Mr. Doe did not cite to them. Mr. McHugh’s records suggest that after April 1, 2004 (the date of Dr. Spitz’s previous invoice), Dr. Spitz spent approximately 13 hours before the October 28, 2005 hearing communicating with Mr. McHugh. Dr. Spitz also spent 1.5 hours after the hearing. These hours will be credited in full.

⁶ It appears that Mr. Doe has erroneously included an additional \$1,500 in his list of costs. The February 10, 2004 invoice is for a \$1,500 retainer and this amount is credited on the April 7, 2004 invoice. Exhibit 43 at pdf 3-4.

The total number of compensable hours for Dr. Spitz is 31.5 (10 + 5 + 2 + 13 + 1.5). The rate of compensation is \$300 per hour. **Mr. Doe is awarded \$9,450.50 for Dr. Spitz's work.**

c) Dr. Mary Norfleet Megson

After the Court vacated the first special master's decision denying compensation and remanded for additional proceedings, Mr. Doe sought permission to retain another expert. Mr. Doe's request was approved and Mr. Doe retained Dr. Megson. Dr. Megson describes herself as a developmental pediatrician, although whether she qualifies as board-certified is unclear. Her area of focus is autism and related disorders. Doe 21, 2009 WL 3288295, at *19.

Dr. Megson's work was performed in two months, November and December 2008. She reviewed court documents, researched her opinion, wrote a report, found references to support her opinion, testified at the December 2, 2008 hearing, and found additional references after her testimony. She claims 54 hours of work. She requests compensation at \$400 per hour. The total amount sought for Dr. Megson's time is \$21,600. She also seeks \$61.36 for mailing costs. Exhibit 203 at pdf19.⁷

The Secretary objected to this request. The Secretary argued: "The number of hours charged by Dr. Megson and her hourly rate are unreasonable and should be greatly reduced. In addition, respondent objects to her full time charge for travel time. Her bill lacks specificity and should be significantly reduced." Resp't Resp. at 13.

In reply, Mr. Doe submitted the same invoice from Dr. Megson as exhibit 231. Mr. Doe also asserted that Dr. Megson's testimony "was needed due to the

⁷ Dr. Megson's invoice was not dated. It appears that she did not create this invoice contemporaneously when her work was performed. Her invoice does not contain a specific entry for writing her report, but her entry has an entry for "writing testimony" on November 23, 2008. If "writing testimony" means writing a report, then the date of this entry is not correct because Mr. Doe's attorney mailed Dr. Megson's report on November 20, 2008.

death of Dr. Spitz.” Pet’r Reply at 5-6.⁸ Otherwise, Mr. Doe did not provide additional information to explain what tasks Dr. Megson was performing.

Dr. Megson’s invoice, although it could have contained more details, has sufficient information for it to be evaluated. The number of hours, although perhaps a bit high, is reasonable given the hourly rate that is awarded to Dr. Megson.

Dr. Megson has requested compensation at a rate of \$400.00 per hour. Neither Mr. Doe nor Dr. Megson has submitted any support for the assertion that \$400 per hour is an appropriate rate of compensation for a person with Dr. Megson’s experience, qualifications, skills, and abilities. The omission occurs even though the Secretary specifically argued that Dr. Megson’s hourly rate should be reduced.

A rate of \$400 per hour for Dr. Megson is not reasonable. Mr. Doe has not cited any evidence supporting this rate. See Pet’r Reply at 5. In the absence of any evidence, a special master may rely upon his or her experience in determining reasonable attorneys’ fees and costs. Saxton v. Sec’y of Health & Human Servs., 3 F.3d 1517, 1521 (Fed. Cir. 1993). The undersigned’s experience suggests that special masters tend to award \$400 per hour to experts with much more experience and a more impressive set of credentials. At a minimum, these highly paid experts are unquestionably board-certified in the relevant discipline. The experts often teach medical school students and medical residents, a position suggesting that their knowledge is reliable. The experts frequently have a lengthy list of publications, including chapters in widely used medical textbooks. They often serve on medical journals, as either a peer-reviewer or an editor. Mr. Doe has not presented evidence that Dr. Megson possesses similar qualifications. See tr. 1109-11 (Dr. Megson’s testimony about her qualifications on direct examination); Pet’r 11/21/08 filing (Dr. Megson’s curriculum vitae);⁹ see also tr. 1168-74 (cross-examination of Dr. Megson regarding her board certification).

⁸ The accuracy of Mr. Doe’s statement is not certain. Mr. Doe sought to retain Dr. Megson in 2008, following the Court’s remand. In 2007, Mr. Doe used Dr. Shane as a replacement for Dr. Spitz.

⁹ Dr. Megson’s strongest qualifications include experience as an assistant clinical professor of pediatrics (1997-1999) and as an associate clinical professor of pediatrics (1999-2001) at the Medical College of Virginia. She has also given lectures about autism to provide continuing medical education.

