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

No. 06-477V
Filed: March 25, 2011
To be Published

ASHLY WHITENER,	*	
	*	
Petitioner,	*	Interim Attorney Fees
v.	*	and Costs; *Avera*
	*	
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

Steven D. Goldston, Esq., Denton, TX, for petitioner.
Lisa A. Watts, Esq., U.S. Dept. of Justice, Washington, DC, for respondent.

DECISION AWARDING INTERIM FEES AND COSTS[1]

Vowell, Special Master:

On June 21, 2006, Ashly Whitener filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. §300aa-10, *et seq*.[2] [the

[1] Because this decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

[2] National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all "§" references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

"Vaccine Act" or "Program"], alleging that the meningococcal vaccination she received on December 30, 2004, caused her to develop Guillain-Barré Syndrome. *See* Amended Petition, filed June 6, 2007, at ¶¶2-6. On September 2, 2009, Special Master Abell, the special master then assigned to this case, ruled that petitioner is entitled to compensation for her injury. *Whitener v. Sec'y, HHS*, No. 06-477V, 2009 WL 3007380 (Fed. Cl. Spec. Mstr. Sept. 2, 2009) ["Entitlement Ruling"]. Thereafter, the parties have been engaged in discussion of an appropriate damages award.

The case was reassigned to me on March 31, 2010, in anticipation of Special Master Abell's retirement. On October 28, 2010, while the parties continued to negotiate a resolution of damages,[3] petitioner filed an Interim Attorneys' Fees and Costs Application ["Pet. App."][4] requesting $50,163.38 in attorney fees and costs accrued through September 30, 2010. Respondent filed her Opposition to Petitioner's Application on November 8, 2010 ["Res. Opp."]. Petitioner filed a Reply on November 30, 2010 ["Pet. Reply"], and she then filed an Amended Application for Interim Attorneys' Fees and Costs on January 3, 2011 ["Amended App."]. The Amended App. provides additional support for the hourly rates claimed in the application and addresses respondent's objections. For the reasons discussed below, I award petitioner an interim award of $50,002.20 in attorney fees and costs.

I. The Appropriateness of an Interim Award.

Relying on the Federal Circuit's decision in *Avera v. Sec'y, HHS*, 515 F.3d 1343 (Fed. Cir. 2008), petitioner seeks an interim award of attorney fees and costs. In *Avera*, the Federal Circuit held that the Vaccine Act's silence on the subject of interim fees does not prohibit their award. In her opposition brief, respondent stops only millimeters short of arguing that *Avera* was wrongly decided. She argues that *Avera* permits interim fees and costs only under the very limited procedural posture obtaining in that case, and that as the instant case is factually and procedurally distinct, interim fees are not

[3] During the period between Special Master Abell's entitlement ruling and the filing of the interim fees request, I ordered petitioner to file updated medical records pertinent to damages and a life care plan. Subsequent to filing the life care plan on August 6, 2010, petitioner completed the filing of medical records and the parties have filed several joint status reports updating me on the progress of their negotiations. Respondent filed her life care plan on January 5, 2011. She then filed the report of an independent medical evaluation on February 17, 2011, and a status report on behalf of both parties detailing the ongoing efforts to resolve damages.

[4] On that date petitioner also filed a statement pursuant to General Order #9, averring she had incurred no personal litigation costs.

authorized by the Vaccine Act or *Avera* here. I hold that an interim award is both permitted and appropriate in this case. In doing so I necessarily reject respondent's objections that (i) the Vaccine Act does not authorize interim awards, and (ii) that *Avera* should be interpreted narrowly to deny an interim award in this case.

A. Respondent's Objection to Interim Fees.

In her opposition, respondent contends that the scope of § 300aa-15(e)(1) is clear from the plain language and cannot be interpreted to allow interim fee awards in this case. *See* Res. Opp. at 4. Respondent maintains that, in cases like this one, an actual award of compensation to a petitioner who has established entitlement on the underlying claim, not merely a ruling that petitioner is entitled to one, is a condition precedent to the *mandatory* compensation of attorney fees and costs. *Id.* According to respondent, an award of fees and costs prior to the fulfillment of the conditions of § 300aa-15(e)(1) (*i.e*., an award of compensation for damages) is an abuse of a special master's authority under the Vaccine Act. *Id.* at 4-5. Respondent adds that repeated efforts in Congress to amend the statute to permit interim fees suggest that at least some members of Congress did not think the Act encompassed interim awards. *Id.* at 5 n.3.