In addition, Dr. Megson has not testified in the Vaccine Program before this case. Tr. 1189. Special masters have compensated doctors who have testified repeatedly in the Vaccine Program at a relatively high hourly rate because, in part, the doctors' experience allows them to perform some tasks efficiently. For example, experienced doctors have reviewed the literature frequently and, therefore, can find articles supporting their opinion relatively quickly. See Simon v. Sec'y of Health & Human Servs., No. 05-941V, 2008 WL 623833, at *5 (Fed. Cl. Spec. Mstr. Feb. 21, 2008); Kuperus, 2006 WL 3499516, at *4 (stating "While it is reasonable to award higher hourly rates to well-qualified experts, that is, in part, with the understanding that such expert will expend fewer hours on the case."). This case demonstrates how an inexperienced doctor can require much more time to do tasks such as review medical records and search for materials. Cf. Broekelschen v. Sec'y of Health & Human Servs., No. 07 -137, 2011 WL2531199, at *3 (Fed. Cl. Spec. Mstr. June 3, 2011) (refraining from compensating an attorney who was being compensated at a high hourly rate for spending many hours on the case), mot. for review filed (June 16, 2011).

Finally, the Secretary notes "Dr. Megson was not an impressive witness and her hourly rate should be severely reduced." Resp't Sur-Reply at 8. The undersigned observed Dr. Megson's testimony and described the presentation of Dr. Megson's opinion as "poor." See Doe 21, 2009 WL 3288295, at *20. Although the Court reversed the decision denying compensation, the Court neither relied upon Dr. Megson's testimony nor commented upon the special master's assessment of Dr. Megson's testimony. See 88 Fed. Cl. at 198-202.

Given these circumstances, a reasonable rate of compensation for Dr. Megson's work in this case is \$200 per hour. This figure also accounts for the fact that Dr. Megson spent some time traveling. The hourly rate also takes into consideration that Dr. Megson spent some time finding and transmitting medical articles, work that is often delegated to a less expensive person.

For her time, Dr. Megson is awarded \$10,800 (54 hours x \$200 per hour). She is also awarded \$61.36 for her mailing expenses. The total awarded for Dr. Megson is **\$10,861.36**.

2. Costs for Experts For Which the Evidence Is Not Sufficient

a) Arthur Taub

Initially, Mr. Doe's request for attorneys' fees and costs requested an award of \$2,000 for Dr. Arthur Taub. The only support for this request was a statement from Mr. McHugh to Mr. Doe, showing that Mr. McHugh paid Dr. Taub \$2,000.00. Exhibit 203 at pdf 1 and pdf 6. The Secretary argued that "[w]ithout further explanation of who Dr. Taub is and without greater specificity about his bill, . . . the fee should be rejected." Resp't Resp. at 12. In reply, Mr. Doe presented an invoice, dated May 26, 2011, stating that

For services rendered in Re [Doe], Data Review and Analysis:

6 h @ 500/h (Billed for 4 h only)	\$2,000.00
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Exhibit 228.

This information is not an adequate basis for compensation. Mr. Doe has not explained anything about Dr. Taub's qualifications.¹⁰ Mr. Doe has not explained how many years of experience Dr. Taub has and has not stated whether Dr. Taub specializes in any area of medicine. Further, Mr. Doe has not explained what "analysis" Dr. Taub provided.

Consequently, Mr. Doe's request for compensation for Dr. Taub's work is DENIED WITHOUT PREJUDICE. Mr. Doe is expected to develop the record more completely.

b) Victor Turow

Dr. Turow began treating Child Doe in 1999. He testified during the December 2, 2008 hearing. His testimony was one reason the Court found that Mr. Doe was entitled to compensation. Doe 21, 88 Fed. Cl. at 200-01.

Dr. Turow has requested compensation for 11 hours of his time at an hourly rate of \$375.00. Dr. Turow has also requested reimbursement for \$35.00 for parking. Exhibit 203 at pdf 17.

¹⁰ Dr. Taub's letterhead says "Arthur Taub, MD PHD PC" and describes him as a "medicolegal consultant."

The Secretary objected. She “objects to the hourly rate charged by petitioner’s pediatrician. Respondent understood that Dr. Turow was testifying as a fact witness. If the court is inclined to pay Dr. Turow an expert fee at all, the hourly rate should be reduced.” Resp’t Resp. at 13. The Secretary’s characterization of Dr. Turow as a fact witness --- as opposed to as an expert witness --- suggests that the payment of Dr. Turow should vary depending upon how he is categorized. The Secretary did not identify any authorities supporting a distinction between doctors who testify about their percipient observations and doctors who testify about materials reviewed for litigation. For his part, Mr. Doe did not provide any reply regarding Dr. Turow.