In addition to the Act's plain language and legislative history, respondent relies on the Federal Circuit's decision in *Avera* to support her argument that interim fees are not permissible in this case. Res. Opp. at 4. Here, respondent's central argument is that the Federal Circuit's holding in *Avera* "must be limited to the very narrow procedural and factual scenario at issue in that case—a request for payment of an undisputed portion of a fee award during the pendency of an appeal regarding attorneys' fees and costs, following a resolution on the merits." *Id.* at 7.

Respondent emphasizes that *Avera* fit within the scope of § 300aa-15(e)(1) because "judgment had entered on the decision denying compensation." *Id.* at 6. That is, an "interim award" in the Program can only be one that occurs at a specific and limited time in litigation—after judgment on the merits, but before a final award of fees. Respondent does not explain how this applies to a case awarding compensation but presumably her "precondition" that an award of compensation be made would mean that *Avera* would only allow interim fees in this case once I issue a decision awarding damages. Seeking to place the instant case outside *Avera*'s scope, respondent notes that while petitioner has prevailed on entitlement, post-entitlement "[c]ompensation . . . has not yet been awarded." *Id.* at 1, 3. Respondent characterizes any fees and costs award made prior to an award of compensation as an award *pendente lite,* implying that there is a meaningful distinction between such an award and an interim award. *Id.* at 6-7.

B. Respondent's Argument is Unpersuasive.

The Federal Circuit has only addressed interim fees in the context of cases lacking a determination of entitlement. *See Shaw v. Sec'y, HHS*, 609 F.3d, 1372, 1373 (Fed. Cir. 2010); *Avera*, 515 F.3d at 1346. Consequently the Circuit has not interpreted the specific part of § 300aa-15(e)(1) at issue here.

In light of the different circumstances in this case, I consider respondent's plain language argument, but find it unpersuasive. She insists that a "resolution on the merits (i.e. … an award of compensation…)" is a "precondition" to an award of attorney fees, but she also argues that "in cases where compensation is awarded to the petitioner, attorney[] fees are to be awarded 'as a part of such compensation.'" She argues that "[t]he Act does not otherwise authorize an award of attorney[] fees and costs." Res. Opp. at 4 (citing § 300aa-15(e)(1)). This begs the question, then, when in the litigation any attorney fees and costs are to be awarded to a petitioner entitled to compensation. Respondent's plain language reading requires payment of attorney fees and costs only as part of a lump sum payment of *all* compensation. The Program, however, routinely awards final attorney fees separately from the damages award, interpreting this separate award to be "as part of such compensation." *See, e.g.*, *Riley v. Sec'y, HHS*, No. 09-719V, 2011 WL 760187 (Fed. Cl. Spec. Mstr. Jan. 21, 2011) (awarding compensation); *Riley v. Sec'y, HHS*, No. 09-719V, 2011 WL 760188 (Fed. Cl. Spec. Mstr. Jan. 24, 2011) (awarding attorney fees and costs); *see also* Vaccine Rule 13. If § 300aa-15(e)(1) permits two awards "as part of such compensation," one for petitioner's damages and one for petitioner's attorney fees, then it cannot be read to prohibit an additional award for interim attorney fees once petitioner is found to be entitled to compensation.

Simply because an interim award is issued before a determination of the amount of damages does not mean an interim award is not permitted. Ms. Whitener is entitled to compensation for her injury. Special Master Abell so decided, and I see no reason to disturb his ruling. The statute establishes no order of events for awarding the various types of compensation to which Ms. Whitener is entitled, other than that an entitlement ruling must occur before or concurrent with an award of compensation. *See* § 300aa-13.

Respondent's interpretation that compensation for an injury is a "precondition" for awarding any attorney fees and costs in cases where entitlement is established is simply not consistent with the Federal Circuit's interpretation of the Vaccine Act in *Avera*. I conclude that the "as a part of such compensation" phrasing in § 300aa-15(e)(1) does not preclude an interim fees and costs award.