Without any guidance from the parties, the undersigned is reluctant to decide this issue. The parties may address it in any application for an award of attorneys’ fees and costs at the end of the case. In doing so, the parties may wish to research authorities that have considered whether treating doctors are entitled to be compensated at their usual rate of compensation or at the rate of compensation for fact witnesses. Mr. Doe is also encouraged to present some evidence about Dr. Turow’s qualifications so that a reasonable hourly rate may be determined. Consequently, Mr. Doe’s request for compensation for Dr. Turow is DENIED WITHOUT PREJUDICE.

c) Andrew P. Doro

Mr. Doe’s initial request included \$19,730 for Andrew Doro, who is described as an educational consultant. The application was supported by a three-paragraph letter. Exhibit 203 at pdf 2 & pdf 34. The Secretary questioned the need for Mr. Doro’s services and suggested that additional information about Mr. Doro’s work was needed. Resp’t Resp. at 13. In reply, Mr. Doe presented Mr. Doro’s statement of services, which is not readily understandable. Exhibit 229.

Mr. Doe has not provided an adequate basis for awarding compensation for Mr. Doro’s services. Mr. Doro’s qualifications have not been given.¹¹ His experience would be helpful in trying to determine a reasonable hourly rate for his work. Additionally, Mr. Doe has not provided any context of the work performed by Mr. Doro. Two examples illustrate this general point. Mr. Doro apparently visited Mr. Doe’s home 14 times in one academic year. The reasonableness of this

¹¹ His letterhead states that he has an “M.S., Educational School Psychology.”

many visits was questioned, see Resp't Sur-Reply at 7, but not explained. Additionally, at the end of January 2010, Mr. Doro spent approximately 16 hours writing a letter to a life care planner. A review of this letter would facilitate an evaluation of the 16 hours claimed. See Torday v. Sec'y of Health & Human Servs., No. 07-372, 2011 WL 2680687, at *7 (Fed. Cl. Spec. Mstr. Apr. 7, 2011) (noting that attorneys should provide an explanation for activities in the damages phase of the case).

Consequently, Mr. Doe's request for reimbursement for Mr. Doro's services is DENIED WITHOUT PREJUDICE.

d) Scott Kush (Life Expectancy Group)

Mr. Doe included a cost of \$5,000 for Scott Kush in his list of costs. Exhibit 203. In informal status conferences, Mr. Doe has explained that Mr. Kush could provide an opinion regarding Child Doe's life expectancy. As the case evolved, the need for an opinion lessened and it appears that Mr. Doe has not yet obtained a report from Mr. Kush. (Mr. Doe has not included any invoice from Mr. Kush among his supporting documents.) Consequently, Mr. Doe's request for reimbursement for Mr. Kush is DENIED WITHOUT PREJUDICE.

3. Costs Relating To Guardianship To Which The Secretary Has Objected

a) Jeffrey I. Rubin

Jeffrey I. Rubin, a psychologist, saw Child Doe to evaluate him in connection with a proceeding commenced by Mr. Doe to have a New York Surrogate Court appoint him the guardian of Child Doe. Dr. Rubin's evaluation of Child Doe's competence would not have been needed but for the injury suffered by Child Doe. See Ceballos v. Sec'y of Health & Human Servs., No. 99-74V, 2004 WL 784910, at *19-22 (Fed. Cl. Spec. Mstr. March 24, 2004). Consequently, the costs incurred for Dr. Rubin are reasonable. **Mr. Doe is awarded \$375.00.**

b) Sandra M. Gumerove

Sandra M. Gumerove is an attorney, knowledgeable about guardianship proceedings in New York. She has submitted invoices for two different tasks.

First, she has charged Mr. Doe \$3,135.00 for her work in establishing a guardianship for Child Doe. Exhibit 203 at pdf 38. As explained, Child Doe's vaccine injury necessitates the guardianship. Thus, Ms. Gumerove's work is compensable.

Second, Mr. Doe's attorney consulted her in connection with Mr. Doe's request that some portion of the award for Child Doe be made in a lump sum payment rather than an annuity. Ms. Gumerove assisted Mr. McHugh in preparing a brief explaining how the Surrogate's Court oversees guardians it appoints. Exhibit 203 at pdf 41. Her efforts were helpful and Mr. Doe is awarded \$455.00 for this work. **The total awarded for Ms. Gumerove is \$3,590.00** (\$3,135 + \$455).

4. Costs That Are Not Disputed

a) Thomas Fitzgerald

Mr. Doe has retained Thomas Fitzgerald, who holds a Ph.D. in economics, to prepare a report about Child Doe's future losses. Mr. Doe filed this report as exhibit 301 on August 31, 2010. Mr. Doe has submitted an invoice from Dr. Fitzgerald, dated July 30, 2010, seeking compensation for 11.60 hours of work at \$280 per hour. Exhibit 43 at pdf 33. The Secretary did not specifically object to costs requested for Dr. Fitzgerald.