Respondent's argument that I should read *Avera* narrowly is also unpersuasive. The Federal Circuit's discussion of the availability of interim awards sweeps broadly, both in *Avera* itself (*see* 515 F.3d at 1351-52), as well as in *Shaw* (*see* 609 F.3d at 1374). While the language describing when interim fees and costs might be appropriate is dicta, I note that in *Avera* itself, interim fees and costs were not awarded, and thus the Federal Circuit's analysis that interim fees and costs are authorized at all could be viewed as dicta as well. *See* 515 F.3d at 1352.[5]

Respondent cannot limit the *Avera* authorization for interim fees to the narrow procedural and factual circumstances presented in that case. In interpreting the Vaccine Act to permit interim attorney fees, the Federal Circuit did not include any language to suggest that either a judgment on the merits or an award of damages were necessary preconditions. An "interim award" in the Program is not only an award of undisputed fees made after a special master's decision on attorney fees, but before completion of appellate review of that decision. Respondent provides no legal support for such a unique award.

In concluding that the Vaccine Act provides for interim fees and costs awards, the Federal Circuit relied on cases finding authorization in other statutes for interim awards that were *pendente lite*. *Avera*, 515 F.3d at 1351-52. Both *Hanrahan v. Hampton*, 446 U.S. 754, 757-58 (1980), and *Texas State Teachers Ass'n. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790-91 (1989), on which the Federal Circuit relied, use the terms "interim award" and an award "*pendente lite*" interchangeably in contemplation of an award made once a party "has established his entitlement to some relief on the merits of his claims." *Texas State Teachers Ass'n*, 489 U.S. at 790 (quoting *Hanrahan*, 446 U.S. at 757). In contemplating interim fee awards in other litigation contexts to support the availability of interim fee awards under the Vaccine Act, the *Avera* court was, at a minimum, contemplating interim fee awards once petitioner established entitlement to some relief.

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[5] In the absence of clear instruction, dicta are the best guidance I have. *See Co-Steel Raritan, Inc. v. Int'l Trade Comm'n*, 357 F.3d 1294, 1307 (Fed. Cir. 2004) (adopting as the definition of dicta, "statements made by a court that are unnecessary to the decision in the case, and therefore not precedential (though they may be considered persuasive)") (internal quotation and alteration omitted). The Circuit's discussions in *Avera* and *Shaw* provide glimpses of its position. *See Application of Noll*, 545 F.2d 141, 151 (C.C.P.A. 1976) (Lane, J., dissenting) (noting that a higher court's dicta "remain as an indication of the [c]ourt's thinking in [an] area"). Certainly the dictum "[i]n *Avera* we held that the Vaccine Act permits the award of interim fees and costs," is telling of the Federal Circuit's position. *Shaw*, 609 F.3d at 1374.

Although *Avera* did not squarely address the question of whether an interim fee award may be made even before a determination on entitlement, the decision certainly appears to contemplate such awards. *See Avera*, 515 F.3d at 1352 (addressing the special master's ability to determine good faith and reasonable basis early in a case). Indeed, cases like *Shaw* are exploring those uncharted waters.[6] But, even if *Avera* does not extend that far, I hold that it does extend to a petitioner who has demonstrated entitlement to Vaccine Act compensation.[7]

Noting the purpose and structure of the Vaccine Act, the Federal Circuit concluded that special masters have the authority to award interim fees and costs. *Avera,* 515 F.3d at 1352; *see also Shaw*, 609 F.3d at 1374. While the Act itself makes no mention of the availability of interim awards, "[t]he Supreme Court has construed other fee shifting statutes, which are silent with respect to interim fees, to allow interim fees in appropriate circumstances." *Avera*, 515 F.3d at 1351.[8] Unlike the fee shifting statutes construed by the Supreme Court, however, the Vaccine Act has no prevailing party requirement. *See id.* at 1352. Successful litigants are entitled to attorney fees. § 300aa-15(e)(1). Unsuccessful litigants are awarded attorney fees when they demonstrate that their claim was brought in good faith, a subjective standard, and upon a reasonable basis, an objective standard. § 300aa-15(e)(1); *Perreira v. Sec'y, HHS*, No. 90-847V, 1992 WL 164436, at *1 (Cl. Ct. Spec. Mstr. June 12, 1992) (describing good faith as subjective and reasonable basis as objective), *aff'd*, 27 Fed. Cl. 29 (1992), *aff'd*, 33 F.3d 1375 (Fed. Cir. 1994). Special masters may determine that a claim was brought in good faith and with a reasonable basis prior to making a decision on

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[6] In *Shaw* the issue before the Federal Circuit was only the reviewability of an interim fees and costs award under § 300aa-12(e). *See* 609 F.3d at 1374. The interim fees and costs at issue were requested and awarded after an entitlement hearing but prior to the issuance of a decision on entitlement. *Id.* at 1373. While this timing was not directly in issue before the Circuit, it demonstrates that *Avera* has not been limited to its facts with respect to this issue, and the Federal Circuit, at the very least, considers it an open question. The Court of Federal Claims has yet to rule on remand in *Shaw*.

[7] Unlike the fee-shifting statutes at issue in the cases on which the Federal Circuit relied in *Avera*, the Vaccine Act does not have a prevailing party requirement. Appreciating this distinction, the Federal Circuit noted that "in vaccine cases there is even more reason to award interim fees because there is no prevailing party requirement." *Avera*, 515 F.3d at 1352. In doing so the court intimated that interim fees would be appropriate in a situation that is outside the scope of § 300aa-15(e)(1).

[8] The Federal Circuit relied on *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 709 n.12, 723 (1974) (addressing the Court's construction of section 718 of Title VII of the Emergency School Aid Act); *Hanrahan*, 446 U.S. at 757-58 (addressing the Court's construction of 42 U.S.C. § 1988); and *Texas State Teachers Ass'n*, 489 U.S. at 790-91 (reaffirming the availability of interim fee awards under 42 U.S.C. § 1988).

entitlement. *Avera*, 515 F.3d at 1352. Additionally, interim fee awards further an underlying purpose of the Act—"to ensure that vaccine injury claimants have readily available a competent bar to prosecute their claims." *Id.* (citing *Saunders v. Sec'y, HHS*, 25 F.3d 1031, 1035 (Fed. Cir. 1994)).

C. Assessing Whether an Interim Award is Appropriate.

Once a special master determines either that petitioner is entitled to attorney fees and costs, or that petitioner has established a good faith belief and a reasonable basis for the petition, she may then assess whether an interim attorney fees and costs award is appropriate. *See Avera*, 515 F.3d at 1352. While special masters have the authority to award interim fees at that point, they "may determine that [they] cannot assess the reasonableness of certain fee requests prior to considering the merits of the vaccine injury claim." *Shaw*, 609 F.3d at 1377. Although the Federal Circuit has given some indication of when an interim fee request should be granted, the factors are not yet clearly delineated. *See id.* at 1375; *see also Avera*, 515 F.3d at 1352.

Several criteria appear important, most notably delays in finalizing a case and the amount of costs incurred. The Federal Circuit has opined that "[i]nterim fees are particularly appropriate in cases where proceedings are protracted and costly experts must be retained." *Avera*, 515 F.3d at 1352. It has also clarified that "[w]here the claimant establishes that the cost of litigation has imposed an undue hardship and that there exists a good faith basis for the claim, it is proper for the special master to award interim attorneys' fees." *Shaw*, 609 F.3d at 1375.

II. Interim Fees are Appropriate in this Case.

As petitioner is entitled to compensation in this case (*see* Entitlement Ruling), she is also entitled to reasonable attorney fees and costs. § 300aa-15(e)(1). While this alone does not demonstrate that an interim award is warranted, it does obviate an examination of whether there exists a good faith belief and a reasonable basis for this case.

The Entitlement Ruling also supports a finding that these proceedings have been protracted. The Entitlement Ruling issued September 2, 2009, more than three years after the case was filed.[9] The additional nine months for which petitioner seeks interim

[9] This is not surprising given the circumstances. The meningococcal vaccine was added to the Vaccine Injury Table on February 1, 2007. *See* Entitlement Ruling at *1 n.3. Consequently, petitioner's theory of causation changed during the pendency of this case, and Special Master Abell was presented with a

attorney fees and costs, post Entitlement Ruling, have been devoted to resolution of a damages award. Four years is long enough to wait for an award of attorney fees and costs to which petitioner is entitled.[10]

As the Amended App. makes clear, petitioner's counsel has obtained and financed the services of a causation expert as well as a life care planner in the prosecution of this case. *See* Amended App., Exs. 1 and 2 (noting retainers paid to both as well as fees and costs incurred by the life care planner). These charges account for $5,004.00. While these charges alone are not so high as to support a finding on their own that an interim award is warranted, they add to such a finding. As petitioner states in her Amended App. at 5, she intends to submit a final bill for her causation expert's services at the conclusion of the case.[11]

Taken together, the length of these proceedings and the payment of experts constitute a sufficient hardship so as to warrant an interim award. I expect that an interim award of attorney fees and costs will aid petitioner's attorney in bringing the damages negotiations to a speedy resolution. An interim award is appropriate.