The number of hours appears to be reasonable. Dr. Fitzgerald, however, is encouraged to include a greater amount of detail in his invoices. Dr. Fitzgerald's report is divided into various sections but no time is associated with the different topics. This separation might be easily accomplished if Dr. Fitzgerald recorded the date of each activity and a description of the activity. Dr. Fitzgerald's failure to provide a more detailed description of his work may result in a denial of some (or all) of the compensation he seeks. Nevertheless, in this case, Dr. Fitzgerald is compensated the full amount. **Mr. Doe is awarded \$3,248.00 for Dr. Fitzgerald's work through July 30, 2010.**

b) Medical Legal Services / The Coordinating Center

Mr. Doe has retained Medical Legal Services, a division of The Coordinating Center, to estimate Child Doe's future medical needs. The primary person is Lynn Trautwein. Mr. Doe submitted a series of monthly invoices,

totaling \$17,575.85.¹² The services are adequately explained on the invoices and are reasonable. **Mr. Doe is awarded \$17,575.85 for work performed by the Medical Legal Services.**

c) Therapy Services of Greater New York

This entity evaluated Child Doe in occupation therapy, physical therapy, and speech therapy. **Mr. Doe requests compensation for \$1,200.00. This amount is awarded in full.**

d) Miscellaneous

Mr. Doe has also incurred costs for relatively small services, such as mailing expenses or serving a subpoena. These are adequately documented. **He is awarded \$877.08 as requested.**

5. Summary

The items for which compensation has been awarded total \$59,132.29. For these items, this decision is the final decision. See Shaw v. Sec'y of Health & Human Servs., 609 F.3d 1372, 1376 (Fed. Cir. 2010) (indicating that decisions awarding interim fees are appealable decisions). The undersigned does not intend to revisit requests regarding Dr. Shane, Dr. Spitz, or Dr. Megson.¹³ Of the items included in the pending request, Mr. Doe's claim has been denied without prejudice for four items. At an appropriate time, Mr. Doe may provide additional information regarding Dr. Taub, Dr. Turow, Andrew Doro, and Scott Kush. See Hirmiz, 2011 WL 2680721, at *8 (refraining from awarding compensation on an interim basis where the petitioner, who is represented by Mr. McHugh, failed to file any documentation supporting the request). If a subsequent fee application fails to provide adequate information, Mr. Doe risks a denial of costs. Rodriguez v. Sec'y of Health & Human Servs., No. 06-559, 2009 WL 2568468, at *21 (Fed. Cl. Spec. Mstr. July 27, 2009) (stating "Mr. McHugh is on notice that invoices shall be submitted for any costs, either those claimed personally by petitioners or those he claims on behalf of his practice, in future fees and costs applications or he risks the denial of all costs claimed for which invoices are not provided."), aff'd,

¹² It appears that Mr. Doe erroneously included an invoice, dated October 14, 2009, that shows that he paid a retainer. Exhibit 203 at pdf 21.

¹³ If this decision contains any mathematical errors, the affected party may file a motion for reconsideration. Sabella, 86 Fed. Cl. at 218 n.6.

91 Fed. Cl. 453 (2010), aff'd, 632 F.3d 1381 (Fed. Cir. 2011), petition for cert. filed, 80 U.S.L.W. 3066 (U.S. July 27, 2011) (No. 11-129); see also Trustees of Chicago Plastering Inst. Pension Trust v. Cork Plastering Co., 570 F.3d 890, 905-06 (7th Cir. 2009) (affirming denial of a requested item of cost when the fee applicant failed to provide reasonable amount of detail).

III. Conclusion

In Avera, the Federal Circuit indicated that the Vaccine Act does not bar special masters from awarding attorneys' fees and costs on an interim basis. Yet, there was nothing in the Federal Circuit's decision that suggests that special masters should permit litigation about attorneys' fees on an interim basis to become the "second major litigation," about which the Supreme Court warned in Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); accord Wasson v. Sec'y of Health & Human Servs., 24 Cl. Ct. 482, 483 (1991) (citing Hensley), aff'd, 988 F.2d 131 (Fed. Cir. 1993) (table).

Here, although the amount awarded in costs is not as much as Mr. Doe requested, a primary reason is that adjudication of some items of costs has been deferred. For items such as Mr. Doro, Mr. Doe has failed to provide an adequate basis for evaluating the request.

Petitioner is entitled to an award of interim costs. The special master determines that there is no just reason to delay the entry of judgment on interim costs. Therefore, in the absence of a motion for review filed under RCFC Appendix B, **the clerk of court shall enter judgment in petitioner's favor for \$59,132.29 in interim costs. This entire amount shall be payable to Mr. Doe alone.** Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

IT IS SO ORDERED.

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