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causation theory of first impression, requiring a thorough *Althen* prong I analysis. *See Althen v. Sec'y, HHS*, 418 F.3d 1274, 1278 (Fed. Cir. 2005) (setting forth a causation-in-fact standard in three prongs, essentially requiring petitioner to prove the vaccine can cause the injury claimed, that it did cause her injury, and that the cause and effect occurred within the expected timeframe). The specific facts of petitioner's clinical course also required a careful *Althen* prong II analysis.

[10] In so finding, I do not ignore the fact that petitioner herself has waited four and one-half years for compensation to which she is entitled. Compensating petitioner's counsel before compensating her is arguably at odds with Congress's intent. While Congress provides for compensating Program attorneys in § 300aa-15(e), this is clearly meant to make it easier for petitioners to bring Vaccine Act claims. *See Avera*, 515 F.3d at 1352 (noting the importance of interim fees awards in order to provide competent counsel). I trust petitioner's counsel in this case will take a proactive role in steering the damages negotiations to a speedy conclusion in the coming months.

[11] Petitioner is reminded that any request for an expert's fees shall be accompanied by documentation of the time expended, the tasks performed, and the rate charged. *See Wasson v. Sec'y, HHS*, 24 Cl. Ct. 482, 484 (1991), *aff'd per curiam*, 988 F.2d 131 (Fed. Cir. 1993).

III. Determining the Amount of Attorney Fees and Costs to be Awarded.

A. The Legal Framework for Determining a Reasonable Award.

This court applies the lodestar method to any request for attorney fees and costs. *See Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) ("[T]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." (quoting *Blum v. Stenson*, 465 U.S. 886, 888 (1984))); *see also Avera*, 515 F.3d at 1347-48; *Saxton v. Sec'y, HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993). The standards for calculating attorney fees set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), "are generally applicable in all cases in which Congress has authorized an award of fees." *Hensley*, 461 U.S. at 433 n.7.

The reasonable hourly rate is "the prevailing market rate," which is defined as the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum*, 465 U.S. at 896 n.11. Petitioners have the burden to demonstrate that the hourly rate requested is reasonable. *See Blum*, 465 U.S. at 895 n.11 ("[T]he burden is on the fee applicant to produce satisfactory evidence–in addition to the attorney's own affidavits–that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.").

The "prevailing market rate" is determined using the "forum rule." *Avera*, 515 F.3d at 1349 ("to determine an award of attorneys' fees, a court in general should use the forum rate in the lodestar calculation"). Prior to the Federal Circuit's decision in *Avera*, the Court of Federal Claims applied the "geographic rule" to determine the appropriate rate of compensation.[12] The geographic rule is based on the fees charged in the community in which the attorney performs the services, rather than the prevailing market rate in the forum community. *See Avera v. Sec'y, HHS*, 75 Fed. Cl. 400, 405 (2007), *rev'd*, 515 F.3d 1343. In *Avera*, the Federal Circuit also adopted the "*Davis* exception"[13] to the forum rule. The court held that the *Davis* exception applies when the bulk of the work in a case is performed outside the forum (Washington, DC, in Vaccine

[12] Because *Avera* changed the focus from the geographic rule previously used in the lodestar calculation to the forum rate, decisions issued prior to *Avera* awarding specific hourly rates must be viewed with some caution, as they may be based on evidence of the geographic rate for the attorneys involved.

[13] The so-called "*Davis* exception" is based on *Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. EPA*, 169 F.3d 755 (D.C. Cir. 1999).

Act cases), in a locale where the attorneys' rates are substantially lower. 515 F.3d at 1349.

In determining the number of hours reasonably expended, a court must exclude 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,* 461 U.S. at 434. Special masters may use their experience in Vaccine Act cases to determine whether the hourly rate and the hours expended are reasonable. *Wasson v. Sec'y, HHS*, 24 Cl. Ct. 482, 483 (1991), *aff'd*, 988 F.2d 131 (Fed. Cir. 1993) (noting special masters have broad discretion in calculating fees and costs awards); *see also Masias v. Sec'y, HHS*, No. 2010-5077, 2011 WL 873148, at *6 (Fed. Cir. Mar. 15, 2011) (finding it is within the special master's discretion to distinguish the work done by an attorney in a Vaccine Act case from other types of litigation in calculating an hourly rate) and at *7 (finding it is within the special master's discretion to rely on prior Vaccine Act cases establishing a relevant local rate); *Rodriguez v. Sec'y, HHS*, No. 2010-5093, 2011 WL 420676, at *4 (Fed. Cir. Feb. 9, 2011) (finding it is within the special master's discretion to consider Vaccine Act work specifically in computing an hourly rate).

B. Reasonable Hourly Rates.

As I discussed in *Shueman v. Sec'y, HHS*, determining an appropriate hourly rate under *Avera* typically requires three steps: determination of the forum rate, determination of the local rate, and comparison of the two to determine whether there is a "very significant difference" in compensation indicating that the *Davis* exception applies. No. 04-693V, 2010 WL 3421956, at *4 (Fed. Cl. Spec. Mstr. Aug. 11, 2010). Neither party has presented evidence in this case of the forum rate. I have previously determined a forum rate for attorneys representing Vaccine Act petitioners. *See Rodriguez v. Sec'y, HHS*, No. 06-559V, 2009 WL 2568468, at *15 (Fed. Cl. Spec. Mstr. July 27, 2009), *aff'd*, 91 Fed. Cl. 453 (2010), *aff'd*, No. 2010-5093, 2011 WL 420676 (Fed. Cir. Feb. 9, 2011). Thus, relying on my reasoning set forth in *Rodriguez*, I find that the forum rate for an attorney with substantial experience in Vaccine Act or similar litigation is between $275.00 and $360.00 per hour for work performed in 2006 and beyond. *Rodriguez*, 2009 WL 2568468, at *15; *see also Schueman*, 2010 WL 3421956, at *4.

Petitioner has requested an hourly rate for Mr. Goldston of $300 for services performed between 2005 and 2010, an hourly rate for paralegals of $85 for services performed from 2005 until June 2007, and an hourly rate for paralegals of $100 for

services performed after June 2007 through September 2007. In defense of Mr. Goldston's rate, she argues that this is the "rate prevailing in the [Dallas-Fort Worth Metroplex[14]] community for similar services by lawyers of reasonably comparable skill, experience, and reputation" since prior to 2005. Amended App. at 2. She makes a similar argument for the paralegal hourly rates. *See id.* at 3. Petitioner filed an affidavit from Mr. Goldston supporting these claims. *See* Ex. A to the Amended App. In his affidavit, Mr. Goldston explains that he has practiced law since 1982, representing both plaintiffs and defendants in civil disputes and injury cases. *Id.* at 2. He has handled four vaccine injury cases in this court. *Id.* As the hearing in this case was conducted telephonically, all of the work appears to have been performed in the Dallas-Fort Worth Metroplex community. *See* Amended App., Exs. 1 and 2.

Respondent does not object to the requested hourly rates. While Mr. Goldston's affidavit alone is not overwhelming evidence of the local rate, it is all that is before me. Mr. Goldston's rate falls in the middle of the range of forum rates I computed in *Rodriguez*, and consequently, I find that there is not a "very significant difference in compensation favoring D.C." *See Avera,* 515 F. 3d at 1349; *see also Hall v. Sec'y, HHS*, No. 02-1052V, 2010 WL 1840837, at *10 (Fed. Cl. May 5, 2010) (finding in that case that a difference of 59% was "very significant"), *appeal docketed*, No. 10-5126 (Fed. Cir. June 3, 2010). I need not apply the *Davis* exception. I accept an attorney rate of $300 per hour as commensurate with the forum rate for the years covered by petitioner's application.

I also accept the requested paralegal rates as reasonable, whether they are forum rates or local rates. I have not previously determined a forum rate for paralegal services, and neither party put any evidence in the record regarding what the forum rate for a paralegal is. Similar rates have been awarded for paralegal work done for a firm based in Vienna, Virginia. *See Picciotti v. Sec'y, HHS*, No. 99-506V, 2010 WL 3920511, at *5 (Fed. Cl. Spec. Mstr. Sept. 14, 2010) (awarding $105 per hour for an attorney performing paralegal tasks in 2005). In the absence of other evidence, I accept $105 as a forum rate for paralegal services. The petitioner failed to demonstrate a local rate for paralegals, other than the rate she claims. I note that in my previous experience, the requested rates of $85 and $100 per hour are commensurate with negotiated rates for Houston, Texas, attorneys practicing in the Program. *See, e.g.*, *Hughes v. Sec'y, HHS*, No. 04-115V, 2010 WL 5558441 (Fed. Cl. Spec. Mstr. Dec. 15, 2010). While I do not doubt there are some differences in hourly rates between the Houston and Dallas communities, I have no better evidence. As such, there is not a

[14] Mr. Goldston's practice is in Denton, Texas, a suburb of Dallas, Texas. *See* Amended App., Ex. A at 2.

"very significant difference in compensation favoring D.C." for paralegals, either. *See Avera,* 515 F. 3d at 1349; *see also Hall*, 2010 WL 1840837, at *10. I need not apply the *Davis* exception here, and I accept petitioner's requested rates for paralegal services.

Petitioner requests 59.6 attorney and paralegal hours on behalf of Chaiken & Chaiken, P.C., her counsel's former firm, and another 76.2 attorney hours on behalf of her counsel's solo practice. Mr. Goldston was associated with the Chaiken & Chaiken, P.C., firm at the beginning of this case through approximately September 28, 2007. *See* Amended App., Ex. 2 at 1. Respondent has no objection to the requested hours.

The total 135.8 hours is a fair request for four and one half years of work on a case that required an entitlement hearing. And, while there will be a subsequent final request for hours incurred from October 2010 through the conclusion on this case, the instant application represents the bulk of the time petitioner's counsel will expend. My review of the documentation filed indicates counsel made good use of paralegal support during his time with his previous firm. Unfortunately that economy was lost once Mr. Goldston transitioned to a solo practice; he subsequently took on tasks that a paralegal would otherwise perform. Nonetheless, my prior experience in the Program indicates that the requested hours are reasonable.

C. Reasonable Costs.

Petitioner requests costs on behalf of the Chaiken & Chaiken, P.C., firm in the amount of $4,926.19. She also requests costs on behalf of Mr. Goldston in the amount of $14,695.69. Respondent has no objection to the specific costs requested.

The Chaiken & Chaiken, P.C., costs represent postage and shipping, medical records collection, photocopying, the case filing fee, fax charges, an expert retainer, and legal research. Mr. Goldston's costs include collection of medical journal articles, obtaining a copy of the hearing transcript, fees and expenses for the life care planner, and record compilation costs. He additionally requests compensation for office supplies. *See* Amended App., Ex. 2, p. 10 (requesting payment for supplies from Best Buy and Office Depot). These office supplies are overhead and are not compensable in the Program. *See Lamar v. Sec'y, HHS*, No. 99-584V, 2008 WL 3845157, at *15 (Fed. Cl. Spec. Mstr. July 30, 2008) (citing *Borger v. Sec'y, HHS*, No. 90-1066V, 1993 WL 540817, at *2 (Fed. Cl. Spec. Mstr. Dec. 16, 1993)). All of the other requested costs are reasonable and shall be awarded. Petitioner is entitled to costs in the amount of $4,926.19 for costs incurred by Chaiken & Chaiken, P.C., and $14,534.51 for costs incurred by Mr. Goldston.

IV. Conclusion.

Petitioner has demonstrated that an interim award is appropriate in this case. I hereby award a lump sum of **$50,002.20** in the form of a check payable jointly to petitioner, Ashly Whitener, and her counsel of record, Steven D. Goldston, Goldston Law Firm, for petitioner's interim attorney fees and costs for all work done on this matter through September 30, 2010. Petitioner shall then direct payment to both firms consistent with this decision. In the absence of a timely-filed motion for review filed pursuant to Appendix B of the Rules of the U.S. Court of Federal Claims, the clerk of the court shall enter judgment in accordance herewith.[15]

IT IS SO ORDERED.

_____
Denise K. Vowell
Special Master

[15] Entry of judgment can be expedited by each party's filing of a notice renouncing the right to seek review. *See* Vaccine Rule 11(a).